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CIVIL

Gunn v. Wortman, 2024 Ark. App. 111 **[substantial evidence; third party beneficiary]** The circuit court entered an order finding that appellant breached a contract in which appellee was a third party beneficiary. On appeal, appellant argued that substantial evidence did not support the verdict. Two elements are necessary for the third-party beneficiary doctrine to apply under Arkansas law: (1) there must be an underlying valid agreement between two parties, and (2) there must be evidence of a clear intention to benefit a third party. To prove a breach-of-contract claim, one must prove the existence of an agreement, breach of the agreement, and resulting damages. Here, appellee hired a contractor to perform work on his hunting property. There was no dispute that there was an agreement between appellant and the contractor to perform work, nor was there any dispute that appellee was the beneficiary of that work. The appellate court found that the evidence in the record did not establish with any specificity what appellant's obligations were under the contract between him and the contractor such that it could then be determined that he breached those obligations. None of the findings established the obligation appellant owed the contractor. A preponderance of the evidence established that appellant contracted to do something other than provide a survey as the circuit court defined it. Absent evidence of a specific promise made by appellant to the contractor that was breached, the breach-of-contract claim by a third-party beneficiary must fail. A preponderance of the evidence established that the agreed work was

something different than just what appellee "wanted." Thus, the appellate court held that substantial evidence did not support the verdict. (Welch, M.; 60CV-21-5289; 2-14-24; Murphy, M.)

Weiner v. Merch. Cap. Grp., LLC, 2024 Ark. App. 118 **[Arkansas Securities Act]** The circuit court dismissed appellant's counterclaim alleging various violations of the Arkansas Securities Act. On appeal, appellant argued that the circuit court erred in dismissing their claim because the contract at issue qualified as a security under the Arkansas Securities Act. The three most important cases involved in this appeal are *Schultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 769 (1977); *Smith v. State*, 266 Ark. 861 (1979); and *Waters v. Millsap*, 2015 Ark. 272. In *Schultz*, the Arkansas Supreme Court analyzed federal and other states' caselaw to decide which framework to use when determining whether a certain transaction is a security under the Arkansas Securities Act. The Arkansas Supreme Court considered the totality of the circumstances, including how the scheme was marketed and organized, which party bore the risk, and whether the transaction resembled a true partnership. The appellate court held in *Smith* that a transaction that met the following five elements was the sale of a security: (1) the investment of money or money's worth; (2) investment in a venture; (3) the expectation of some benefit to the investor as a result of the investment; (4) contribution towards the risk capital of the venture; and (5) the absence of direct control over the investment or policy decisions concerning the venture. The Arkansas Supreme Court in *Waters* stated the definition of a security within the meaning of the Arkansas Securities Act should not be given a narrow construction but should be determined in each instance from a review of all the facts of whether an investment scheme or plan constitutes an investment contract, or a certificate of interest or participation in a profit-sharing agreement, within the scope of the statute. The Arkansas Supreme Court also addressed the *Smith* five-element test as well as the family-resemblance test articulated by the United States Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). Although the five-factor test is important in considering whether a specific transaction constitutes a security, the Arkansas Supreme Court went on to hold that the analysis should include the *Smith* elements along with all of the factors in a given transaction, as required by *Schultz*. The Arkansas Supreme Court noted that the factors in the *Reves* family-resemblance test were also instructive in determining whether a transaction is a security but that those factors were encompassed by the *Schultz* test. Here, this case concerned an agreement between appellee and appellant, in which appellee purchased future receivables from appellant. The appellee brought a breach of contract action against the appellant after it failed to make all the payments outlined in the parties' contract. Appellant brought a counterclaim alleging various violations of the Arkansas Securities Act. The appellate court held that the circuit court erred by stating that the holding of *Waters* required an analysis of only the five-factor *Smith* test to determine whether the parties' agreement qualified as a security. However, the circuit court should have considered the *Smith* test as well as a more expansive review of the entire transaction, especially considering the sophistication of the parties and any other elements that have been articulated in past cases that can help determine whether their agreement constituted a security. Therefore, the circuit court erred in its dismissal order incorporating only the *Smith* test, because the circuit court did not consider all factors surrounding the transaction. (Scott, J.; 04CV-20-388; 2-21-24; Abramson, R.)

Est. of Daniel v. Est. of Daniel, 2024 Ark. App. 120 **[statute of limitations; repudiation]** The circuit court entered orders regarding a dispute over the ownership of real property. The orders granted the claims of appellees for unjust enrichment, declaratory judgment, and quiet title, and imposed a constructive trust on the relevant property and ordered an appellant, as personal representative of an estate, to convey two separate undivided one-third interests in the property to appellees. A cause of action for breach of contract 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. A constructive trust arises when a party holds legal title for other persons. A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Repudiation of the duty to reconvey begins the deadline to sue. Repudiation means the party holding legal title refuses to reconvey that title consistent with the prior agreement or duty to convey. It is the transferee's repudiation of his promise that brings the trust into being. Arkansas appellate courts have held that limitations-accrual cases require affirmative actions or words to repudiate an oral contract, thus triggering the running of the limitations period. Here, three brothers, Charles, George, and James, entered into an oral agreement among themselves to buy a farm. George provided the initial cash down payment, James chipped in, and Charles paid the remaining balance, plus interest. According to the appellees, the plan was that title to the farm initially would be held only in Charles' name because the other brothers had legal troubles. Charles would hold the property in that manner until the other two brothers' legal troubles were resolved and then convey it to them and himself in equal one-third interests. The three brothers operated the farm as joint owners, holding themselves out to the world and to each other as equal owners of the farm and equally sharing in certain income from the farm. However, there was nothing in the record to indicate that either George or James took steps to enforce Charles's agreement to convey an interest to them after their legal troubles were resolved. Instead, they waited until Charles died in September 2019, and then made demand on his wife, the appellant. When his wife refused, in her capacity as administrator of Charles's estate, to convey any interest in the property to George or James in April 2020, they commenced the underlying action in May against Charles's estate. George died after the suit was commenced. The issue in this appeal was when the appellees' causes of action to enforce the agreement they entered into with Charles accrued—thus beginning the statute-of-limitations period. The appellate court held that the causes of action at issue accrued when appellant repudiated her deceased husband's agreement with George and James to reconvey title to their agreed-upon interests in the property to them. Thus, the statute-of-limitations period began when appellant refused their request. To the extent the three brothers agreed to reconvey title to the property after certain legal issues had been resolved, there was no evidence of a specific time limit imposed by their agreement. Moreover, there was no evidence that Charles ever refused to reconvey title or denied his joint ownership of the property with George and James. Instead, the brothers consistently acted as joint owners, recognizing that joint ownership until Charles's death. Repudiation is the standard and requires more than mere inaction amidst brotherly cooperation. Therefore, the circuit court did not err in finding that their claims accrued in April 2020 when appellant repudiated Charles's agreement with George and James. (Weaver, S.; 65CV-20-26; 2-21-24; Gladwin, R.)

CRIMINAL

Franklin v. State, 2024 Ark. 9 **[mistrial; invited error rule]** Appellant was convicted by the circuit court of driving while intoxicated (DWI) and refusal to submit to a chemical test. On appeal, appellant argued the circuit court erred by not granting his motion for a mistrial. A mistrial is an extreme and drastic remedy that is appropriate only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. Among the factors to be considered in determining whether a circuit court abused its discretion in denying a motion for mistrial are whether the prejudicial response was deliberately induced and whether an admonition to the jury could have cured any resulting prejudice. An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. Under the invited-error rule, one who is responsible for error cannot be heard to complain of that for which he was responsible. Here, defense counsel moved for a mistrial during their questioning of the officer who was at the scene and transported the appellant to the detention center. The circuit court denied the motion, finding that it was in response to the questioning of the defense. The Supreme Court agreed finding that the officer's testimony was a legitimate response to the door opened by defense counsel via distinct questions asked on cross-examination. The defense counsel moved a second time for a mistrial during another officer's testimony in response to a question by the State, that he had administered a PBT. The second officer's answer was not a foreseeable response to the prosecution's question and could not be said to have been deliberately induced by the prosecution. Additionally, the utterance that a PBT was given without mention of the actual results was a harmless error, if an error at all. There was already ample evidence before the jury that supported appellant's guilt of DWI regardless of the mention of the PBT. Appellant admitted that he had been drinking, smelled like alcohol, exhibited physical indicators of intoxication, and had both open and closed containers of beer in his car. Finally, any alleged prejudicial effect of the officers' statements could have been alleviated by an immediate curative instruction—one that the court offered, but the defense refused. Thus, the circuit court's denial of a mistrial was not an abuse of discretion as the drastic remedy of a mistrial was not warranted. (Ramey, J.; 64CR-21-75; 2-1-24; Hiland, C.)

Lawson v. State, 2024 Ark. App. 91 **[felon-in-possession-of-a-firearm; stipulation felon status]** The circuit court convicted appellant of possession of a firearm by certain persons, simultaneous possession of drugs and firearms, possession of a controlled substance (methamphetamine), possession of a controlled substance (cocaine), fleeing, and possession of a controlled substance (marijuana). On appeal, appellant argued that the circuit court abused its discretion by admitting certified copies of his prior convictions. When a defendant in a felon-in-possession-of-a-firearm case offers to stipulate to or admit to the convicted-felon element of that charge, the circuit court is required to accept the stipulation or admission, conditioned by an on-the-record colloquy in which the defendant acknowledges the underlying prior felony conviction and accedes to the stipulation or admission. The appellate court held that the circuit court abused its discretion by admitting the certified copies of his prior convictions when appellant offered to stipulate to his

status as a felon. In the narrow sphere of felon-in-possession-of-a-firearm cases, the prejudicial impact of evidence on the nature of the prior crime offered merely to prove the convicted felon-status element cannot be controverted. Accordingly, in this case, the appellate court declined to engage in the harmless error analysis. Therefore, the circuit court erred in admitting certified copies of appellant's prior convictions. (Batson, B.; 10CR-21-15; 2-14-24; Abramson, R.)

Calkins v. State, 2024 Ark. 23 **[jury instructions; justification; kidnapping]** The circuit court convicted appellant of two counts of first-degree murder and sentenced him to two consecutive terms of life imprisonment, plus a fifteen-year sentencing enhancement to each term for using a firearm. On appeal, appellant argued that the circuit court abused its discretion by denying his proffered jury instructions on justification and kidnapping. There must be a rational basis in the evidence to warrant the giving of a jury instruction. When the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction when there is no basis in the evidence to support the giving of the instruction. The appellate court has affirmed a circuit court's refusal to submit a proffered jury instruction when the only basis for the instruction was the defendant's self-serving statements or testimony, contradicted by other witnesses. Here, appellant claimed that evidence was presented through the testimony of the physician who performed appellant's fitness-to-proceed and criminal-responsibility evaluations that appellant thought the victims were going to hurt him, that he was in imminent danger, and that he was defending himself when he killed them. The appellate court found no abuse of discretion in the circuit court's refusal to instruct the jury on justification and kidnapping because there was no rational basis in the evidence for those instructions. Appellant asserted that his own statements, which were introduced through the physician's testimony, constituted sufficient evidence to warrant giving the instructions. Additionally, although appellant told the physician that he thought they were going to hurt him, multiple witnesses testified that they had never observed any aggression from the victims toward appellant, but they had seen him become physically violent toward one of the victims on several occasions. A witness said that she had heard appellant threaten to kill one of the victims as well. On the basis of the facts presented at trial, the appellate court held that the circuit court did not abuse its discretion in rejecting the proffered instructions. (Weaver, T.; 69CR-21-36; 2-22-24; Kemp, J.)

Day v. State, 2024 Ark. App. 132 **[record seal; probation]** The circuit court denied appellant's petition to dismiss his case and seal the record pursuant to the First Offender Act, codified at Ark. Code Ann. § 16-93- 301. On appeal, appellant argued that the circuit court erred in finding that he had not fulfilled the terms and conditions of his probation and thus did not qualify to have his record sealed. The First Offender Act, as codified, states in relevant part that when an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the circuit court or district court, in the case of a defendant who previously has not been convicted of a felony, without making a finding of guilt or entering a judgment of guilt and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than

one year, under such terms and conditions as may be set by the circuit court or district court. Appellant contended that the circuit court erred in denying his petition to seal because he had not committed any felony, misdemeanor, or other criminal offense while on supervised probation. The appellant entered a guilty plea in Texas to possession of marijuana under a deferred adjudication procedure and was placed on probation for three years. Additionally, appellant's testimony was an admission that he purchased marijuana, transported marijuana across state lines, consumed marijuana, and entered a marijuana dispensary in New Mexico, all of which constituted violations of his probation. Contrary to appellant's argument, a conviction is not necessary proof of committing an offense. Appellant's own testimony confirmed that he had committed at least one offense punishable by confinement in jail or prison during his probationary period. Therefore, the circuit court did not abuse its discretion in denying appellant's petition. (Gibson, R.; 02CR-15-213; 2-28-24; Harrison, B.)

PROBATE

Forrest v. Fleming, 2024 Ark. App. 104 **[consent; adoption]** The circuit court determined that appellant's consent was not required for his children to be adopted by appellee, their stepfather. On appeal, appellant argued that the circuit court erred in finding that he unjustifiably failed to communicate with his children when the children's mother thwarted his attempts at visitation; and in finding that he unjustifiably failed to support his children when there was no order requiring him to support them, and he stopped supporting the children only when their mother refused his attempts to see them and speak to them on the phone. Arkansas Code Annotated § 9-9-207(a)(2) provides that consent to adoption is not required of a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree. Adoption statutes are strictly construed, and a person wishing to adopt a child without the consent of the parent must prove consent is unnecessary by clear and convincing evidence. Justifiable cause means the significant failure must be willful in the sense of being voluntary and intentional; it must appear the parent acted arbitrarily and without just cause or adequate excuse. "Failed significantly" does not mean "failed totally." When faced with having to decide whether a parent has presented justifiable cause, courts must assess and weigh the parent's reasons why he or she failed to communicate with or support the children. **[failure to communicate]** Here, the circuit court had the mother's petition to establish paternity, appellant's admission of paternity and request for an order setting child support, and appellant's counterclaim for visitation pending before it since February to March 2018. The circuit court did not rule on these claims until December 14, 2021, four days before the adoption hearing, when it found appellant was the biological father and did not set child support or visitation. There was a protective order against appellant for appellee granted in December 2017. The appellee also obtained an ex parte order of protection in January 2018, on behalf of the children against appellant, prohibiting appellant from initiating any contact with the children, including, but not limited to, physical presence and telephonic, electronic, oral, written, visual, or video communication. Appellant was also prohibited from using a third party to contact the children

except by legal counsel or as authorized by law or court order. The appellate court found that the ex parte order of protection against appellant for the children was in effect throughout the case, which gave appellant with a valid reason for not contacting his children by phone and for not attending their school activities as allowed in the appellee's December 2017 order of protection. Thus, the appellate court held that appellant had justifiable cause for not communicating with his children during the time period in question. **[failure to support]** It is a general rule that a parent has a duty and an obligation, independent of any court order or statute, to support his or her child. The circuit court also found that appellant had failed to provide support for his children. The appellant argued he asked the circuit court to award child support, but the circuit court did not. When a party asks the court to set child support and the court fails to do so, the court cannot later use failure to support as grounds to allow an adoption without the party's consent. The circuit court should have set child support and visitation because the appellant did not have the opportunity to show that he could and would support and communicate with his children. Thus, the appellate court held that the circuit court erred in finding that appellant did not have justifiable cause for not communicating with, or providing support for, his children. (Sutterfield, D.; 58PR-20-268; 2-14-24; Barrett, S.)

Haverstick v. Haverstick (In re Est. of Haverstick), 2024 Ark. 17 **[change of annuity beneficiaries by will]** The circuit court entered an order denying and dismissing appellant's petition to declare an annuity-beneficiary form valid and controlling. On appeal, appellants, the deceased's sons, argued that the circuit court erred in finding that the deceased's will changed the annuity's beneficiaries because: (1) the will did not claim to change the beneficiaries; (2) even if the will claimed to change the beneficiaries, it was ineffective because it did not comply with the contractual procedure for making changes; and (3) under Act 925 of 2021, attempts to change annuity beneficiaries by will are ineffective. **[change of beneficiaries]** The paramount principle in interpreting wills is that the testator's intent governs. The testator's intent is to be gathered from the four corners of the instrument itself. Here, the deceased will stated, "I have made my estate the beneficiary of the proceeds from that policy." The appellants argued that the use of past and present tense in the will shows he did not intend to change beneficiaries. They asserted that the deceased used present tense to state what he was doing by the will and past tense to state what he did before making the will. The will at issue specifically identified the annuity valued at $400,000. The will further set forth the deceased intent to leave each of his sons $10,000 to be paid from the annuity. Thus, because the deceased clearly identified the annuity policy and his intent to change how the proceeds from the annuity would be distributed upon his death, the circuit court did not err in finding the will intended to change the annuity's beneficiaries. **[contractual procedure]** Arkansas holds that a change of beneficiary can be accomplished in a will so long as the language of the will is sufficient to identify the insurance policy involved and an intent to change the beneficiary. The policy of allowing the testator to modify a beneficiary designation to life insurance policies also applied to the will at issue here, which changed how the proceeds from the annuity would be distributed upon the deceased's death. The will is the deceased's last expression on the subject, and it ought to control. Therefore, the circuit court did not err in finding the will changed the annuity's beneficiaries, even though it did not follow contractual procedure in the present case.

[retroactivity] Any doubt is resolved against retroactivity and in favor of prospectivity only. Act 925 of 2021 is codified at Ark. Code Ann. § 23-81-137 and 28-25-111. Arkansas Code Annotated § 23-81-137 states that a designated or named beneficiary of a life insurance policy or annuity contract (1) can be changed according to the terms of the life insurance policy or annuity contract; and (2) cannot be changed in a will. Arkansas Code Annotated § 28-25-111 provides that a testamentary change to a designated or named beneficiary of a life insurance policy or annuity contract is ineffective if the change is not made according to the terms of the life insurance policy or annuity contract. Here, the deceased executed the will at issue in 2015 and passed away in 2018. In reviewing the Act, the Supreme Court noted that it did not expressly state that it is to be applied retroactively. The legislature could have included language in the Act stating that it should be applied retroactively, but it did not. Further, appellee had a vested interest in the proceeds of the annuity when the deceased died, which was before the enactment of the Act. Because the Act was not merely remedial or procedural, the Supreme Court held that the Act did not apply retroactively. Therefore, the circuit court did not err in finding that the deceased's will changed the annuity's beneficiaries. (Mitchell, C.; 74PR-18-25; 2-15-24; Baker, K.)

DOMESTIC RELATIONS

Heileman v. Cahoon, 2024 Ark. App. 72 **[modification of custodial time]** The circuit court entered an order modifying appellant's custodial time with his children. On appeal, he argued that the custodial time modification amounted to a loss of joint custody. In 2017 the circuit court entered a divorce decree that provided that the parties would share joint custody of their children, with appellee having primary custody and appellant having secondary custody. Appellant would have the children every other weekend (6:00 p.m. Friday until 6:00 p.m. Sunday) as well as "overnight visitation every Tuesday and Wednesday from 5:00 p.m. until the children are returned to school, or 9:00 a.m." As to summer visitation, the parties agreed to alternate weekly throughout the entire summer. In 2021, the appellee petitioned for a modification of the custodial arrangement and argued that there had been a substantial and material change in circumstances since the entry of the divorce decree. Specifically, that appellant was working and living primarily out of state. The circuit court here did not change the joint-custody designation or grant appellant "visitation," it adjusted the parties' physical custodial schedule during the school year due to a change in circumstances—not a "material" change in circumstances. Because the circuit court did not modify the parties' joint custodial arrangement, there was no need for the appellate court to conduct a material-change-in-circumstances analysis. The Arkansas Supreme Court established this principle in *Nalley v. Adams*, 2021 Ark. 191, 632 S.W.3d 297. In *Nalley*, the Arkansas Supreme Court observed that the case presented neither a change in custody nor a change in visitation, so a material-change-in-circumstances analysis is not triggered. Instead, the narrow issue in *Nally* was an adjustment of parenting time previously ordered by the circuit court. When the original agreement was signed, both parties lived in Jonesboro, and the children had not reached school age. After appellant decided to work full-time in Lexington, Kentucky, it was not possible for him to exercise his custodial time as set forth in the agreement. Therefore, the circuit court eliminated the Tuesday/Wednesday custodial time and enlarged appellant's weekend custodial time from two

nights to four nights. The circuit court's modification applied only to the time the children were in school. Under the parties' original agreement, appellant was granted visitation from Friday evening to Sunday evening every other weekend and every Tuesday and Wednesday evening. So, for every fourteen days, appellant had six nights with the children. Under the circuit court's modified schedule, appellant has the children from Thursday afternoon to Monday morning every other week; in other words, four nights for every fourteen days. This was not a 50 percent decrease in physical custodial time. The adjustment served to make the schedule less disruptive for the children, which the circuit court could have found to be in their best interest. In addition, the circuit court reasoned that the modification was necessary for the "stability and consistency" of the children, which are important considerations in cases involving children. The appellate courts do not require a circuit court to use "magic words" if it is obvious that the circuit court considered the child's best interest. Thus, the appellate court held that the circuit court did not err in modifying appellant's custodial schedule. (Broadaway, M.; 56DR-17-53; 2-7-24; Harrison, B.)

Zaragoza v. McDonald, 2024 Ark. App. 77 **[grandparent visitation; subject matter jurisdiction; contempt]** The circuit court entered an order finding appellant in contempt and denied her petition to terminate appellees' grandparent visitation with appellant's child. On appeal, appellant argued that the circuit court erred by awarding grandparent visitation because the court lacked subject-matter jurisdiction because paternity had not been established, and that the circuit court erred by finding her in contempt. **[subject-matter jurisdiction]** Subject-matter jurisdiction cannot be conferred on a court by consent of the parties or by waiver. In *Horton v. Freeman*, 2014 Ark. App. 166, the appellate court held that a circuit court had subject-matter jurisdiction to hear a grandparent-visitation petition even though paternity had not been established by a court of competent jurisdiction. Accordingly, the circuit court did not err. **[contempt]** In order to establish contempt, there must be willful disobedience of a valid order of a court. Before one can be held in contempt for violating the court's order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. Civil contempt protects the rights of private parties by compelling compliance with court orders made for the benefit of the parties. Here, the circuit court found appellant in contempt for failing to facilitate the appellees' visitation as required by a court order, and the appellate court found that evidence supported that finding. Thus, the circuit court did not err in holding the appellant in contempt. (Duncan, X.; 04DR-20-1128; 2-7-24; Abramson, R.)

State Off. of Child. Support Enf't v. Milner, 2024 Ark. App. 117 **[registered support order; child support]** The circuit court entered an order denying entering judgement against appellee for an arrearage under a registered support order from Alaska. The circuit court found that appellee owed no further support for the children or to the State of Alaska, and his child-support obligation had been completely satisfied. Under Ark. Code Ann. § 9-14-236(c) child-support arrearages can be recovered only until the child for whom support was ordered turns twenty-three. But for a registered foreign support order, the Uniform Interstate Family Support Act (UIFSA) requires applying the limitation period of the enforcing state or the issuing state, whichever is longer. The

limitation period in Alaska for collecting missed child-support payments is essentially an unlimited time period. Alaska Sta. § 25.27.225 states that a support order ordering a noncustodial parent obligor to make periodic support payments to the custodian of a child is a judgment that becomes vested when each payment becomes due and unpaid. That arrearage is considered a "judgment," though it is entered by Child Support Enforcement Division of Alaska's Department of Revenue (CSED), an administrative agency, because like a court judgment it is not subject to retroactive modification. The Alaska Supreme Court held that proceedings under § 25.27.226 were in aid of enforcement of a judgment which was already in existence, akin to executions, which in Alaska can be initiated after five years only by court order. Under UIFSA, the collection procedures and remedies are provided by the law of the state where the support order is registered. In Arkansas, there are no limitations on the enforcement of child-support judgments. Arkansas Code Annotated § 9-14-235(d) allows enforcing a child-support judgment until it is satisfied, including through contempt proceedings, and defines a "judgment" to include unpaid support and interest when it has been reduced to judgment by the court or become a judgment by operation of law. Here, the appellee's obligations and payments demonstrated he was in arrears; thus, the circuit court must have concluded the arrears were no longer collectible under the law of the UIFSA. The Alaska support order registered in the circuit court in September 2010 was the second modification of a support order issued in 1995. When the Office of Child Support Enforcement (OSCE) began enforcement proceedings in February 2022, the children appellant had been ordered to support were twenty-six years old. Appellee's accumulating arrears became a judgment by operation of Alaska law, though they had not been reduced to judgment in either Alaska or Arkansas. Therefore, appellant's attempt to enforce the arrearage in Arkansas was timely. (Thomason, M.; 14DR-10-199; 2-21-24; Harrison, B.)

Powell v. Powell, 2024 Ark. App. 119 **[not marital property; inheritance; gift]** The circuit court entered a divorce decree, in part finding that certain real property containing a storage building and trailer was not marital property. On appeal, appellant argued that the circuit court erred in finding that the property was an inheritance, and the property constituted a gift. The appellate court gives due deference to the circuit court's determination of the credibility of the witnesses and the weight to be given to their testimony. All marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. Marital property means all property acquired by either spouse subsequent to the marriage; however, an exception to this rule is property acquired by gift. Here, the circuit court heard the appellee's testimony that his father transferred the property to him to avoid probate and appellee's statement that he never made any payment on the loan or gave consideration for the land. The appellee testified that the bank required him to cosign, and there was no testimony that cosigning on the note was a condition of his father's transfer of the property to appellee. The circuit court found that appellee was gifted real property by his father in anticipation of his death and was deeded to him to bypass probate proceedings. The appellate court gave due deference to the circuit court's determination of the credibility of the witnesses and was not left with a definite and firm conviction that the circuit court erred. Thus, the circuit court did not err in its findings. (McCune, M.; 17DR-21-278; 2-21-24; Virden, B.)

Willhite v. Willhite, 2024 Ark. App. 147 **[order of protection; sufficient evidence]** The circuit court granted an order of protection against appellant for the appellee, his ex-wife. On appeal, appellant argued that appellee failed to present sufficient evidence to support a finding of domestic abuse. When a petition for an order of protection 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. Where there is no evidence that the respondent committed physical abuse or inflicted imminent fear of physical harm, bodily injury, or assault, it is an abuse of discretion to issue the order of protection. Here, before appellee had completed her case-in-chief, appellant indicated that he no longer wanted to defend against the petition. Even if appellant's actions were not an acquiescence, there was sufficient evidence of the infliction of fear of imminent physical harm or bodily injury. Here, appellant texted appellee that while she might think he will show up while she is sleeping, he wanted to "fuck up" her life, not her dreams. The next day, he texted that he was coming to her house and that he was leaving his phone behind. The appellee indicated that she was afraid he might be suicidal and that there might be a murder/suicide situation. Additionally, the appellant told her that she needed to sleep with one eye open; that when he goes, she goes too; and that she needed to look over her shoulder for the rest of her short life. These statements were more than just controlling or harassing; they were threatening. The appellate court will not act as a super fact finder nor second-guess the circuit court's credibility determinations. Therefore, the circuit court did not err in granting the order of protection. (Martin, D.; 72DR-22-1476; 2-28-24; Thyer, C.)

Willhite v. Willhite, 2024 Ark. App. 148 **[order of protection; sufficient evidence]** The circuit court granted an order of protection against appellant for the appellee, his daughter. On appeal, appellant argued that appellee failed to present sufficient evidence to support a finding of domestic abuse. Here, appellant stated that he no longer wanted to defend against the petition before hearing all of appellee's evidence. Therefore, appellant's statements could be construed as acquiescence. Even if appellant's actions were not an acquiescence, there was sufficient evidence of the infliction of fear of imminent physical harm or bodily injury. Appellee testified that her brother called her to inform her that their father had called him and left a message for appellee that if she did not call within the next five minutes, he would knock down the door and beat her. Appellee believed he might harm her and had the police escort her to the police station until her mother arrived. The appellee also testified that a few months prior to this call, appellant "blew up" on her and would not let her leave until he said she could leave. Given the evidence of appellant's erratic and threatening behavior towards appellee's mother, with whom she lived, there was ample evidence to support this fear. Additionally, there was testimony presented that appellee slept with a gun by her side due to that fear. Therefore, the circuit court did not err in granting the order of protection. (Martin, D.; 72DR-22-1477; 2-28-24; Thyer, C.)

JUVENILE

Kazzeev. Ark. Dep't of Human Servs., 2024 Ark. App. 78 **[PPH; genuine, sustainable investment]** No clear error in concluding that appellant failed to prove that she had made a genuine, sustainable investment in completing the case plan to keep reunification as the goal, when in its order from the permanency planning hearing, the trial court found that appellant had been only partially compliant with the case plan and court order; appellant had completed some services but had not secured employment, had not maintained a clean home, and had experienced difficulty with implementing the parenting skills from the classes that she attended. Although appellant asserted that she could have alleviated "the clutter and the puppy messes" within a three-month period, she had not done so in the twelve months leading up to the permanency-planning hearing. Also, appellant had not progressed to the point that she could have unsupervised visits with the child. **[TPR; failure to remedy]** When child was removed due to appellant's general inability to care for him, it was proper to terminate parental rights when after a year of services, and more intensive parenting-skills classes between PPH and TPR, appellant continued to struggle providing even the most basic care for the child. **[TPR; best interest/potential harm]** No error in finding it in child's best interest to terminate parental rights due to the risk of potential harm to the child when appellant had extensive history with the court (felony conviction for the near-death starvation of her first child, and the appellant's negligent homicide of another child). (Williams, L.; CV-23-490; 2-7-24; Virden, B.)

Hall-Elliot v. Ark. Dep't of Human Servs., 2024 Ark. App. 81 **[PPH; sustainable, measurable progress]** No clear error in changing the goal to termination when the child had been out of the home for more than a year; Appellee provided intensive in-home services and supplies to show appellants how to keep a house clean enough that the child would be safe. Appellee provided two different professional extermination services and rodent traps. The home remained squalid as it was in the beginning of the case. **[TPR; subsequent factors]** The appellants were unwilling or unable to maintain any level of basic cleanliness necessary to provide a safe environment for the child. The appellants could not or would not complete the necessary paperwork so that they could get government assistance with food. They were not qualified for housing assistance and did not appreciate the need to move to a more suitable environment. Appellant father did not complete drug rehabilitation, and he failed to attend AA/NA meetings with regularity. Despite the provision of counseling, the appellants had an unhealthy relationship evidenced by frequent arguments; appellant father had been verbally abusive toward appellant mother. Moreover, the termination hearing did not happen until many months after the PPH, during which time the circuit court ordered appellee to continue services to the family, so appellants were allowed more time to provide a safe, stable home that the child needed. Yet were still unable to do so. No clear error. (Elmore, B.; CV-23-534; 2-7-24; Klappenbach, N.)

Wilkerson v. Ark. Dep't of Human Servs., 2024 Ark. App. 88 **[TPR; best interest/potential harm]** No error in finding potential harm when appellant lacked stable and appropriate housing, lacked

stable and sufficient income or employment, had not addressed her substance abuse problem, had not addressed her mental health issues, and had acted erratic during visits to the point that in-person visitation was suspended by the trial court. (Coker, K.; CV-23-543; 2-7-24; Murphy, M.)

Jones v. Ark. Dep't of Human Servs., 2024 Ark. App. 92 **[TPR; Failure to remedy]** Child was adjudicated dependent-neglect on the basis of neglect and parental unfitness due to appellant's failure or refusal to provide the food, clothing, shelter, or medical treatment necessary for the juvenile; appellant's failure to protect the juvenile; appellant's failure to assume responsibility for, or participate in, a plan to assume the responsibility for the juvenile; appellant's failure to appropriately supervise the juvenile; and because appellant resumed methamphetamine use (mere months after an earlier dependency-neglect case had ended) and frequently left the child with people who had methamphetamine addictions. It was not error to terminate on the failure to remedy grounds when appellant was never in compliance with the case plan or orders of the court until twenty (20) months after the child had been removed; the appellee was found to have made reasonable efforts throughout the case; the child never returned to appellant's care; and appellant was in the same situation as when the case (and the case before) began: appellant testing positive for methamphetamine nineteen (19) months into the case; and there was no appropriate caretaker for the child: appellant's plan at the time of the termination hearing was for her new boyfriend, whom she met in another drug rehabilitation program she did not finish, was to care for the child while appellant was at work; appellant was also openly discussing with foster parents the option of obtaining guardianship over the child so that she wouldn't have to be a parent full-time. **[TPR; best interest/potential harm]** While the words "potential harm" did not appear in the transcript of the hearing, this was not a fatal flaw to the court's assessment as the "Juvenile Code does not require 'magic words' to be in the order to satisfy a 'best interest' inquiry." Here, there was sufficient testimony for the court to consider the potential harm in making its best-interest determination; no clear error. (Williams, L.; CV-23-571; 2-14-24; Abramson, R.)

Hall v. Ark. Dep't of Human Servs., 2024 Ark. App. 94 **[TPR; best interest]** While keeping siblings together is an important consideration, it is not outcome determinative because the best interest of each child is the polestar consideration. Evidence of a genuine sibling bond is required to reverse a best-interest finding on the basis of severance of a sibling relationship. In this case, the only evidence of such a bond was a statement by appellant that the siblings love each other, which is insufficient to override the entirety of the evidence supporting TPR, especially considering there was uncontroverted evidence that the separate placements were committed to ensuring continuing sibling contact. (Haltom, B.; CV-23-595; 2-14-24; Gladwin, R.)

Jackson v. Ark. Dep't of Human Servs., 2024 Ark. App. 115 **[TPR; appointment of counsel]** Appellant had the right to counsel at all stages of the proceeding, but only to appointed counsel at the termination of parental rights hearing TPR as he was not the parent from whom custody was removed. Despite the record never indicating that appellant requested counsel, he was nonetheless

represented by appointed counsel at the permanency planning hearing and at the termination hearing. **[TPR; best interest/potential harm]** When appellant began services approximately sixteen months after the case began, tested positive for THC and cocaine in the months leading up to the TPR, never completed the nail bed drug test and hair follicle drug tests that were ordered of him at the beginning and throughout the case, there remained no evidence that appellant had achieved sobriety or remedied his drug abuse issues. Evidence of a parent's continued drug use and failure to comply with the case plan and court orders supports a potential-harm finding; failure of a parent to submit to drug screens is evidence of potential harm. (Byrd Manning, T.; CV-23-584; 2-14-24; Brown, W.)

Harris v. Ark. Dep't of Human Servs., 2024 Ark. App. 135 **[TPR; aggravated-circumstances/little likelihood]** No error in finding little likelihood that services would result in successful reunification as at the time of the termination hearing, the case had been open for a year and a half, appellant had appropriate housing for only a month, she had attended only four parenting classes, and did not have the mental capacity to care for the child. **[TPR; best interest/potential harm]** The child was removed due to a broken femur and other serious injuries from a domestic dispute, yet appellant had not attended any domestic-violence classes or completed any parenting classes. The evidence supporting an aggravated circumstances ground can also support a potential harm finding. (Ladd, D.; CV-23-643; 2-28-24; Abramson, R.)

Edwards v. Ark. Dep't of Human Servs., 2024 Ark. App. 137 **[TPR; aggravated circumstances/little likelihood]** During the initial protective-services case before the children were removed from her custody, appellant mother refused inpatient treatment that would have allowed the children to stay with her; during the subsequent dependency-neglect case, she was forced to leave a transitional-living program because she tested positive for methamphetamine. Between removal in August 2021 and the TPR hearing in May 2023, appellant mother made only three attempts to get counseling or drug treatment. She never achieved stable housing, income, or transportation, and her caseworker testified that there were no further services that could be offered that would likely lead to a successful reunification. As to appellant father, he testified that he attempted to go to his drug-and-alcohol assessment only two or three weeks before the termination hearing, long after the referral had been made. He could not complete the assessment because he had not obtained identification, and he stated that he continued to regularly use methamphetamine, as recently as four days before the hearing. He testified that he did not have stable housing or income. Appellants were also offered services through the Safe Babies program, which provided additional and expedited support to parents trying to achieve reunification. There was no error in finding that there was little likelihood that services would result in successful reunification. **[TPR; best interest/potential harm]** Appellants' continued drug use clearly demonstrated potential harm to the children. (Blatt, S.; CV-23-560; 2-28-24; Virden, B.)