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CIVIL

Bettis v. Ameriprise Financial Services, Inc., 2023 Ark. App. 350 [**motion to compel arbitration**]
The circuit court denied appellant’s motion to compel arbitration. On appeal, appellant argued that the circuit court erred in its denial of her motion to compel arbitration because a valid agreement to arbitrate existed. When asked to compel arbitration, a circuit court is limited to deciding two threshold questions. The court must first consider whether there is a valid agreement to arbitrate between the parties. If the court does find a valid agreement to arbitrate, then the court must consider whether the dispute falls within its scope. Only when the court finds affirmatively that a valid agreement to arbitrate exists between the parties and that the dispute falls within its scope will the court consider any defenses to the enforcement of the agreement. Here, the circuit court’s order stated only that the motion to compel arbitration was denied. The circuit court did not address either of the two threshold questions. Additionally, the appellee did not deny that there was an arbitration clause in its contract with appellant. It only contended that the circuit court properly denied the motion to compel arbitration because granting it would force appellee to litigate “two sides of a family dispute” in two separate forums. The appellate court held appellant’s motion to compel arbitration should have been granted. Therefore, the circuit court erred in denying appellant’s motion to compel arbitration. (Wright, H.; 60CV-20-4516; 8-30-23; Abramson, R.)

Parnell v. SNJ Truck Service, 2023 Ark. App. 364 [**contempt**] The circuit court entered an order holding the appellants in contempt. On appeal, the appellants argued that the circuit court erred by holding them in contempt. Contempt may be established when the offending party willfully disobeys a valid order of the court. However, before one can be held in contempt for violating the court's order, the order must be definite in its terms and clear as to what duties it imposes. If the alleged contemnor is without the ability to comply with the order, a court's contempt power may not be exercised. Statements of counsel can bind clients in appropriate situations, including in contempt proceedings. Here, the circuit court had ordered appellants to execute and deliver to appellee three documents: a warranty deed, an affidavit to be signed by appellant, and an affidavit of heirship. Before the contempt hearing, appellants provided appellees with two of the documents, but they did not provide the affidavit of heirship. Appellants argued that they had been unable to find someone who could execute the affidavit and that they did not know the names of all the heirs. Appellants' attorney admitted that appellants had not complied with the court's order to provide the affidavit of heirship. Although appellants argue that they did not willfully violate the court's order because their compliance was outside of their independent control, they put on no evidence to demonstrate their inability to comply. Therefore, the circuit court did not err in holding the appellants in contempt. (Broadaway, M.; 9-6-23; 56CV-21-29; Klappenbach, N.)

Barton v. King, 2023 Ark. App. 380 [**trust; removal of trustee**] The circuit refused to set aside a trust and removed the trustee. On appeal, appellant argued that the trust at issue should have been set aside and voided because appellee procured it and inappropriately used his influence over the deceased to have her execute it. On cross-appeal, appellee argued that the circuit court erred in removing him as the trustee. When a trust is drafted by a beneficiary who is in a confidential relationship with the person creating a trust, a rebuttable presumption arises on that beneficiary to prove beyond a reasonable doubt that the person creating the trust had both the mental capacity and the freedom of will and actions to render the trust legally valid and, further, that the trust was not created from the undue influence of that beneficiary. The requisite level of mental capacity to create a trust is defined as having sufficient mental capacity to retain in his memory, without promptings, the extent and condition of his property and to comprehend how he is disposing of it, and to whom. Here, appellee held the deceased's power of attorney and thus stood in a confidential relationship with her. The burden shifted to appellee to prove beyond a reasonable doubt that the deceased had both the mental capacity and the freedom of will and actions required to render the trust legally valid. Bank employees, old friends, and one of the beneficiaries confirmed that the deceased was in charge of herself and that they were not suspicious of appellee. Giving due regard to the credibility assessments made by the circuit court, the appellate court could not say that the circuit court clearly erred in deciding that appellee successfully rebutted the accusation of undue influence. Additionally, the circuit court acknowledged that there was some proof that the deceased suffered from some health issues in her later two years that affected her mental acuity, but there was no medical evidence to support that when the trust was created, the deceased lacked the mental capacity to make her own decisions. When the issue is mental capacity, it is the time of execution that is key. Bank employees confirmed that the deceased knew what she owned and what she was doing. The notary verified the deceased's signature with no qualms. The circuit court heard from

twelve witnesses, including bank employees, a notary, and longtime friends of the deceased, and concluded that despite her age, health issues, and occasional confusion, the deceased was “fiercely independent” and had the capacity to execute the trust. Thus, the appellate court held the circuit court did not err in upholding the trust. **[cross-appeal]** A trustee is required to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, including “promptly” furnishing a copy of the trust instrument upon request. A beneficiary may request the court to remove a trustee if the trustee has committed a “serious” breach of trust. Here, the appellee did not provide any of the trust’s beneficiaries any information about the trust until months after its creation. It was not until after the beneficiaries filed their complaint against appellee that the trust documents were finally revealed. Appellee resisted revealing the trust documents and did not perform an accounting until required to do so by the circuit court. The appellate court held that the circuit court did not err in finding that this was a serious breach that warranted appellee’s removal as trustee. (Pope, S.; 9-13-23; 02CV-19-42; Klappenbach, N.)

King v. Barton, 2023 Ark. App. 388 **[attorney’s fees]** The circuit court awarded attorney’s fees in a separately appealed underlying trust-administration case. On appeal, appellant argued that he was the prevailing party on all but one issue, and the circuit court abused its discretion in determining the amount of the fees awarded. Arkansas Code Annotated § 16-22-308 and its requirement that to be awarded fees, one must be the “prevailing party” is inapplicable in actions involving trusts. Because the instant case involved the administration of a trust, the matter of who ultimately prevailed in the suit is immaterial to the determination of the award of attorney’s fees. Arkansas Code Annotated § 28-73-1004 allows the court to award reasonable attorney’s fees in a judicial proceeding involving the administration of a trust as justice and equity may require. Thus, the circuit court was within its discretion to award attorney’s fees. **[amount awarded]** Appellant next argued the circuit court erred by considering only one of the eight factors for awarding attorney’s fees in *Chrisco*, 304 Ark. 227, 800 S.W.2d 717. There is no fixed formula for determining what constitutes a reasonable amount for attorney’s fees. However, a court should be guided in that determination by the following long-recognized factors: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. Here, the circuit court considered briefing, affidavits, and billing records to determine which fees were attributable to work performed regarding appellant’s removal as trustee. The circuit court made detailed findings regarding the amount of fees and how the amount was calculated. There was nothing to indicate that the court granted the award of attorney’s fees and costs improvidently, thoughtlessly, and without due consideration. Thus, the circuit court did not abuse its discretion in awarding attorney’s fees. (Pope, S.; 02CV-19-42; 9-20-23; Virden, B.)

Kitchens v. City of Fort Smith, 2023 Ark. App. 408 [**Freedom of Information Act; open meetings**] The circuit court entered an order finding that the appellees did not violate the open-meeting provisions of the Arkansas Freedom of Information Act (FIOA). On appeal, appellant argued that FIOA was violated by appellee’s act of contacting each member of the city’s board of directors to determine whether they concurred in the removal of an item from the agenda of an upcoming board meeting. FOIA is to be liberally construed to accomplish its broad and laudable purpose that public business be performed in an open and public manner. The open-meetings provision of FOIA provides in pertinent part that all meetings, formal or informal, special, or regular, of the governing bodies of all municipalities shall be public meetings. FOIA does not attempt to give an exact description of every conceivable factual situation that might give rise to the application of FOIA. Here, the city clerk inquired of six Board members whether they concurred with one member’s request to remove an item from the agenda. There was no evidence that any inquiry was made regarding the members’ positions on the merits of any tax allocation proposal, that any discussion or debate was had between members regarding the proposals, or that any decision was made regarding the proposals. The issue of how to allocate the tax was discussed and voted on at the public meeting. Therefore, under these circumstances, the circuit court did not clearly err in finding that the appellees’ actions were not in violation of FOIA. [**attorney’s fees**] On cross-appeal, appellee argued the circuit court erred in its denial of its motion for attorney’s fees. Arkansas Code Annotated § 25-19-107(d)(2) provides that if a defendant has “substantially prevailed” in a FOIA action, “the court may assess expenses against the plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes.” Here, the appellate court agreed with the circuit court that FOIA law was not so well-settled that the current case was clearly frivolous and that appellant’s request at the hearing to invalidate the action taken at the board meeting did not establish that she filed the action for dilatory purposes. Thus, the circuit court did not err in its denial of attorney’s fees. (Magness, G.; 66FCV-21-927; 9-27-23; Klappenbach, N.)

Shellito v. Hurley, 2023 Ark. App. 414 [**breach-contract; statute of limitations**] The circuit court granted appellee’s motions to dismiss appellant’s breach-of-contract cause of action on the basis of the statute of limitations. On appeal, appellant argued that the circuit court erred in determining the date of the breach and consequently, in finding that the statute of limitations had run before she filed her complaint. In order to prevail on a motion to dismiss a complaint on the basis of a statute-of-limitations defense, it must be barred on its face. The period of limitations for contracts runs from the point at which the cause of action accrues. A cause of action accrues the moment the right to commence an action comes into existence and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. And when the parties have entered into an agreement that requires a series of mutual acts and have left the time of those acts open-ended, as here, the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement. If there is any reasonable doubt as to the application of the statute of limitations, this court will resolve the question in favor of the complaint standing and against the challenge. Here, the parties did not dispute that the three-year statute of

limitations set forth in Ark. Code Ann. § 16-56-105 applied. The issue was when the statute began to run. Appellate alleged in her complaint that the parties agreed to sell both of their homes and, after they closed on the sales, to use the proceeds to pay off the mortgage on a home in Arkansas that was placed solely in appellee's name. She alleged that part of the money she gave to appellee would be used to pay off appellee's credit card debt and the remainder would be combined with appellee's proceeds to pay off the mortgage of the home. In January 2018, appellee sold his home in Oregon. In February 2018, appellant sold her home in Oregon and gave \$61,000 to appellee. Although the complaint alleges that appellee used the proceeds from the sales of both Oregon homes to pay off the balance of the Arkansas mortgage, it does not allege precisely when that occurred. Moreover, the complaint did not allege that the parties' agreement required appellee to execute a deed jointly conveying the property immediately upon receiving funds from appellant or upon paying off the mortgage. The complaint did not state precisely when the parties agreed that this would occur. Because the complaint did not allege a precise time that appellee was required to add appellant's name to the deed for the Arkansas home, the appellate court could not make a determination when the statute of limitations began to run. Accordingly, the appellate court held that the circuit court abused its discretion in dismissing appellant's complaint alleging breach of oral contract. (Hearnsberger, M.; 26CV-21-319; 9-27-23; Wood, W.)

Berry v. Slack, 2023 Ark. App. 415 [**summary judgment**] The circuit court granted appellees' motion for summary judgment and dismissed with prejudice the appellants' complaint for forcible entry and detainer, trespass, and conversion. On appeal, the appellants argued the circuit court erred in granting summary judgment and dismissing their complaint. A circuit court may grant summary judgment when there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. When ruling on a motion for summary judgment, a circuit court cannot grant relief beyond that prayed for in the motion. Further, sua sponte dismissal of a party's complaint is a reversible error. Here, the appellees moved for summary judgment against one of the appellants but not the other appellant. Thus, the circuit court erred when it sua sponte granted summary judgment against the appellant whom summary judgment was not sought against by the appellees. (Fox, T.; 60CV-20-7152; 9-27-23; Wood, W.)

Camp Nine Co., Inc. v. Firehunt, Inc., 2023 Ark. App. 421 [**easement by prescription; statute of limitations**] The circuit court entered an order finding that the appellee was entitled to an easement across their land under the legal theories of prescription, necessity, and implication. On appeal, appellant argued that the circuit court erred in its findings and analyses regarding the statute of limitations and the applicability of any of the cited easement doctrines to the facts. [**statute of limitations**] Declaratory relief is dependent on—and not available in the absence of—a justiciable controversy and is intended to supplement, rather than supersede, ordinary causes of action. Thus, the courts look at the underlying causes of action in the complaint to determine if any statute of limitations applies. Here, appellant filed its complaint against appellee alleging trespass, and sought a declaratory judgment that there was no easement across their land. The appellee answered and counterclaimed seeking declaration of easement by implication, necessity, or prescription. If

appellee was the possessor of the easement, then its cause of action for recovery only began to run when appellant asserted an adverse interest. Thus, the statute of limitations did not bar the relief sought by appellee on the facts. **[easement by prescription]** Where there is usage of a passageway over land, whether it be by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right. A prescriptive easement, once attached, is permanent and irrevocable. Here, the previous owner testified that prior to selling the property to appellee, he used the access road for forty-eight years without ever asking permission from appellant. Later, in connection with litigation, appellant even asked the previous owner to sign an affidavit stating that his use was permissive—and he declined to do so. Under these facts, the witness had established an easement by prescription, and because the court found that the easement by prescription began during the witness’s ownership, that easement necessarily transferred to subsequent landowners. **[overbroad]** The extent of a prescriptive easement is fixed by the use through which it was created. However, the use under which it arises determines the general outlines rather than the minutest details of the interest. When an easement is acquired by prescription, the nature of the use cannot be changed to render it more burdensome to the servient estate than it was during the prescriptive period. In the case of an easement by prescription, both its creation and extent are ascertained from the adverse use of the property over a long period of time. Here, the testimony established that the previous owner used the road to get to and from his property whenever he needed to access it, including for recreation, clearing land, and performing improvements and maintenance. The easement recognized by the circuit court determined the general outline: where the easement was, how large it was, and for what purpose— ingress and egress and maintenance thereof. Thus, the appellate court held that the circuit court did not err in recognizing the easement. (Gibson, R.; 21ACV-20-56; 9-27-23; Murphy, M.)

CRIMINAL

Townsend v. State, 2023 Ark. App. 356 **[suspended imposition of sentence; sentencing order]** The circuit court revoked appellant’s suspended imposition of sentence. On appeal, appellant argued the revocation must be reversed and dismissed because it was based on alleged violations that occurred prior to entry of the sentencing order. The legislature amended Ark. Code Ann. § 5-4-307(a) in 2019 to provide, that a period of suspension or probation commences to run when the circuit court pronounces the probationer’s sentence in the courtroom or upon the entry of a sentencing order, whichever occurs first. This statute only determines when a period of SIS or probation begins, not when it becomes effective for revocation purposes. While it is true that the SIS could begin when announced in open court even if the sentencing order was not entered until a month later, the order is not considered entered or effective for purposes of revocation proceedings until the sentencing order is filed. Here, appellant was charged with possession of methamphetamine on December 1, 2021. Appellant pleaded guilty to the charge in exchange for a five-year SIS on January 10, 2022. The sentencing order reflecting the guilty plea and the five-

year SIS was filed on February 4, 2022. On January 25, 2022, the State filed a petition to revoke appellant's SIS, alleging that on January 13, 2022, appellant committed the offenses of possession of methamphetamine or cocaine with intent to deliver and tampering with physical evidence, and he was in possession of methamphetamine and drug paraphernalia. Appellant argued that the revocation must be reversed and dismissed because it was based on alleged violations that occurred before the judgment was filed because Administrative Order No. 2 and caselaw is clear that an SIS does not begin until the judgment is filed, regardless of the existence of Ark. Code Ann. § 5-4-307(a). The appellate court held that Ark. Code Ann. § 5-4-307(a) as amended is not in direct conflict with Administrative Order No. 2 and our caselaw. Appellant's SIS could not be revoked because at the time of the conduct that was used to revoke his SIS, the sentencing order was not entered of record. Although his SIS commenced upon pronouncement in the courtroom, it may not be revoked unless the sentencing order is entered of record. Therefore, the circuit court erred in revoking appellant's SIS. (Short, J.; 29CR-21-223; 8-30-23; Barrett, S.)

Smith v. State, 2023 Ark. App. 383 [**probation revocation; confrontation clause**] The circuit court revoked appellant's probation and sentenced him to a term of three years in the Arkansas Department of Correction. On appeal, appellant argued that the circuit court erred by admitting testimony into evidence in violation of the Confrontation Clause. Generally, a defendant in a revocation hearing is not entitled to the full panoply of rights that attend a criminal prosecution, but they are entitled to due process. A defendant is entitled to the right to confront and cross-examine adverse witnesses unless good cause is shown for not allowing confrontation. The circuit court must balance the probationer's right to confront witnesses against grounds asserted by the State for not requiring confrontation. First, the court should assess the explanation offered by the State for why confrontation is undesirable or impractical. A second factor that must be considered is the reliability of the evidence that the State offers in place of live testimony. Here, no evidence was presented as to why the supervising officer was unavailable to testify thereby making confrontation impractical. Moreover, the testimony elicited at trial revealed that, in some instances, the interpretation of the drug screen requires some subjective interpretation and/or verification by a second officer. While the testifying officer relied on records that did not indicate verification by a second officer was required in this case, the officer had no personal knowledge as to the visual conclusiveness of the test or whether such verification should have been provided. As a result, the appellant was prevented from conducting an effective cross-examination on the validity of the test results. Thus, the appellate court held that the Confrontation Clause was violated. (Galloway, D.; 9-13-23; 01SCR-20-35; Thyer, C.)

Davis v. State, 2023 Ark. App. 403 [**model jury instructions**] Appellant was convicted by a jury of negligent homicide. On appeal, appellant argued the circuit court erred in refusing to give non-model jury instructions on the definition of "negligently." When the trial court determines that the jury should be instructed on an issue, the model criminal instruction must be used unless the court concludes that it does not accurately state the law. A non-AMI criminal instruction should be given only when the trial court finds that the AMI does not state the law or that AMI does not contain a

needed instruction on the subject. Just because an appellant’s proffered instructions contain correct statements of the law does not mean that a trial court errs in refusing to give them. A person commits negligent homicide if he negligently causes the death of another person. The statutory definition of “negligently” provides that “[a] person acts negligently with respect to attendant circumstances or a result of his conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or that the result will occur.” Here, in appellant’s proffered instruction, appellant substituted the term “a reasonable person” for “a reasonable Law Enforcement Officer.” The circuit court refused to give the non-model jury instruction proffered by appellant and the model jury instruction on negligent homicide was read to the jury. Because the model instruction tracked the language of the statute, it was a correct statement of the law. There is no special section in the Criminal Code on negligent homicide when it is committed by a law enforcement officer and there is no separate definition for the state of mind “negligently” when a law enforcement officer is involved. Therefore, the circuit court did not abuse its discretion in refusing to give appellant’s proffered instruction when the instruction that was given accurately stated the law. (Elmore, B.; 43CR-21-489; 9-27-23; Virden, B.)

Young v. State, 2023 Ark. App. 416 [**sentencing order; illegal sentence**] The circuit court entered a sentencing order sentencing appellant as a habitual offender to four years in prison followed by a five-year suspended imposition of sentence pursuant to appellant’s negotiated plea of guilty to felony failure to appear. There is no statute authorizing drug or alcohol treatment as a condition of incarceration, making any sentence containing such a condition illegal on its face. Once the trial court enters a judgment and sentence of incarceration, jurisdiction transfers to the Arkansas Department of Correction, a part of the executive branch of government, to determine any conditions of that incarceration. Here, the sentencing order contained the requirement that appellant must complete drug rehabilitation classes while incarcerated. Therefore, the circuit court must correct the error and enter an amended sentencing order removing the requirement that appellant complete drug rehabilitation while incarcerated. (Thyer, C.; 16JCR-20-1330; 9-27-23; Hixson, K.)

PROBATE

Simmons v. Steele, 2023 Ark. App. 386 [**termination of temporary guardianship**] The circuit court terminated appellant’s temporary guardianship of her grandchildren. On appeal, appellant argued that the circuit court erred in affording appellee the fit-parent presumption in terminating the guardianship. A guardianship may be terminated by court order if it is (A) no longer necessary; and (B) no longer in the best interest of the ward. There is a presumption that fit parents act in the best interests of their children. If the natural parent is found to be unfit, then he or she is not entitled to the fit-parent presumption. Guardianships are no longer necessary once a fit parent revokes his or her earlier given consent to the guardianship. The Arkansas Supreme Court has expanded the fit-parent presumption to a fit parent who did not consent to a guardianship, holding that such a parent “must still be afforded a natural parent’s constitutional right to raise his or her child without

undue interference from the government.” By petitioning to terminate the guardianship, the fit parent, who has the child’s best interest at heart, informs the court that the guardianship is no longer necessary. Whether a natural parent is “fit” is a very different question from whether it would be in a child’s “best interest” to live with a natural parent. The mere fact that a child may have more or better opportunities with another family cannot be enough to keep that child away from an otherwise fit parent. Here, appellee had not previously been deemed unfit and was, therefore, entitled to the fit-parent presumption. Once appellee notified the court he wished to terminate the guardianship, appellant had the burden of proving appellee’s unfitness or to show exceptional circumstances that would overcome the fit-parent presumption, but she did not do so. Because appellee was not found unfit, he was entitled to the presumption that he was acting in the best interest of his children. Therefore, the circuit court did not err in terminating appellant’s temporary guardianship of her grandchildren. (McCormick, D.; 9-13-23; 75NPR-21-102; Murphy, M.)

DOMESTIC RELATIONS

Hanson v. Hanson, 2023 Ark. App. 363 [**change in custody**] On appeal, appellant argued that the circuit court erred by placing appellee in charge of medical decisions for the parties’ children; relying on personal information not in evidence; and ordering a change to joint custody of the parties’ three children. [**medical decisions**] The appellate court defers to the trial court on credibility determinations and the weight to be accorded to witnesses’ testimony. Here, the appellate court held that the record supported the trial court’s determination regarding the children’s medical decisions. The circuit court thoughtfully addressed the issue and included a specific provision in its order prohibiting appellee from failing to give any ADHD medication unless it is recommended by a medical doctor and then only at the direction of the doctor. Additionally, the testimony at the hearing indicated that appellant did not cooperate with appellee on medical decisions, including failing to provide him with copies of insurance cards so he could obtain treatment if needed during visitation. The appellate court held that the circuit court did not abuse its discretion in finding that the appellant’s husband should neither discipline nor even be alone with the children. [**outside evidence**] Trials are to be decided only on the evidence and the testimony legally admitted during the course of the trial. Here, the trial court ruled that appellant’s new husband was neither to discipline the minor children nor be left alone with them. The trial court stated, “A step-parent—I’ve been a step-parent of a teenager. But I wouldn’t be disciplining him because counselors told me you don’t, and I didn’t.” To the extent, if any, the trial court did factor in the above-described advice, the record before the appellate court supported that it was far from the only information considered on this issue. The appellate court found that it was significant that evidence before the circuit court indicated that appellant’s husband had been directly involved in appellant’s decision to file the FINS petition. Likewise, there was evidence presented that the appellant’s husband made “mean” faces to the children and that they feared him. The totality of this evidence raised questions about appellant’s new husband’s disciplinary practices. Thus, the appellate court could not say the circuit court clearly erred in its ruling. [**joint custody**] While there is a statutory preference for joint custody, this preference does not override the ultimate guiding principle, which is to set custody that comports with the best interest of the children. When

parties have fallen into such discord that they are unable to cooperate in reaching shared decisions in matters affecting their children, then a material change in circumstances affecting the child's best interest has occurred. Whether joint custody was in the children's best interest requires examination of a variety of factors. A parent's violation of court orders is yet another factor that can be considered by the trial court concerning child custody. Here, it was undisputed that appellant acknowledged during cross-examination that her filing a FINS petition was a material change in circumstances. The appellant also unilaterally decided when, and even whether, visitation would occur in violation of the decree. For example, appellant refused visitation when the children were out of school for winter break because it was not a "holiday." This was significant because a parent's past action is a good indicator of future conduct. Additionally, the circuit court's review of all the evidence led it to find appellant less than credible, as noted in its questioning about the FINS petition and her ultimate admission that it was to teach her child a lesson. The appellate court held that the record supported the trial court's finding and that it did not err in granting joint custody. (Thomason, M.; 14DR-10-102; 9-6-23; Gladwin, R.)

Haynes v. Bass, 2023 Ark. App. 385 **[postnuptial agreement; division of property]** On appeal, appellant argued that (1) the circuit court erred in finding that the postnuptial agreement was valid and enforceable; (2) assuming that the postnuptial agreement was valid, the circuit court erred in not following the postnuptial agreement; and (3) the circuit court erred in the award of expenses to appellee and in the division of property based on the report of the special master. **[postnuptial agreement]** Appellant claimed that she was stopped from challenging the postnuptial agreement at the final hearing based upon an alleged finding by the prior judge. A postnuptial agreement is an agreement entered into during marriage to define each spouse's property rights in the event of death or divorce and is analyzed under contract law. Here, appellant changed her legal position as to whether the postnuptial agreement was enforceable or unenforceable in various pleadings and at various hearings. Appellant introduced the postnuptial agreement without limitation or reservation as her own exhibit despite her earlier protestation. The appellate court found that it was clear from the record that each party had the opportunity to present evidence and to be heard on the issue of whether the postnuptial agreement was valid and enforceable. An appellant cannot complain on appeal that the circuit court erred if the appellant induced, consented to, or acquiesced in the court's position. From the evidence introduced and arguments presented, the circuit court specifically held that the postnuptial agreement was valid and enforceable. Therefore, appellant was not prohibited from challenging the validity of the postnuptial agreement, and there was no indication that the circuit court clearly erred in its finding that the postnuptial agreement was valid and enforceable with respect to the property and other matters set out in the agreement. **[division of property; marital residence]** While a court has no authority to modify a couple's independent contract, the contract is still subject to judicial interpretation. Ambiguities in a written contract are construed strictly against the drafter. Circuit courts are charged with achieving equity in divorce cases. Here, appellant's attorney drafted the postnuptial agreement; therefore, any ambiguity in the agreement is to be strictly construed against appellant. The only significant difference between the postnuptial agreement distribution and the decree of divorce distribution was that in the decree of divorce, the court allowed appellee to be compensated from the sales proceeds in the amount of

one-half of any costs he expended in maintaining the residence and land during the multiyear pendency of the divorce. Further, to remain objective, the circuit court appointed a receiver to review the documentation of the amounts paid by appellee and present a report to the court. The receiver asked both parties to provide her with any evidence of funds expended during the pendency of the divorce to maintain the property so that she could determine each party's contributions and compensation. Only appellee submitted evidence of certain expenses he funded. As such, the circuit court's ultimate division of the marital residence was not erroneous. **[debt service]** Here, the circuit court ordered the proceeds from the sale of real property to first be placed in the registry of the court to allow appellee to deduct the amount he expended toward debt service on their property during the pendency of the divorce with the remaining proceeds to be divided equally between the parties. The postnuptial agreement did not specifically address how the debt service of the property would be handled. The net proceeds of any sale are necessarily affected by the amount of debt the parties reduced during the pendency of the divorce. Thus, it was not an error to give appellee credit for this debt service. **[non-marital residence]** The circuit court ordered that appellant's other residence be sold. The postnuptial agreement provided that the other residence would be her "sole and separate property." However, the postnuptial agreement did not require appellee to pay the mortgage or any other expenses for the other residence, which was to be purchased by the appellant. The circuit court had previously ordered appellant to make the note and mortgage payments on the other residence, which she failed to do so. Appellant was held in contempt and was allowed to purge herself of contempt by paying appellee. Appellant failed to pay the money as ordered, and the circuit court ordered the other residence to be sold as a result of her inaction. Under these circumstances, the circuit court did not err. (Rogers, R.; 26DR-07-1156; 9-13-23; Hixson, K.)

Gadberry v. Gadberry, 2023 Ark. App. 398 **[sanction; retroactive child-support; income imputation]** The circuit court entered a divorce decree and subsequently an order denying appellant's motion for a new trial. On appeal, appellant argued the circuit court erred in striking appellant's ability to present witnesses or evidence; ordering retroactive child support without a previous order to pay child support; and imputing income, in view of appellant's inability to work. **[sanctions]** Rule 37(b)(2) of the Arkansas Rules of Civil Procedure authorizes the circuit court to impose sanctions if a party fails to obey an order to provide discovery and gives the court broad discretion to make such orders in regard to the failure as are just, including refusing to allow the party to "support or oppose designated claims or defenses, or prohibit him from introducing designated matters into evidence." Here, the circuit court had to issue two orders to compel compliance with discovery, and appellant still did not abide by the circuit court's orders. He supplemented the discovery one to two months after each order's deadline, and he still did not fully comply. The appellant was warned in the second order to compel that his exhibits and witnesses may be struck if he failed to obey the circuit court's orders. Thus, the circuit court did not abuse its discretion in striking appellant's ability to present witnesses or evidence. **[retroactive support]** A parent has a legal obligation to support his minor children. This moral and legal duty remains regardless of the existence of a support order. Here, the parties separated and filed for divorce on the same day. The circuit court awarded appellee retroactive child support from the

date she filed her complaint for divorce. Appellee testified that appellant had not given her anything by way of support for the children since their separation except for \$500. It made no difference if appellant had never been ordered to pay child support. Thus, the circuit court did not err in awarding retroactive child support. **[income imputation]** Arkansas Supreme Court Administrative Order No. 10 addresses income imputation considerations and provides that if imputation of income is ordered, the court must take into consideration the specific circumstances of both parents, to the extent known, including such factors listed in the administrative order. There is a rebuttable presumption that the payor and the payee can work full-time or earn full-time income, and the court may calculate child support based on a determination of potential income that would otherwise ordinarily be available to the parties. The court may consider a disability or the presence of young children or disabled children who must be cared for by the parent as being a reason why a parent is unable to work. Here, the circuit court heard conflicting testimony concerning appellant's ability to work and earn at least minimum wage. The circuit court credited appellee's testimony over appellant's on the issue. The circuit court specifically found that appellant could obtain some form of employment, including medical-document review, but had chosen not to work. Thus, the appellate court could not say the circuit court abused its discretion. (Johnson, A.; 60DR-18-2946; 9-20-23; Brown, W.)

Sharbino v. Graham, 2023 Ark. App. 399 **[order of protection; corporal punishment]** The circuit court entered an order granting an order of protection. On appeal, appellant argued the circuit court erred in finding that the corporal punishment in this case was not reasonable or moderate and that the corporal punishment met the definition of domestic abuse. When a petition for a protective order is filed under the Domestic Abuse Act, the circuit court may provide relief to the petitioner upon a finding of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. Here, the appellant whipped his child with a belt while on a fishing trip. The corporal punishment inflicted on the child caused visible physical injury, which was enough to meet the definition of domestic abuse. The circuit court properly considered all the evidence and testimony before it and made its decision. Having reviewed the record, including the color photos of the child's body after the whipping, the appellate court was not left with a definite and firm conviction that a mistake had been made. Thus, the circuit court did not err in granting the order of protection. (Weeks, A.; 68CV-21-126; 9-27-23; Harrison, B.)

Scherling v. Scherling, 2023 Ark. App. 402 **[unequal division of property]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court wrongfully deprived him of his property interest in the home he had shared with appellee and custody of their dogs. 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. The court may deviate from this presumptive half split after taking into consideration factors enumerated in Ark. Code Ann. § 9-12-315(a)(1)(A), including length of marriage; age, health, and station in life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate,

liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation, or appreciation of marital property, including services as homemaker; and the federal income tax consequences of the court's division of property. When the property is divided pursuant to those factors, the 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 entered in the matter. Factors other than those statutorily listed can also be considered in determining equitable property distribution. Arkansas Code Annotated § 9-12-315(a)(1)(B) provides: "When property is divided pursuant to the foregoing considerations the 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 entered in the matter." Here, the circuit court allocated the marital home and awarded ownership of the parties' two dogs to the appellee. The circuit court referenced in its comment from the bench the relevant section of the property-distribution statute in explaining its decision to award the house to appellee. Additionally, the circuit court noted from the bench that appellee had originally purchased the house in her sole name and that appellant's name was only added after the parties had been married for a few months and in connection with appellee's decision to refinance. While the circuit court explained from the bench its reasoning in the record, the divorce decree did not provide written findings that supported the unequal division of property. The circuit court may make an unequal division, but it is required to explain why an unequal division is equitable and state its basis and reasons in a written order. Therefore, the circuit court must enter an order that sets forth the reasons for the unequal division of marital property. (Schrantz, D.; 04DR-21-768; 9-29-23; Abramson, R.)

Armstrong v. Keeton, 2023 Ark. App. 410 [**Admin. Order 10; tax returns**] The circuit court entered an order modifying appellant's child-support obligation. On appeal, appellant argued that the circuit court's ultimate calculation of his income for child-support purposes was clearly erroneous, and his modified child-support obligation should have been made retroactive to the day he filed his motion for modification. [**child support calculation**] Appellant first argued that the circuit court's ultimate calculation of his income for child-support purposes was clearly erroneous because the circuit court should have used only his 2019 and 2020 personal tax records. Admin. Order 10 requires that a party's actual gross income be used. Section (III)(2) of Admin. Order 10 governs "income from self-employment, business owners, executives, and others." Subsection b of that section provides that, "at a minimum, a self-employed parent shall provide their two most recent years of state and federal tax returns." Here, the two years of personal tax returns provided by appellant and advanced by him as the only accurate and applicable proof of his income was the minimum. Admin. Order 10 makes clear that documents and records other than personal tax returns may be utilized in making a child-support determination, particularly when it comes to a self-employed individual such as appellant. Moreover, Admin. Order 10 specifically provides that "income is intentionally broad and designed to encompass the widest range of sources consistent with the State's policy to interpret 'income' broadly for the benefit of the child." Thus, the circuit court's utilization of the tax records of the S corporation that appellant was president and sole owner of, did not run afoul of Admin. Order 10. [**tax deductions**] Appellant also argued against the circuit court adding back certain deductions made in his corporation's tax returns. In reference

to deductions for tax purposes, Admin. Order 10 provides that the same considerations that permit “considerable deductions for business-related expenses . . . are not always relevant to monies a parent should have available for child support,” and some deductions, such as those for personal vehicles or home offices, should be added back. Thus, the circuit court did not err in adding back certain deductions. **[retroactive modification]** The commencement date of an award of child support is a matter within the discretion of the trial court. It is proper for a court to fix the effective date of an order of child support from the date of filing of the petition or complaint, or from the date of trial, or from the date of the parties’ separation. Arkansas Code Annotated § 9-14-107(d) provides that “any modification of a child support order shall be effective as of the date of service on the other party of the file-marked notice of a motion for increase or decrease in child support unless otherwise ordered by the court.” Here, the circuit court made the child-support modification retroactive to the date of the hearing on the motion to modify child support. Although appellant argued that Ark. Code Ann. § 9-14-107(d) mandated retroactivity to the date of the filing of the motion, it specifically permitted the court to order otherwise. Thus, the circuit court did not abuse its discretion. (Pierce, M.; 60DR-18-1532; 9-27-23; Gruber, R.)

JUVENILE

Waldon v. Ark. Dep’t of Human Servs., 2023 Ark. App. 353 **[joint custody; coparenting]** Appellant argued that the circuit court’s order granting joint custody with the child’s father should be reversed, claiming there was not sufficient evidence that joint custody was in the minor child’s best interest, contending that the court’s order was “woefully uninformative,” thereby forcing her and the father to evenly split parenting time despite “undisputed evidence” that the father was incapable of effective communication, the parents’ “historical inability to co-parent,” and the father’s prior history (or lack thereof) with the child. Additionally, Appellant contended that the arrangement left the minor child in an unstable and exhausting situation and cited a multitude of facts to demonstrate that “there is a much more systemic problem that prohibits effective coparenting.” The level of animosity outlined in Appellant’s appeal, however, simply was not reflected in either the record or her testimony before the circuit court. Appellant testified that she and the father “coparent[ed] fine” when asked about the option of joint custody. While the record clearly reflected that the parents had a certain amount of dislike for one another and communication had been difficult in the past, it did not rise to the level of toxic coparenting that Appellant described on appeal. In fact, Appellant testified that she was agreeable to the father having visitation every weekend and all the holidays, and she would do her best to fulfill whatever custody order the court entered on behalf of her child. Simply put, there was no indication from either parent that he or she was unwilling to work with the other or fundamentally incapable of doing so. Both parties were clear that all that was left to be determined was custody, and the court began by reiterating that the purpose of the hearing was the father’s motion for custody. If Appellant believed that a joint-custody arrangement was impossible due to her and the father’s “long standing and contentious” relationship, it was imperative for her to have expressed this to the court, and she did not. The evidence established that the father was able to provide the child a stable home life during the entire dependency-neglect process, which lasted nearly a year; that the

father did not contribute to the dependency-neglect; that the child enjoyed living in both homes; that Appellee deemed both parents fit; that the attorney ad litem declared that the child was attached to both of his parents and his half siblings on his father's and mother's sides; that the attorney ad litem stated that he believed it was in the child's best interest to have "as much contact with both parents as can be possible"; and that the attorney ad litem believed both Appellant and the father were fit parents. While Appellant was correct that the attorney ad litem proclaimed it was in the child's best interest to remain with Appellant, she was essentially asking the court to reweigh the evidence, which it would not do; it is not reversible error for the circuit court to weigh the evidence differently than the Appellant asks for it to be weighed. In awarding joint custody, the circuit court ordered the parents to work together as joint custodial parents. The court's determination that Appellant and the father could work together to establish a joint-custody arrangement was supported by the record; thus, the court found no clear error in the circuit court's order awarding joint custody. (Hewitt-Ladd, D.; CV-22-712; 8-30-23; Gladwin, R.)

Swanson v. Ark. Dep't of Human Servs., 2023 Ark. App. 355 [**TPR-little likelihood**] Appellant argued that there was insufficient evidence to support the grounds for termination, which included failure to remedy, subsequent factors, and aggravated circumstances. She consolidated her sufficiency argument, stating that she remedied the conditions that caused removal, corrected the subsequent factors, and that there were no additional services necessary to reunify her with her child. The court disagreed. The children were adjudicated dependent-neglected based on parental unfitness due to parental drug use and domestic violence in the home. Despite nineteen months of receiving appropriate services, Appellant was not ready to take custody of the children. The caseworker testified that she did not think a continuation of services would result in a successful reunification. Appellee provided services to assist Appellant with her addiction, including inpatient treatment and both individual and group outpatient counseling. Despite these services, Appellant relapsed and tested positive four times in the months prior to the termination hearing. After the relapse, Appellant participated in an outpatient program, only to test positive for methamphetamine just before the termination hearing. Although she denied having used methamphetamine in months, she admitted taking hydrocodone without a prescription. In addition, there was testimony that the caseworker went to Appellant's home at least three times in the month prior to the termination hearing to obtain random drug screens, but Appellant was not home. Appellant was unable to submit a urine sample during her two-hour visitation with the children the week before the termination hearing. In addition to the drug use, domestic violence continued to be an issue in the home. The caseworker testified that Appellant refused to admit continuing a relationship with the father. After the fifteen-month review hearing, the court entered an order which provided, "The parents have stated they want to stay together. If they choose to remain together, they shall attend domestic violence counseling." The caseworker testified that the parents began couples counseling shortly before the termination hearing, noting that it had been recommended since "day one." They attended one session and missed the next session; Appellant filed for an order of protection the next day due to an alleged incident that occurred about a week before the termination hearing in which the father broke the glass on her front door when she would not let him inside the home. There was testimony that Appellant had filed for orders of

protection in the past but had not followed through. The father denied breaking into her home or breaking any property, adding that Appellant had called him several times since she filed for the order of protection. Although Appellant testified that she did not resume a relationship with the father and intended on pursuing the order, the court was not required to believe her self-serving testimony. In addition, Appellant obtained unsupervised visits prior to the termination hearing with instructions that the father was to have no contact with the children. Even though she testified that she knew the father was not to have contact with the children during the visitation, she allowed him to do so because the children wanted to ride on the four-wheeler with him and she “had told them no for so long.” This incident caused Appellant to lose unsupervised visits. Appellant’s statutory-grounds argument was a request for the court to reweigh the evidence, which it would not do, especially given that credibility determinations are left to the circuit court. Given the circumstances, there was sufficient evidence for the court to find there was little likelihood that further services to Appellant would result in a successful reunification. (Sullivan, T.; CV-23-112; 8-30-23; Gruber, R.)

Mayer v. Ark. Dep’t of Human Servs., 2023 Ark. App. 365 [**ADJ-sufficiency of evidence**] The child appeared at school without bruising, and then was absent from school for two days, during which time he was in the exclusive care of Appellant father. Appellant father testified that during that time frame, he physically punished the child. Upon the child’s return to school several days later, bruising in various stages of healing was discovered. When an investigation was initiated, the parents were uncooperative, gave multiple implausible versions of how the bruising occurred, and then left the state with the children, frustrating Appellee’s attempts to provide services and take physical custody of the children. Two independent witnesses testified that Appellant mother told them that the bruising—which the court found was not transitory, insignificant, or accidental—was caused by Appellant father hitting the child with an object. Those same two witnesses testified that Appellant mother asked each of them to give a different explanation for how the child was injured. The court specifically found Appellant mother’s and Appellant father’s testimony lacked credibility and found the caseworker for Appellee’s testimony to be credible. Those findings, taken together, were clearly enough to adjudicate the children dependent-neglected from abuse and parental unfitness. The Appellants asked the court to reweigh the evidence and make different credibility determinations. The circuit court’s weighing the evidence differently than Appellants wanted it to be weighed was not reversible error. The court will neither act as a super fact-finder nor second-guess a circuit court’s credibility determinations. [**reasonable efforts to prevent removal**] The parents asserted that the court erred by finding that Appellee had made reasonable efforts to prevent removal. They argued that Appellee should have left the children with Appellant mother, and it was unreasonable not to do so, given that the alleged abuser—Appellant father—did not live in the home, and his contact could have been limited through court order. However, the court determined that an emergency existed, and probable cause was present to remove the children from the home. Further, any attempts Appellee could have made to leave the children in the home with Appellant mother prior to removal were thwarted by the parents’ lack of cooperation with Appellee and leaving the state. (Warren, D.; CV-23-89; 9-6-23; Gruber, R.)

Long v. Ark. Dep't of Human Servs., 2023 Ark. App. 372 **[TPR-meaningful efforts]** Children were initially removed for parental drug use and environmental concerns. Appellants argued that Appellee failed to make meaningful efforts to assist Appellants in correcting the conditions because Appellee failed to “follow-through” with obtaining a professional pest-control company. Although Appellant mother did testify that she requested Appellee’s help, the caseworker for Appellee stated that he did not make any referrals for pest control because the “family has not ever been open to those kinds of services.” Moreover, there were several environmental issues with the parents’ home that did not involve an insect infestation. For example, Appellee offered testimony that the parents’ home was still cluttered and unsafe and that they also still had electrical issues to resolve. Thus, even if a professional pest-control company could have resolved any infestation issues, the home would still be environmentally unsafe according to the testimony Appellee offered, which the circuit court credited. **[TPR-failure to remedy]** Furthermore, even if the parents had resolved the environmental issues with their home, the fact remained that both parents failed to resolve their substance-abuse issues by the time of the termination hearing. Appellant father argued that even though he admitted that he used methamphetamine two or three months before the hearing, the court should reverse because he “went to his drug and alcohol assessment; he went to his hair follicle test as ordered; and he consistently called the treatment facility to begin his treatment.” He additionally argued that Appellee failed to show that he “consistently abuse[d] drugs.” Appellant mother argued that Appellee failed to show that she had any substance-abuse issues and that even though she did have a positive screen for THC at the time the children were removed and refused to complete a hair-follicle test when the case first opened, she had a medical marijuana card, and Appellee lacked any “credible concerns” that she had an issue with substance abuse. However, these arguments lacked merit. Both parents failed to complete their psychological and drug-and-alcohol assessments until very late in the case. Appellant father’s recent hair-follicle test taken a week prior to the termination hearing showed that he was positive for methamphetamine, and he admitted using methamphetamine just two or three months prior to the termination hearing. Further, by the time of the hearing, he had failed to start any inpatient treatment as recommended and testified that he did not think he needed inpatient treatment but would agree to go if required. Appellant mother refused a hair-follicle test; her psychologist testified that he believed she was overusing medical marijuana and would benefit from outpatient drug treatment, however, she failed to follow the recommendation. Recent drug usage and the failure to submit to drug screens or hair-follicle tests demonstrated a parent’s failure to remedy a substance-abuse problem. No clear error found. **[TPR-best interest; potential harm]** Appellant father admitted at the termination hearing that he had recently used methamphetamine two or three months before the hearing; tested positive for methamphetamine on a hair-follicle test taken two weeks prior to the termination hearing; and stated that he does not believe he needs inpatient drug treatment. Additionally, there was testimony that the environmental concerns had not been remedied by the time of the termination hearing. As such Appellant father’s behaviors over the course of the entire case as outlined above did not show enough stability to render the circuit court’s finding that he posed a risk of potential harm to the children clearly erroneous. (Williams, L.; CV-23-11; 9-6-23; Hixson, K.)

Minor Child v. State of Arkansas, 2023 Ark. App. 376 [**Rule 37 relief**] Appellant pled true in a Lincoln County delinquency case and was ordered to probation; the case was then transferred to Pope County for supervision of that probation. Pope County Circuit Court later committed the juvenile to DYS, yet Appellant's Rule 37 petition was filed in Lincoln County. However, that relief was not available in Lincoln County. First, Appellant was not in custody under a Lincoln County sentence. Second, jurisdiction transferred from Lincoln County to Pope County, so Lincoln County had no jurisdiction to rule on the petition. Consequently, Appellant's Rule 37 petition should have been filed in Pope County, not Lincoln County. (Brown, E.; CR-23-97; 9-13-23; Harrison, B.)

Hutchins v. Ark. Dep't of Human Servs., 2023 Ark. App. 392 [**TPR-best interest; potential harm**] There was no clear error made when the circuit court found that termination of Appellant's parental rights was in the child's best interest because the child would be subjected to the following potential harm: Appellant is not a biological parent; child had never lived with nor formed a relationship with Appellant; and Appellant was not aware of nor experienced with the child's special needs and therapies, such that the child would be at a significant risk of psychological harm if placed in his home at this point in the child's life. (Coker, K.; CV-23-86; 9-20-23; Gruber, R.)

Brown v. Ark. Dep't of Human Servs., 2023 Ark. App. 424 [**placement – safety issues**] The statutory prohibition on placement found in Ark. Code Ann. § 9-27-355(b)(1)(B)(i) that “[if] there is a safety issue identified from a Child Maltreatment Central Registry check or criminal background check, the [Appellee] is not required to provide further assessment or notice to” those persons entitled to preferential treatment, is not limited to just a true finding on the potential foster parent, here the Appellant as the minor child's maternal grandmother, but on other adult persons in the home. In this case, it was Appellant's husband, with true findings of sexual abuse on the minor child's mother/Appellant's own daughter, that prevented Appellee from considering placement with Appellant and that barred the circuit court from placing the minor child with Appellant. (Williams, L.; CV-23-140; 9-27-23; Brown, W.)

Wagner v. Ark. Dep't of Human Servs., 2023 Ark. App. 400 [**TPR-failure to remedy**] There was no clear error found when the circuit court held that the Appellant had not remedied the conditions that caused removal (methamphetamine use and housing instability) because she had not established stability or sobriety for a sufficient amount of time, having established both only very recently: testing positive for methamphetamine after the permanency planning hearing, completing inpatient drug treatment only 4 weeks prior to the termination hearing, and was intending to sign a lease on a two-bedroom home the next day. [**TPR-best interest/potential harm**] There was no clear error found when the circuit court held that the uncertainty of foster care was affecting the children's mental health, with the oldest two having been in foster care before, and the youngest child having spent more than half of his life in foster care, in light of Appellant's inability to

establish sobriety from methamphetamine for more than a few weeks at a time. (Zimmerman, S.; CV-23-88; 9-27-23; Harrison, B.)

Ark. Dep't of Human Servs. v. Stephens, 2023 Ark. App. 405 **[foster care]** The circuit court committed clear error when it ordered the oldest minor child to remain in foster care without a dependency-neglect finding. Additionally, the court's justification for keeping the child in foster care, while dismissing the case regarding her four siblings because "[t]here is no proof that the other children were abused," was also erroneous. Arkansas Code Annotated section 9-27-303(17)(A) mandates that a finding of dependency-neglect of a sibling can establish that another sibling is at substantial risk of serious harm. Furthermore, case law supports a circuit court's finding of dependency-neglect for any sibling of a child who has suffered neglect or abuse—even though there was no reason to think that the other siblings have also been abused or neglected. Therefore, Appellant was not required to prove the dependency-neglect basis as to each juvenile. Accordingly, the court's order mandating the oldest child to remain in foster care while her siblings return to the custody of the parent Appellees was clearly erroneous and must be reversed. Moreover, the circuit court cited no precedent—and the appellate court found none—that would give a circuit court the authority to deny a dependency-neglect petition but nonetheless order a juvenile to remain in foster care and instruct Appellant to keep a case open as to only one of five siblings. When Appellant raised its objection and concerns at the adjudication hearing, the circuit court adamantly proclaimed that it could "open up a protective services case for the young lady and see how this works out." After counsel for the parents stated that they were "fine" with the child staying with her aunt "indefinitely," the court specified that counsel needed to prepare an agreed order reflecting that the child's case was still pending "only for the purposes of protecting the family unit." However, no agreed order was ever entered. Arkansas Code Annotated section 9-27-329(a) (Supp. 2023) states: "If the circuit court finds that the petition has been substantiated by the proof at the adjudication hearing, a disposition hearing shall be held for the court to enter orders consistent with the disposition alternatives." Further, the statute required that in considering the disposition alternatives, the court "shall give preference to the least restrictive disposition consistent with the best interest and welfare of the juvenile. . . ." Here, the circuit court used the least-restrictive-disposition language of the statute in its order when holding that the child must remain in foster care while expressly holding that it was not making "any findings as to adjudication." Because the court declined to adjudicate the child dependent-neglect, it could not jump to the disposition alternative of foster care without the requisite finding. The appellate court acknowledged the circuit court's finding that "it [was] contrary to the welfare of [the child] to go home" and were sympathetic to the court's express concerns regarding the child, a circuit court simply cannot require a juvenile to remain in Appellant's custody without the requisite authority to do so. Pursuant to Ark. Code Ann. § 9-27-329(a), disposition alternatives such as foster care may be explored only after a dependency-neglect finding. Thus, the portion of the circuit court's order requiring the child to remain in foster care and in Appellant's custody—despite the court's declination to adjudicate the juveniles dependent-neglected—was reversed, and the case was thereby dismissed. (Williams, C.; CV-23-150; 9-27-23; Gladwin, R.)

Littleton v. Ark. Dep't of Human Servs., 2023 Ark. App. 411 [**TPR-best interest; less restrictive alternative**] In the absence of family bonds or an approved ICPC home study on a grandparent, there was no clear error in forgoing relative placement as a permanency goal for the children and no reason to delay permanency for the children through termination and adoption if there was no reasonable hope for reunification. (Blatt, S.; CV-23-96; 9-27-23; Potter Barrett, S.)