

# APPELLATE UPDATE

PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

MARCH 2023  
VOLUME 30, NO. 5  
THIS EDITION CONTAINS CASES  
FROM MARCH 2023

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## CIVIL

*Metropolitan Tower Life Insurance Co. v. Roosevelt Land Partners Corp.*, 2023 Ark. App. 105 [structured settlement payments transfer] Appellants became obligated to make payments to appellee under a structured settlement annuity agreement pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), for work-related injuries appellee suffered while working in Afghanistan. Appellee filed an application for approval of a transfer of the structured settlement payment rights before the circuit court, which then entered an order approving the transfer. Appellant later moved to vacate and amend the order, which the circuit court denied. On appeal, appellant argued the circuit court erred in granting appellee's petition to approve the transfer of the structured settlement payment rights; and in denying their motion to vacate or amend based on its interpretation of 33 U.S.C. § 916 and the Arkansas Structured Settlement Protection Act (ARSSPA), Ark. Code Ann. § 23-81-701. The appellate court held that 33 U.S.C. § 916 prohibits the assignment or transfer of any benefits or compensation payable pursuant to the LHWCA, including those payable under a structured settlement annuity agreement because such compensation is "due or payable" under the LHWCA. Appellee's attempted transfer of his structured settlement payments would contravene 33 U.S.C. § 916. Because appellee's attempted transfer of his structured settlement payments would violate the LHWCA, the transfer is prohibited by the ARSSPA, Ark. Code Ann. §§ 23-81-704(3) and 28-81-707(e). Therefore, the circuit court

erred in its approval of appellee's attempted transfer of his structured settlement payments. (Batson, B.; 10CV-20-78; 3-1-23; Abramson, R.)

*Johnson v. Johnson*, 2023 Ark. App. 107 [**constructive trust**] The circuit court entered an order dismissing with prejudice appellants' petition for a constructive trust. On appeal, appellants argued the circuit court erred in granting the appellee's motion to dismiss because the appointment of a special administrator was not required to petition for a constructive trust to protect the heirs' interest in the estate. Rule 17(a) of the Arkansas Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest." An "interested person" is defined by the probate code as any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary. Arkansas Code Annotated § 28-9-203 provides, in relevant part that real estate passes immediately to the heirs upon the death of the Intestate. In *Breshears v. Williams*, 223 Ark. 368 the Arkansas Supreme Court held that the circuit court had jurisdiction to appoint a special administrator. *Breshears* does not mandate the appointment of a special administrator when a constructive trust is sought by the heirs of an estate who are attempting to protect their interest in the estate. Here, the deceased died intestate, and appellants claimed to be his children, though paternity had not been proved at that time. By virtue of their status as potential heirs, they are real parties in interest. Appellants were not pursuing a constructive trust to recover assets or file suit on behalf of the estate, to enrich the estate, or to claw back assets of the estate. They were acting on their own behalf as heirs protecting their interest in the estate. Thus, appellants were able to file a petition for a constructive trust to protect their interest in the deceased's estate. The circuit court erred in its determination that appellants were required to request the appointment of a special administrator under these facts. (Wyatt, R.; 35CV-20-199; 3-1-23; Virden, B.)

*Bauer v. Beamon*, 2023 Ark. App. 111 [**bench trial; equitable remedies; damages**] Appellees filed a complaint against the appellants alleging they fraudulently failed to disclose issues after appellees purchased a house from the appellants. The complaint made an equitable claim for rescission and a legal claim for damages based on the alleged fraud. After a bench trial, the circuit court ruled that the appellees waived rescission of the land transaction, but it awarded damages reimbursing appellees for costs they incurred to remediate the issues. On appeal, appellants argued the circuit court erred when it granted appellees' motion for a bench trial and, after rejecting their claim for rescission, awarded them relief on their "complaint for damages." The Arkansas Constitution does not assure the right to a jury trial in all possible instances, but only in those cases where the right to a jury trial existed when the Constitution was framed. The right to a jury trial extends only to those cases that were subject to trial by jury at common law, and in equitable proceedings, there was no right to a jury at the common law. The general rule applicable in election-of-remedies cases is that where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts of the case and his rights, makes a deliberate choice of one, then he is bound by his election and is estopped from again or electing or resorting to the other remedy, although the judgment obtained in the first action

fails to afford relief to the party making the election. Here, the appellees asserted in their first count that they sought rescission as a remedy and in their second count an action for the common law tort of fraud and deceit and resulting damages. The circuit court did not err when it granted appellees' motion for a bench trial in which they expressly elected rescission as their remedy. Rather, the circuit court erred when it did not hold the appellees to their election of remedies. The appellees' election of their equitable remedy in their first count of their second amended complaint precluded them from later seeking—and receiving—the damages they alleged in their second count. Therefore, the circuit court erred when it awarded damages. (Medlock, M.; 17CV-17-549; 3-1-23; Klappenbach, M.)

*Cogburn v. Marsh*, 2023 Ark. App. 114 [**insufficiency of service; waiver**] The circuit court entered an order denying appellants' motion to dismiss and granted appellee's motion for default judgment. On appeal, appellants argued they did not waive the affirmative defense of insufficiency of service of process such that the circuit acquired personal jurisdiction over them. The purpose of a summons is to ensure due process by giving the defendant adequate notice of the suit and an opportunity to respond before a judgment is entered. Actual knowledge of a proceeding does not validate defective process. Where no answer has been filed, a summons must comply exactly and not substantially with the requirements of Rule 4(b) of the Arkansas Rules of Civil Procedure. A party may waive a service challenge by actively participating in an action without objecting to the alleged insufficiency of service. A determining factor in deciding whether a defendant has waived his rights and entered an appearance is whether the defendant seeks affirmative relief. A request for affirmative relief that waives a challenge to sufficiency of process is something more than a defensive action that is inconsistent with a defendant's assertion that the circuit court lacked personal jurisdiction over him. When service is not made in a manner provided for in Rule 4, the service and the judgment entered thereon are void ab initio. On November 1, one of the appellants was delivered "papers" by a process server that included a copy of the complaint, the temporary restraining order, and a hearing notice for November 5. No summonses were ever served on either appellant. Appellants appeared at the November 5 hearing without legal representation. Appellants contended that their attendance at the November hearing could not have waived their affirmative defenses because, even assuming proper service occurred on November 1, there was still ample time remaining for them to file a responsive pleading under the rules of civil procedure, which the appellate court agreed. Additionally, the appellants did not request any affirmative relief at the hearing. While one of the appellants did testify that the court should deny the relief requested by appellee, the court was clear that it was not addressing the merits of appellee's underlying claims. In doing so, appellant was maintaining a defensive posture, not seeking affirmative relief. The appellate court held that the appellants did not waive their affirmative defenses such that the circuit court acquired personal jurisdiction over them. Because the circuit court did not acquire personal jurisdiction over the appellants, the default judgment was void ab initio. (Riner, A.; 49CV-19-51; 3-1-23; Gruber, R.)

*Altice USA, Inc. v. Johnson*, 2023 Ark. App. 120 [**arbitration agreement**] The circuit court entered an order denying appellant’s motion to compel arbitration. On appeal, appellant argued that appellee manifested her agreement to an arbitration provision when she paid monthly invoices referring her to the appellant’s Residential Services Agreement (RSA) on its website. In deciding whether to grant a motion to compel arbitration, two threshold questions must be answered. First, whether there was a valid agreement between the parties, and second whether disputes fall within the scope of the agreement. When deciding whether the parties agreed to arbitrate a certain matter, ordinary state law principles governing contract formation apply. In Arkansas, the essential elements of a contract are: (1) competent parties; (2) subject matter; (3) consideration; (4) mutual agreement; and (5) mutual obligations. Here, the appellate court held that appellee’s payment of the invoices that she received from appellant, which directed her to the RSA available on appellant’s website, manifested her assent to its terms, and the arbitration provision otherwise appeared in writing on appellant’s website and was supported by mutuality of obligation. Therefore, the circuit court erred in denying appellant’s motion to compel arbitration. (Batson, B.; 10CV-20-94; 3-1-23; Wood, W.)

*Corbitt v. Pulaski County Jail*, 2023 Ark. 18 [**writ of mandamus**] The circuit court entered an order denying appellant’s complaint for declaratory judgment and injunctive relief and petition for writ of mandamus seeking to direct appellees to allow appellant to carry a firearm inside the Pulaski County District Court. On appeal, appellant argued that the circuit court abused its discretion by denying his petition for writ of mandamus because the plain language of Ark. Code Ann. § 5-73-122(b) allows him to carry a firearm into a courthouse. Specifically, with regard to Ark. Code Ann. § 5-73-122(b), appellant asserted that it allows officers of the court to possess a firearm in the courtroom of any court or courthouse in the state and that the phrase “officers of the court” means attorneys. Arkansas Code Annotated § 5-73-122(b) states: “However, a law enforcement officer, either on-duty or off-duty, officer of the court, bailiff, or other person authorized by the court is permitted to possess a handgun in the courtroom of any court or a courthouse of this state.” Declaratory judgment is a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes. Mandamus, however, seeks to enforce a legal right after it has been established—not to establish a right. Here, in denying mandamus relief, the circuit court found that appellant failed to show that he had a clear, legal right that had been denied. Appellant should have established his rights pursuant to Ark. Code Ann. § 5-73-122(b) before filing his petition for writ of mandamus. Therefore, there was no abuse of discretion in the circuit court’s denial of appellant’s mandamus petition. (Wright, H.; 60CV-20-275; 3-2-23; Kemp, J.)

*Gillette v. City of Fort Smith*, 2023 Ark. 24 [**illegal sentence; district court appeal**] Appellant was charged with “Carrying a Weapon in a Publicly Owned Building” in violation of Ark. Code Ann. § 5-73-122. Appellant pled not guilty and after a bench trial the district court took the case under advisement and ordered appellant to pay the court costs of \$140. Additionally, the district court indicated that if there were no further offenses within thirty days, the charge would be

dismissed. Appellant filed a motion for reconsideration and a motion to stay punishment pending appeal. The district court denied both motions as it stated, there was no conviction. The district court never entered a judgment of conviction, and at the end of the thirty days, it discharged and dismissed the case. Appellant timely filed a notice of appeal with the circuit court. The circuit court then granted appellee's motion to dismiss for lack of jurisdiction according to the conviction requirement of Rule 36(a) of the Arkansas Rules of Criminal Procedure. On appeal, appellant argued that the district court illegally imposed court costs and probation in violation of his state and federal constitutional procedural due process rights and his federal and state constitutional right to a trial. An order assessing court costs against the defendant upon dismissal of the indictment is void and violates due process of law. Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence. Here, the Arkansas Supreme Court held that appellant's due process rights were violated when the district court imposed a sentence that inflicted both monetary and probationary conditions without a conviction or finding of guilt. While the circuit court correctly determined that it lacked jurisdiction due to the conviction requirement of Rule 36(a), it neglected to identify what was a void de facto sentence that the district court had imposed on appellant. Therefore, the circuit court should enter an order on the motion to void the illegal sentence. (Tabor, S.; 66FCR-21-174; 3-2-23; Womack, S.)

*A-1 Recovery Towing and Recovery, Inc. v. Walther*, 2023 Ark. 34 [**Tax Procedure Act; assessment review**] The circuit court entered an order affirming the decision of the Arkansas Department of Finance and Administration (DFA) concerning adjustments made by DFA to A-1's taxable income and to its shareholders accounts for tax years 2013 through 2017. On appeal, appellant argued that the circuit court erred in affirming DFA's decision based on its erroneous interpretation of Ark. Code Ann. § 26-18-406, which provides that a suit in circuit court to contest a DFA assessment shall be tried de novo. Under the Tax Procedure Act, a taxpayer may file suit in the circuit court to contest a DFA assessment or determination, where the matter shall be tried de novo. Arkansas Code Annotated § 26-18-406(c)(3) further provides that a presumption of correctness or weight of authority shall not attach to a final assessment or decision of the secretary in a trial de novo or an appeal under this section. A trial de novo simply means that the whole matter is opened up for consideration by the circuit court as if the proceeding had been originally brought in that court. Circuit courts regularly decide cases brought under the Tax Procedure Act after the filing of motions to dismiss or motions for summary judgment. Here, the circuit court entered an order disposing of the case without either party filing a motion. By sua sponte affirming DFA's decision, the circuit court essentially granted summary judgment in favor of DFA in the absence of a dispositive motion. In its order, the circuit court made no findings of fact or conclusions of law. No dispositive motion—motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment—was filed. The Arkansas Supreme Court held that the circuit court failed to follow Ark. Code Ann. § 26-18-406 when it affirmed DFA's decision sua sponte. The circuit court was required under Ark. Code Ann. § 26-18-406(c) to try this case

de novo—as if the case had originally been brought in that court—without attaching a presumption of correctness or weight of authority to DFA’s determination. Therefore, the circuit court erred by affirming DFA’s decision without providing reasoning for its ruling; without either party filing a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment; and without allowing appellant to present additional evidence. (Fox, T.; 60CV-21-961; 3-9-23; Wynne, R.)

*NP191, LLC v. Branch*, 2023 Ark. App. 156 [**mortgage; summary judgment; statute of limitations**] The circuit court granted summary judgment in favor of the appellee. On appeal, appellant argued that the circuit court erred in granting summary judgment to appellee upon a finding that Ark. Code Ann. § 16-56-111(a) barred its action to enforce its mortgage when there was no acceleration of the note. Arkansas Code Annotated § 16-56-111(a) states, “[A]ctions to enforce written obligations, duties or rights . . . shall be commenced within five (5) years after the cause of action shall accrue.” A cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations runs from that time. The statute of limitations begins each time a borrower fails to meet a monthly obligation under a promissory note, assuming the five-year statute of limitations has not expired from the date the creditor can recover the last installment. When the debt is to be paid in installments, the statute of limitations runs against each installment from the time it becomes due. The present case involves a written credit agreement providing for a line of credit. The agreement differed from what might be considered a traditional promissory note and mortgage contract in that monthly payments were subject to change annually based on the economic climate as outlined in the contract. In this instance, the credit agreement called for 240 monthly payments and specifically set out that all principal and interest would be paid in monthly installments. The term of the loan was thirty years with the last payment to be made on April 29, 2041. The fact that these payments may change annually does not destroy the character of a debtor-creditor relationship or that this is an installment contract. The agreement satisfies the elements of an installment contract. Appellee’s last payment on the loan was in 2013. Appellant did not pursue a cause of action until October 7, 2020, when it filed suit to enforce the promissory note and to foreclose on appellee’s mortgage. Appellant may collect underpayments extending back five years but no further because installment payments are separate causes of action when the underpayment occurs. Thus, all payments due prior to October 7, 2015, were barred pursuant to Ark. Code Ann. § 16-56-111(a). The record showed the circuit court did not consider appellant’s argument that each individual payment constituted a separate cause of action. Therefore, the circuit court erred in granting summary judgment to appellee. (Wright, H.; 60CV-20-5614; 3-15-23; Barrett, S.)

*Digby-Branch v. Westside Consol. Sch. Dist. No. 5*, 2023 Ark. App. 164 [**summary judgment; Arkansas Teacher Fair Dismissal Act**] The circuit court granted summary judgment in favor of appellees. On appeal, appellant argued the circuit court erred in finding that appellee substantially complied with the Arkansas Teacher Fair Dismissal Act (ATFDA). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file,

together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The fact that both parties move for summary judgment does not necessarily establish that there is no issue of fact. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted. Both motions should be denied if the court finds that there is a genuine issue as to a material fact. Under the ATFDA, a nonrenewal by a school district shall be void unless the school district substantially complies with all provisions of the subchapter and the school district's applicable personnel policies. Pursuant to Ark. Code Annotated § 6-17-1503(c), appellant's nonrenewal is void as a matter of law if the district did not substantially comply with the provisions of the ATFDA and the school district's applicable personnel policies. Here, material facts remained regarding whether the district substantially complied with its policies and procedures. Accordingly, the appellate court held that appellant's claim was not appropriate for summary judgment. (Richardson, M.; 16JCV-20-620; 3-15-23; Murphy, M.)

*Gibson v. Little Rock Downtown Neighborhood Association*, 2023 Ark. 45 [**Amendment 101**] The circuit court granted summary judgment in favor of appellees on their illegal-exaction claim related to Amendment 101 to the Arkansas Constitution. On appeal, appellants argued that the circuit court erred by adding a nonexistent-lane restriction to Amendment 101 funds. Amendment 101 states that its intent is to continue the tax levied under Amendment 91 to provide special revenue for the use of maintaining, repairing, and improving the state's system of highways, county roads, and city streets. No language in the intent section of Amendment 101, or the remainder of the amendment, indicates that the funds collected may only be utilized on four-lane-highway improvements. The only mention of four-lane highways is in reference to the prior tax levied under Amendment 91. This was in contrast to Amendment 91, which included the term "four-lane highway" more than thirty times. The Supreme Court held that the language in Amendment 101 was intended to provide revenue for the "state's system of highways, county roads, and city streets," regardless of the number of lanes. Thus, the circuit court erred in its interpretation of Amendment 101 and in granting summary judgment in favor of the appellees. (Pierce, M.; 60CV-20-6460; 3-16-23; Hudson, C.)

*Osage Creek Cultivation, LLC v. Ark. Dep't of Fin. & Admin.*, 2023 Ark. 47 [**subject-matter jurisdiction; sovereign immunity**] Appellants allege the Arkansas Medical Marijuana Commission granted a marijuana cultivation license to a corporate entity that had been dissolved. As existing cultivation license holders, they challenged this decision and then sued when the Commission refused to revoke the new license. The circuit court dismissed appellant's complaint for lack of subject-matter jurisdiction. [**subject-matter jurisdiction**] When a complaint alleges claims under both the Administrative Procedure Act (APA) and the declaratory judgment statute, a circuit court must separate out whether it has subject-matter jurisdiction under either. An APA claim may fail for lack of subject-matter jurisdiction, but the declaratory judgment claim may survive. Here, the circuit court found the appellants lacked subject-matter jurisdiction for the APA

claims, but the circuit court did not analyze jurisdiction for the declaratory judgment claim. The circuit court erred by not finding subject-matter jurisdiction over the claim for declaratory judgment that the State had acted ultra vires. **[sovereign immunity]** The State's sovereign immunity derives from Article 5, section 20 of the Arkansas Constitution: "The State of Arkansas shall never be made defendant in any of her courts." Lawsuits seeking financial damages from the State are barred by sovereign immunity. On the other hand, lawsuits seeking declaratory or injunctive relief against state officials committing ultra vires, unconstitutional, or illegal acts can go forward. But a lawsuit of this kind must still plead facts that, if proven, would establish entitlement to relief. Here, the Supreme Court held that the pleadings did not surmount sovereign immunity. Therefore, the circuit court did not err in dismissing the complaint. (Welch, M.; 60CV-21-5305; 3-16-23; Wood, R.)

*City of Fort Smith v. Merriott*, 2023 Ark. 51 **[illegal-exaction; unjust-enrichment]** After a bench trial on illegal-exaction and unjust-enrichment claims the circuit court awarded appellees damages. On appeal, appellant argued the circuit court erred in finding that it committed an illegal exaction and that it was unjustly enriched. **[illegal-exaction]** A governmental levy of any charge is subject to an illegal-exaction claim unless it meets both elements of the following two-prong test: (1) it is fair and reasonable; and (2) it bears a reasonable relationship to the benefits conferred on those receiving the services. Once a fee is determined fair and reasonable, the question is whether it bears a reasonable relationship to the benefits conferred. Here, appellee, on behalf of the citizens and taxpayers of Fort Smith, sued appellant after discovering that appellant was dumping nearly all its recyclables in a landfill. Appellee claimed that appellant's continued collection of monthly sanitation charges, which purportedly included fees for recycling, was an illegal exaction. The Supreme Court found that appellant used the fee for its intended purpose. The appellant's ordinance set a single fee for the cost of residential collection and disposal of solid waste, recycling, and yard waste. Appellant spent the funds on the collection and disposal of solid waste, recycling, and yard waste. Thus, even though appellant continued to collect recyclables and general trash separately and appeared to run a recycling program, it still used the sanitation fee to collect and dispose of sanitation. Therefore, the circuit court erred in finding that the fee was illegal exaction. **[unjust enrichment]** To find unjust enrichment, a party must have received something of value, to which it is not entitled and which it must restore. An action based on unjust enrichment is maintainable where a person has received money or its equivalent in the context that, in equity and good conscience, he or she ought not to retain. To measure damages, the courts look at the plaintiff's loss or injury; to measure restitution, the courts look at the defendant's gain or benefit. If the claimant's evidence will not yield even a reasonable approximation of damages, the unjust enrichment is merely speculative, and restitution will not be awarded. Here, the damages sought by the appellee were speculative. Appellee did not introduce any evidence of the unjust value of the benefit appellant received from the appellees. The Supreme Court held that because the appellee did not present evidence of appellant's wrongful gain from the suspension of the recycling operation, the circuit court's restitution award was erroneous. (Tabor, S.; 66FCV-17-637; 3-16-23; Wood, R.)



*James v. Mounts*, 2023 Ark. 53 [**life-insurance policy; substantial compliance**] The circuit court entered a declaratory judgment finding that the death benefit of a term life insurance policy owned by the deceased was payable to appellees and not to appellant. On appeal, appellant argued that the circuit court erred in finding that the deceased substantially complied with the insurance policy requirements to change a beneficiary designation with an unsigned, undated change-of-beneficiary form. Under Arkansas law, only substantial compliance with the insurance policy's change-of-beneficiary procedures is required. *Tibbels v. Tibbels*, 232 Ark. 857 defines what is meant by substantial compliance in the context of changing life insurance beneficiaries. Here, the Supreme Court agreed with the circuit court's finding that the deceased's faxed return of an unsigned and undated change-of-beneficiary form, filled out in his handwriting, substantially complied with the notice requirement to change beneficiaries. Therefore, the circuit court did not err in finding that the death benefit of a term life insurance policy owned by the deceased was payable to his children. (Guthrie, D.; 52CV-18-154; 3-16-23; Webb, B.)

## CRIMINAL

*Mitchell v. State*, 2023 Ark. App. 119 [**double jeopardy; partial verdict**] The circuit court denied appellant's motion to dismiss a charge of first-degree murder and its included offense of second-degree murder. On appeal, appellant argued that his retrial on those offenses was barred by double jeopardy. For purposes of double-jeopardy analysis, the United States Supreme Court has described a judgment of acquittal as "a jury verdict of not guilty." Whether based on a jury verdict of not guilty or on a ruling by a court that the evidence is insufficient to convict, a judgment of acquittal terminates jeopardy and bars retrial. The State is not prevented, however, from retrying a defendant after its first attempt to obtain a conviction has ended in a mistrial due to jury deadlock. The jury's inability to reach a final decision is considered a manifest necessity that permits the declaration of a mistrial and continuation of the initial jeopardy that commenced when the jury was first empaneled. Arkansas follows the majority rule, which does not permit partial verdicts in cases where a jury deadlocks on a single charge that includes multiple degrees of offenses. A circuit court may not conduct a partial-verdict inquiry as to the charged offense and the lesser offenses included within it. Here, after deadlocked proceedings in which the circuit court declared a mistrial, and without objection by either party, the foreperson acknowledged in open court that the jury had unanimously voted to find appellant not guilty of first- and second-degree murder; the jurors were polled on their not-guilty votes; and their signed verdict forms of acquittal were confirmed in open court and entered of record. The appellate court held the circuit court erred when it deviated from the standard instructions and allowed the jury to return a partial verdict. While the circuit court's decision to undertake a partial-verdict inquiry was a legal error, it was not an act outside of the court's constitutional authority that rendered the jury's two verdicts null and void. In both form and substance, the verdicts represented the jury's final decision, as the trier of fact, that appellant was not guilty of first- and second-degree murder. It, therefore, was an acquittal. Thus, the circuit court erred in denying appellant's motion to dismiss, which sought to

prevent his retrial on first- and second-degree murder on double-jeopardy grounds. (Yeargan, C.; 57-18-174; 3-1-23; Wood, W.)

*Conic v. State*, 2023 Ark. App. 145 [**DWI; sentencing; probation**] Appellant appealed from sentencing proceedings for a fourth offense driving while intoxicated, an unclassified felony he committed in 2015. This was his fifth sentencing for that offense. On appeal, appellant argued the circuit court erred by resentencing him in proceedings to revoke an illegal probation sentence. A sentence is illegal if the statutes in place when the crime was committed did not authorize it. When construing a statute, the courts must place it beside other statutes relevant to the subject-matter in question and ascribe meaning and effect to be derived from the whole. Statutes relating to the same subject must be construed together and in harmony, if possible. Because a defendant must be sentenced under the laws effective when the offense was committed, the statutes were discussed as they read on 15 May 2015. Several statutes unambiguously prohibit probation for DWI offenders. Arkansas Code Annotated § 5-4-301(a)(1) & (a)(1)(D) states, that a court shall not suspend imposition of sentence as to a term of imprisonment or place a defendant on probation for driving while intoxicated, § 5-65-103. Additionally, Ark. Code Ann. § 5-4-321 allows a court, in a misdemeanor traffic case other than a case involving driving under the influence of alcohol or a drug, to postpone judgment for not more than one year with the defendant on supervised or unsupervised probation status. The requirement that any DWI offender be “imprisoned” for some time, Ark. Code Ann. § 5-65-111, implicitly prohibits probation because no one can be sentenced to serve probation after a term of imprisonment. Probation is more directly prohibited before an adjudication of guilt. Here, appellant was sentenced to ordinary probation, not “probationary supervision.” The mandatory penalties were not imposed with appellant’s probation sentence. Therefore, the revocation involved a sentence that was specifically prohibited by statute. The circuit court erred by resentencing appellant in proceedings to revoke an illegal probation sentence because probation was prohibited for DWI offenders under Ark. Code Ann. § 5-4-301, 5-4-320, 5-4-322, and 5-65-111. (Gill, A.; 60CR-15-2679; 3-15-23; Harrison, B.)

*Parker v. State*, 2023 Ark. 41 [**speedy trial**] Appellant was convicted of first-degree murder, first-degree unlawful discharge of a firearm from a vehicle, second-degree unlawful discharge of a firearm from a vehicle, first-degree attempted murder, and sentence enhancements. On appeal, appellant argued his right to speedy trial was violated. The constitutional right to a speedy trial, as embodied in Rule 28.1 of the Arkansas Rules of Criminal Procedure, is available to an accused in all criminal prosecutions. Pursuant to Rule 28.1, any defendant charged with an offense and incarcerated in prison in this state pursuant to conviction or another offense, or lawfully held to bail or otherwise lawfully set at liberty, must be brought to trial within twelve months unless there are periods of delay that are excluded under Rule 28.3. Once the defendant makes a prima facie showing of a speedy-trial violation, i.e., that his or her trial took place outside the speedy-trial period, the burden shifts to the State to show that the delay was the result of the defendant’s conduct or was otherwise justified. Rule 28.3 of the Arkansas Rules of Criminal Procedure governs excluded periods, when calculating speedy-trial periods, and provides in pertinent part: “The

following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant. ... (b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted: (1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled; (2) the court determines that the delay will not prejudice the defendant; and (3) the court schedules the trial on the next available date permitted by the trial docket. ... (h) Other periods of delay for good cause.” Here, the speedy-trial calculation spans from the date of appellant’s arrest, to the date that he filed his dismissal motion. **[scheduling order]** A new scheduling order essentially supersedes a preceding one. Here, the circuit court entered an order in January, setting a jury trial for March. In this order, the circuit court specifically stated that the time would be charged to the defense. However, the circuit court subsequently entered a second order in March, resetting the trial date for May, which was silent on the issue of speedy trial and did not expressly toll the time running on speedy trial. Thus, because the second order superseded the first order speedy trial ran during that time when it was not expressly tolled. **[sua sponte order]** Rule 28.3(b) of the Arkansas Rules of Criminal Procedure allows for speedy trial to be tolled for docket congestion if the court enters an order at the time the continuance is granted. Here, the circuit court’s order could not retroactively toll speedy trial for docket congestion. Because the circuit court’s sua sponte order retroactively tolled speedy trial, it was insufficient to toll the time for speedy-trial calculations on the basis of docket congestion. Appellee argued that appellant failed to challenge the circuit court’s “good cause” to toll speedy trial, pursuant to Rule 28.3(h) of the Arkansas Rules of Criminal Procedure. Rule 28.3(h) of the Arkansas Rules of Criminal Procedure provides an exception for other periods of delay for good cause. Other periods of delay for good cause means something unique from docket congestion or lack of a forum. Here, the circuit court noted in its order that it was difficult to obtain a space for a three-week setting with only two courtrooms and that a new prosecutor had been assigned and needed time to prepare in its sua sponte order. The Supreme Court held that the appointment of a new prosecutor did not constitute other good cause to toll speedy trial. The order contained no finding that the prosecutor was unable to try the case, nor did it state whether the newly appointed prosecutor was the only prosecutor responsible for trying appellant’s case. Thus, the order lacked a sufficient basis on which to toll speedy trial. Additionally, the appellee argued that appellant did not object to the exclusion of the time for speedy-trial purposes. Typically, a contemporaneous objection to the excluded period is necessary to preserve the argument in a subsequent speedy-trial motion if defense counsel is present at the hearing and has an opportunity to object. Here, appellant was not present during a critical-state, in-chambers discussion. The record demonstrated that the circuit court conducted an ex parte hearing in chambers without appellant or his attorney present. Additionally, there was no record of the in-chambers discussion. The record also demonstrated that appellant’s counsel did subsequently object to the scheduling order two days after it was entered. Thus, this particular time speedy trial continued to run. **[indefinite date]** Rule 28.3(b)(3) of the Arkansas Rules of Criminal

Procedure states that an order tolling speedy trial for docket congestion must, at the time the continuance was granted, schedule the trial on the next available date permitted by the trial docket. Failure to do so counts against time running on speedy trial and is not an excluded period. Here, one of the circuit court's orders tolled speedy trial until an indefinite date in the future. The order should have reset the trial for the next available date permitted by the docket. Because the order failed to do so, the time period was not tolled. Speedy trial had run for a total of 405 days. Therefore, State failed to demonstrate that appellant was brought to trial within the twelve-month period required by Rule 28 of the Arkansas Rules of Criminal Procedure. (Philhours, R.; 18CR-18-425; 3-16-23; Kemp, J.)

*McClure v. State*, 2023 Ark. App. 174 [**recusal; revocation**] The circuit court revoked appellant's suspended imposition of sentence. The circuit judge erred in not recusing when the circuit judge was the prosecutor who brought the charge against appellant that was the underlying offense forming the basis for appellant's revocation hearing. (Batson, B.; 10CR-15-11; 3-29-23; Barrett, S.)

## DOMESTIC RELATIONS

*Smith v. Smith*, 2023 Ark. App. 108 [**relocation; change of custody**] The circuit court entered an order granting appellee's motion to relocate with and to change custody of, the parties' children. On appeal, appellant argued that there was no material change of circumstances and that the circuit court erred in determining that changing custody to appellee was in the children's best interest. When a change of custody is sought in a joint-custody arrangement, the trial court must first determine that a material change in circumstances has transpired from the time of the divorce decree; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. Here, the parties shared joint custody of their children. Appellee relocated from Lake City, first to Bentonville and then to Heber Springs, which is nearly two hours from Jonesboro, where appellant lives. Appellee's relocation made maintaining joint custody impractical given the children's ages as they were approaching school age. Appellee's decision to relocate approximately two hours away from appellant was a voluntary decision, but the trial court found that her relocation for a higher-paying job with benefits was valid after she had lost her job in Jonesboro. Relocating in order to obtain employment itself does not constitute a material change in circumstances. However, appellee's relocation was not the sole reason for finding that a material change of circumstances had occurred. Tensions between the parties had escalated since the entry of the divorce decree. The circuit court saw appellant's behavior as controlling, and the evidence showed that the parties' relationship and their ability to communicate with each other had deteriorated such that a no-contact order was necessary. The appellate court held that the circuit court did not err in finding that a material change in circumstances had occurred since the divorce decree given appellee's relocation and the parties' inability to co-parent because of communication difficulties. Given the appellate court's standard of review, the appellant court held that the circuit court did not err in determining that awarding

custody to appellee was in the best interest of the children. (Alexander, T.; 16JDR-20-416; 3-1-23; Virden, B.)

*Gould v. Gould*, 2023 Ark. App. 118 [**property division; alimony**] The circuit court entered a decree divorcing the parties. As part of the decree, the circuit court awarded appellee alimony and ordered the sale of a motorcycle with the proceeds payable to their adult daughter. On appeal, appellant argued the circuit court erred in making an unequal division of marital property without explanation; in directing the motorcycle proceeds to be paid to the parties' adult daughter; and in awarding an excessive amount of alimony. [**unequal property division**] Arkansas Code Annotated § 9-12-315(a) provides that, at the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. In that event, the court shall make some other division that the court deems equitable taking into consideration certain factors listed in Ark. Code Ann. § 9-12-315(a)(1)(A). When property is divided pursuant to the factors, the circuit court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order. The statute does not compel mathematical precision in the distribution of property. Allocation of the parties' debt is an essential issue to be resolved in a divorce dispute and must be considered in the context of the overall distribution of the parties' property, but the statutory presumption of equal division does not apply to the division of marital debts. Here, because the circuit court found that the parties' agreement as to the division of their property was equitable, there was no need for the circuit court to make findings on the factors listed in Ark Code Ann. § 9-12-315. The parties, prior to trial, divided the property between them. Thus, the court was not charged with determining the equitable division of the other marital property. Additionally, at trial, both parties testified that they used disability money earmarked for their daughter to purchase the motorcycle as well as to purchase land and pay off debt, including the remaining debt owed on the motorcycle. Appellee further testified that the parties had agreed to reimburse their daughter for the use of the money for her education or otherwise. This was, in essence, a marital debt. Therefore, the circuit court did not err in ordering the sale of the motorcycle with the proceeds payable to their adult daughter. [**alimony**] The primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. The circuit court may also consider other factors, including the couple's past standard of living, the earning capacity of each spouse, the resources and assets of each party, and the duration of the marriage. Here, the circuit court considered all the factors when making its alimony award. Because the circuit court considered all the factors and based its decision on the facts presented at trial, the court did not abuse its discretion in awarding alimony. (McSpadden, D.; 25DR-21-16; 3-1-23; Thyer, C.)

*Wallis v. Holsing*, 2023 Ark. App. 137 [**custody modification**] The circuit court entered an order modifying custody and awarded the parties joint custody of their minor child. On appeal, appellant argued the circuit court erred in finding a material change in circumstances and in determining that a modification of custody was in the child's best interest. [**material change**] Modification of

custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; and second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. Failure of communication, increasing parental alienation by a custodial parent, and inability to cooperate can all constitute a material change in circumstances sufficient to warrant modification of custody. The combined, cumulative effect of particular facts may together constitute a material change. Here, appellant argued that the parties' inability to get along, co-parent, and communicate civilly with one another are facts that have been known to the circuit court since the divorce decree was entered; therefore, they did not constitute a material change and circumstances. The circuit court found the failure in communication and increased parental discord between the parties to be escalating but essentially unilateral, and it refused to reward appellant for creating the situation. The appellate court held that it was not erroneous to consider this a material change in circumstances. **[best interest]** In 2021, the General Assembly changed the law regarding custody, creating a rebuttable presumption that joint custody is in a child's best interest. There is a recognized preference for divorced parents to share equal time with their children unless clear and convincing evidence demonstrates it is not in the best interest of the child. The appellate court recognized that although those laws apply specifically to initial custody determinations, they have been applied in other custody determinations. In *Pace v. Pace*, 2020 Ark. 108, the Arkansas Supreme Court recently affirmed a circuit court's denial of a motion for modification and continuance of a joint-custody arrangement when the parties clearly could not get along but there was no evidence the "parental discord" had affected the child's health and welfare. The court specifically recognized the legislature's change favoring joint custody, noting that the parties were no longer obligated to maintain a careful balance of cooperation to stave off a judicial dissolution of a joint-custody arrangement. Additionally, in *Nalley v. Adams*, 2021 Ark. 191, the Arkansas Supreme Court held there was no "modification" but affirmed a circuit court's change of custody from primarily with the mother to equal time with each parent as an authorized adjustment of parenting time. Here, there was evidence that the parties' inability to communicate was negatively impacting their child. Although the child appeared to be doing well and excelled in school, there was also evidence that the child's anxiety level was "extremely high," and that the child was scared about what to say to people for fear of getting in trouble due mainly to appellant's behavior. There was also evidence that the child was being weighed by the appellant before and after visits with appellee. Therefore, the circuit court did not err in finding that the modification of the decree to joint custody was in the best interest of the parties' child. (Parker, J.; 43DR-15-749; 3-8-23; Wood, W.)

*Mullenix v. Mayberry*, 2023 Ark. App. 139 **[attorney's fees; civil procedure]** The circuit court filed an order granting appellee's motion for attorney's fees and denied appellant's motion to dismiss appellee's motion for attorney's fees. On appeal, appellant argued the circuit court erred because appellee had failed to serve her motion for attorney's fees on him as required by Arkansas Rule of Civil Procedure 5(b)(1). Rule 5(a) of the Arkansas Rules of Civil Procedure states that "every other paper . . . filed subsequent to the complaint . . . shall be served upon each of the parties. . . ." According to Rule 5(b)(1) of the Arkansas Rules of Civil Procedure, whenever service

under this rule is required or permitted to be made upon a party, “the service shall be upon the attorney. . .” However, under Rule 5(b)(1) there is an exception where service is made in an action in which a “final judgment has been entered and the court has continuing jurisdiction,” service “shall be [made] upon the party.” Finally, Rule 5(b)(3) of the Arkansas Rules of Civil Procedure completes the service protocol by further refining service on a “party” by stating, “If a final judgment or decree has been entered and the court has continuing jurisdiction, service upon a party by mail or commercial delivery company shall comply with the requirements of Rule 4(G)(1) and (2), respectively.” Here, appellant filed a petition to modify custody, visitation, and child support. Appellee asked that the motion be denied and that she be awarded attorney’s fees. The circuit court entered an order denying appellant’s petition regarding custody and visitation but modified child support in appellee’s favor. After the order was entered, appellee filed a motion for attorney’s fees and served a copy on appellant’s attorney. The appellate court found that their review was limited to whether the order appealed from was a “final judgment” and whether “the court had continuing jurisdiction.” The grant of attorney’s fees is a collateral matter that does not bear upon the finality of the final judgment on the merits. Therefore, the circuit court’s order on appellant’s petition to modify custody, visitation, and child support was a final judgment. Further, it is axiomatic that a circuit court maintains continuing jurisdiction in domestic-relations cases, such as divorce proceedings, child custody disputes, child-support cases, and guardianship proceedings. As such, appellee was required to serve her motion on appellant and not just appellant’s attorney under the rule. Therefore, the circuit court erred in granting appellee’s motion for attorney’s fees. (Dyer, C.; 26DR-20-45; 3-8-23; Hixson, K.)

*Knesek v. Knesek*, 2023 Ark. App. 148 [**modification of custody**] The circuit court entered an order partially restating the parties’ divorce decree. On appeal, appellant argued the circuit court erred in modifying the custody of the children. The party seeking modification of the custody order has the burden of showing a material change in circumstances. Modification of custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child’s best interest. In order for the circuit court to make the factual determination of whether there have been sufficient changed circumstances to warrant a modification of child support, the circuit court must consider evidence. Here, appellee moved to modify the divorce decree in order to take the children out of the country and for authority to apply for passports for them. There was no testimony or finding of any material change in circumstance or best-interest analysis. No evidence of change of circumstances was sought or offered; thus, no change could be found. The court also made no determination whether the change of custody was in the best interest of the children. Therefore, the circuit court erred in modifying custody of the children. (McCune, M.; 17DR-19-94; 3-15-23; Abramson, R.)

*Philmon v. Philmon*, 2023 Ark. App. 150 [**distribution of property; commingling**] The circuit court entered a divorce decree. On appeal, appellant argued the circuit court erred in awarding

appellee any interest in gold and silver coins because he “unrefutably acquired” them using his retirement funds. At the time a divorce decree is entered, marital property, which is defined as all property acquired by either spouse subsequent to the marriage with certain exceptions, shall be distributed one-half to each party unless the court finds such a division to be inequitable. In determining whether property remains under the control of one spouse upon divorce or is the property of both spouses, “tracing” may be used by the court. One claiming ownership of nonmarital property that has been commingled with marital property bears the burden of tracing the separate property so that it can be treated as such for property-division purposes upon divorce. When transactions result in great difficulty in tracing the manner in which nonmarital and marital property has been commingled, the property acquired in the final transaction may be declared marital property. Here, there was no real attempt to distinguish who owned each individual gold and silver coin or even each lot of coins. The parties’ coins had been commingled to such an extent and for so long a period that there was no way to separate them. Moreover, appellant failed to prove that the gold and silver coins could be traced to his retirement funds. The testimony established that appellant did use his retirement funds to purchase gold and silver coins; however, appellant admitted that he had sold some of those coins, and the evidence showed wire transfers from gold groups to a joint bank account to which appellee had access. Tracing became difficult—if not impossible—once the coins had been sold and then had been used to purchase rental properties, which appellant conceded in his proposed findings were marital. Further, the fact that the coins had been buried on the property appellant deeded to appellee was evidence that he had not attempted to keep the coins separate. The appellate court held the circuit court did not err in determining that the gold and silver coins had been commingled such that tracing was not feasible and that the gold and silver coins were thus marital property. (Sullivan, T.; 64DR-19-22; 3-15-23; Virden, B.)

*Wilson v. Wilson*, 2023 Ark. App. 155 [**division of property**] The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred when it held (1) the retirement accounts held jointly by the parties were the separate property of appellee and (2) that she should have been awarded some benefit to a Washington County farm since marital funds were used to pay the debt or one-half ownership. Property placed in both spouses’ names is held in tenancy by the entirety and is marital property. Clear and convincing evidence is required to overcome this presumption. Unless the presumption is overcome, the property shall be distributed one-half to each party. When a husband and wife hold real property as tenants by the entirety, it is presumed that the spouse who furnished the consideration made a gift in favor of the other spouse, and this presumption must also be rebutted by clear and convincing evidence. All earnings or other property acquired by each spouse after marriage must be treated as marital property unless it falls into one of the statutory exemptions contained in Ark. Code Ann. § 9-12-315(b). The burden is on the party who asserts an interest in the property to establish that it is, in fact, separate property. [**retirement accounts**] Appellant first argued that the circuit court erred in declaring the parties’ joint retirement accounts as appellee’s separate property. In cases where transactions result in great difficulty in tracing the manner in which nonmarital and marital property has been commingled, the property acquired in the final transaction may be declared marital property. Depositing the stock proceeds



and marital funds into retirement accounts as opposed to investment accounts is some proof of intent that the retirement accounts were for the benefit of both parties when it was time for them to retire. Here, testimony of both parties showed that the retirement accounts were jointly held as tenants by the entirety and were funded with both separate and marital funds that could not be traced. The appellate court held that the circuit court erred in its findings and were against the preponderance of the evidence that appellee intended to maintain stock-sale proceeds as his separate property. **[separate property]** Appellant next argued the circuit court did not consider either the sweat equity she invested in the farm prior to marriage by helping in the remodel of the farmhouse or that marital funds were used to pay the indebtedness on the farm debt. All nonmarital property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division as it deems equitable. The nonowning spouse is entitled to have the circuit court consider the contribution of marital funds to the reduction of the indebtedness on the property of the owning spouse when balancing the equities in the property division. Here, appellee was awarded a farm as his separate property per the divorce settlement agreement. The circuit court was correct in finding that the farm is appellee's separate property, but it did not conduct an analysis to determine if appellant was entitled to some benefit from her contributions. The circuit court should make specific findings as to what, if any, benefit appellant should receive for her contributions. Therefore, the circuit court's division of the parties' assets was erroneous. **[alimony]** The primary factors to consider in awarding alimony are the financial need of one spouse and the other spouse's ability to pay. Property division and alimony are complementary devices that a circuit court uses to make the dissolution of a marriage as equitable as possible. Here, the circuit court should consider the issue of alimony based on an equitable division of the parties' marital assets and consider the statutory factors regarding alimony in making written findings. (Scott, J.; 04DR-20-1033; 3-15-23; Barrett, S.)

## JUVENILE

*Marissa Valentin v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 135. **[ADJ-abuse]** Child's testimony of being struck in the face with a fist, resulting in a bruise on the forehead, coupled with the Appellant's admission that she did strike the victim, was sufficient evidence to support an abuse finding at adjudication; no photographic evidence of injury is required. **[ADJ-parental unfitness]** Lunging at one's child with a kitchen knife and threatening to kill one's children in their sleep supports an unfit-parent finding because a fit parent would not threaten their children in this manner. No error found; adjudication decision affirmed. (Byrd Manning, T.; CV-22-633; 3-8-23; Potter Barrett, S.)

*Robert Bevell v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 138. **[TPR-paternity]** The parental element of the statutory grounds was satisfied by the circuit court's oral ruling that Appellant was the biological father upon admission of paternity test results at the permanency-planning hearing. While the circuit court's oral finding that Appellant was the child's biological father was not stated as such in a written order, in context, the court's use of the term "legal father," referring to

Appellant in the permanency-planning order, was contingent on its oral finding. **[TPR-aggravated circumstances]** A finding of aggravated circumstances does not require that Appellee prove that meaningful services toward reunification were provided to Appellant, especially considering Appellant did not participate in any service or request any visitation with the child during the brief time he was not incarcerated throughout the case and was currently incarcerated on a five-year parole revocation. **[TPR-best interest/least restrictive alternative]** To succeed on a relative-placement argument on appeal, at a minimum, there must be an appropriate and approved relative in the picture. Appellant's claim that there was an unnamed / unvetted family member interested in placement was insufficient. Additionally, restating that Appellant's grandparents remained interested was insufficient, especially considering they had been ruled out as potential placement earlier in the case because Appellant lived in the home when not incarcerated, and Appellant's father, a sex offender who abused his own children, also lived on the property. No error found; decision affirmed. (Sullivan, T.; CV-22-602; 3-8-23; Wood, W.)

*Brittany Price v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 140. **[TPR-best interest/adoptability]** A court report addendum signed by the adoption supervisor listing 155 matched potential homes for the juveniles was sufficient evidence to conclude that the court considered adoptability when it found the children adoptable. **[TPR-best interest]** Even though the juvenile was placed in his father's custody and had achieved permanency, there was no error in finding termination of Appellant's parental rights was in the best interest of the juvenile, when the mother had significant substance-abuse history, refused to treat her profound mental health issues, tested positive for methamphetamine the day of the termination hearing, and acquired criminal charges on a few different occasions during the case, most involving drugs. Decision affirmed. (Brown, E.; CV-22-642; 3-8-23; Hixson, K.)

*Shane Helms v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 158 **[TPR-aggravated circumstances; little likelihood]** After a review of the evidence and a very case-specific fact pattern, the appellate court could not say that the circuit court erred in concluding that there was little likelihood that services would result in successful reunification. **[TPR-best interest; adoptability]** Appellant's argument that placement with a relative was a less restrictive alternative than adoption was without merit: the relative had no ICPC-required, approved home study for placement; the relative had only seen the child a handful of times, the last time when the child was still an infant; the relative did not reach out to express interest in the child until fourteen (14) months after the child entered foster care. **[TPR-best interest; potential harm]** No error in deciding the child was at risk of future harm if placed in Appellant's home when the child was traumatized, suffered severe emotional episodes, did not transition well, and the Appellant himself was low-functioning. (NOTE: this was a 5-4 split; there are pending petitions for rehearing and for review). (Byrd Manning, T.; 3-15-23; CV-22-335; Thyer, C.)