

# APPELLATE UPDATE

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*Appellate Update* is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:

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## ANNOUNCEMENTS

On March 30, 2023, the Arkansas Supreme Court announced a return to the pre-COVID-19-pandemic standard for the finding of “good-cause” delays for speedy-trial purposes. See *In Re Response to the COVID-19 Pandemic—Return to Pre-pandemic Standard for Finding of Good-Cause Delays under Speedy-Trial Rule*.

## CIVIL

*City of Fort Smith v. B&A Electric Inc.*, 2023 Ark. App. 24 [**agency relationship; breach-of-contract**] The circuit court entered judgment against appellant following a jury verdict on breach-of-contract claims brought by appellees. On appeal, the appellant contended that there was insufficient evidence to support the judgment in favor of the appellees. Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. In order to prove a breach-of-contract claim, one must prove the existence of an agreement, breach of the agreement, and resulting damages. A party asserting the existence of an agency relationship has the burden of proving that an agency relationship exists. The two essential elements of an agency relationship are: (1) that an agent has the authority to act for the principal;

and (2) that the agent act on the principal's behalf and be subject to the principal's control. Here, the appellant and a third-party defendant entered into a written contract for the construction of a sports complex on city-owned land. On appeal, the appellant argued— and the appellees conceded— that there was no direct contract between the parties. At all relevant times, the appellant had an agreement with the third-party defendant, and the third party-defendant had agreements with the appellees. Although the appellant gave the third-party defendant the authority to hire the contractors, it had little involvement concerning which contractors the third-party defendant hired or how the appellees performed their jobs except for making inspections when thresholds were met. If the appellees believed they had a contractual relationship with the appellants via their verbal contracts with the third-party defendant, belief alone is not enough to support a finding that the third-party defendant was an agent for the appellant. An actual agency relationship has to exist, even if it appeared that the third-party defendant had the authority to bind appellant. Because appellant, a city, is a sovereign, there can be no apparent or implied agency relationship between the parties. Accordingly, the jury's verdict in favor of the contractors' breach-of-contract claims was not supported by substantial evidence. (Tabor, S.; 66FCV-17-285; 1-25-23; Brown, W.)

*Dayberry v. Payne*, 2023 Ark. App. 26 [**Good Samaritan Law; third-party action**] The circuit court granted summary judgment in favor of appellee. On appeal, appellant argued that the circuit court erred by concluding that: (1) immunity under the Good Samaritan Law applies in third-party actions; and (2) appellee's "rendering of emergency assistance or services" included pulling onto the median so that appellee is immune from an action for parking negligently. Here, a motorcyclist driving in front of appellee on the interstate lost control and crashed into a concrete culvert in the median. Appellee pulled off, partly into the median without her hazard lights on, to perform CPR. Appellant collided with appellee's parked vehicle. The appellate court held that Arkansas's Good Samaritan Law, Ark. Code Ann. § 17-95-101, does provide immunity from civil damages for acts or omissions of ordinary negligence resulting from rendering emergency assistance or aid in good faith at an accident scene, in a suit by a third party to the accident who alleges injuries resulting from a Samaritan's aid. Therefore, the circuit court did not err in granting immunity to appellee. (Martin, D.; 72CV-20-2058; 2-1-23; Harrison, B.)

*The AGRED Foundation v. Friends of Lake Erling Association*, 2023 Ark. App. 29 [**standing; contracts**] The circuit court dismissed appellant's motion to dismiss and appellant's cross motion for summary judgment. The circuit court then granted summary judgment in favor of appellee. On appeal, appellant argued that appellee had no standing to bring suit against it, and the previous owner's act of exchange with the United States government did not prohibit appellant from requiring a permit for motorized boats on Lake Erling. [**standing**] To bring a lawsuit against an opposing party, one must have standing to do so. Without standing, a party is not properly before the court to advance a cause of action. Here, the appellate court found that the appellee had standing pursuant to the Uniform Declaratory Judgments Act as well as Arkansas Code Annotated § 4-28-105, which gives non-profit organizations standing to sue on behalf of its members.

Therefore, the circuit court did not err in finding appellee had standing. **[contracts]** When construing any contract, courts must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. Furthermore, the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. Here, a lake was constructed by a paper company as a source of water for its nearby mill. Some of the land beneath the lake was owned by the federal government, so the United States and the paper company entered into an act of exchange (the act). The act required the company to place no restrictions on the public use of the lake and allow public access via its land. The company later conveyed its interest in the land to appellant, who agreed to assume all obligations and duties imposed by the act. The appellate court held that appellant setting forth a requirement that members of the public either pay a fee to operate a watercraft or forfeit their rights to use such on the lake violated the express terms of the act. Thus, the circuit court did not err in ruling that the motorized watercraft fees and decal program were restrictions and prohibited under the agreement. (Jones, C.; 37CV-16-16; 2-1-23; Gladwin, R.)

*Olsen v. Roper*, 2023 Ark. App. 35 **[subject-matter jurisdiction]** The circuit court dismissed the case between appellants and appellees for lack of subject-matter jurisdiction. On appeal, appellants argued the circuit court erred in granting the motion to dismiss. Subject-matter jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties. In *Viravonga v. Samakitham*, 372 Ark. 562 the Arkansas Supreme Court held that the circuit court had the authority to oversee and determine who may vote in a temple election when two competing factions of a temple had each alleged it represented the true board of directors. The court explained that due to the state's obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively, jurisdiction existed for the court to decide legal questions involving the ownership and control of church property. Here, the parties agreed the church officers controlled the church property. Therefore, the court did have subject-matter jurisdiction to, at a minimum, grant the temporary injunctive and additional temporary relief to preserve the church property and manage its affairs until the matter of correct church leadership could be otherwise resolved. Thus, dismissing the entire case for lack of subject-matter jurisdiction was too expansive a ruling. **[summary judgment]** The courts are prohibited from becoming involved in disputes between members of a religious organization that are essentially religious in nature because the resolution of such disputes is more properly reserved to the church. Even when property rights are involved, rival factions may be remitted to their remedy within the denomination if its form of government is such as to permit an appeal to higher ecclesiastical authority. Religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government. Here, the church's constitution affiliated the church with a national denomination and adopted the national denomination's reconciliation procedure if a division should take place within the congregation. The church's constitution further directed that control of the church and its property must remain with the group that is decided through the national denomination's reconciliation process. The circuit court acted properly and within its jurisdiction in temporarily restraining the parties in how they may control the church property until the correct

church leaders could be conclusively established. The appellate court held that under the facts to declare who exactly the ultimate church leadership should be; that decision is ecclesiastical in its character and capable of resolution through the church's internal government. Accordingly, it was not erroneous for the circuit court to dismiss the remaining claims as beyond the scope of its authority. Thus, summary judgment was appropriate. (Clawson, C.; 23CV-19-1164; 2-1-23; Murphy, M.)

*Kinard v. Kinard*, 2023 Ark. App. 96 [**implied or actual family-settlement agreement**] After a bench trial, the circuit court entered an order finding that (1) appellants had failed to prove the existence of an implied contract or family-settlement agreement pertaining to the transfers of ownership of various tracts of land. On appeal, appellants argued the circuit court's findings were erroneous. Family-settlement agreements are favorites of the law. Courts of equity have uniformly upheld and sustained family arrangements in reference to property, where no fraud or imposition was practiced. However, there must first be a meeting of the minds, and if there is no meeting of the minds, there is no contract. Here, there was no evidence that the deceased agreed to such an arrangement. The deceased and her husband executed a deed to convey the farm property, reserving a life estate for themselves. Later the beneficiaries were asked to quitclaim their interests in the farm back to the deceased and her husband to be put into their trusts. The deceased initially divided the land in the trust in accordance with an earlier deed, but she made no promise not to change her mind about the provisions in her revocable trust, which she did more than once. The appellants were aware of what the term "revocable" meant. Additionally, one of the appellants admitted to wanting to "derail" the estate plans after he had deeded back his interest in the land, which belies his contention that there was a binding family-settlement agreement. Therefore, the circuit court did not err in finding there was no implied contract or family-settlement agreement. (Puryear, C.; 06CR-19-34; 2-1-23; Abramson, R.)

*City of Sherwood v. Bearden*, 2023 Ark. App. 67 [**summary judgment; immunity**] The circuit court denied appellant's motion for summary judgment after finding that the complaint brought by appellee was not barred by statutory immunity because the plaintiffs had met proof with proof on the issue of inverse condemnation. On appeal, appellant argued that it is immune from suit. Inverse condemnation is a cause of action against a governmental defendant to recover the value of property that has been taken in fact by a governmental entity although not through eminent-domain procedures. When a municipality acts in a manner that substantially diminishes the value of a landowner's land, and its actions are shown to be intentional, it cannot escape its constitutional obligation to compensate for a taking of property on the basis of its immunity from tort action. Here, appellees failed to offer proof for the allegation in their complaint that appellant installed pipes that led to flooding on their property. Although deposition testimony did establish that appellant would have approved a private developer's subdivision drainage system, the appellate court held that the mere approval of the developer's plans is not sufficient evidence of government action that could constitute a taking. The city's approval of a private development pursuant to the city's regulations should not give rise to liability against the city for the negligence of a developer.

Additionally, the appellees failed to put forth proof of any intentional conduct necessary to establish a taking. When one knows that an invasion of another's interest in the use and enjoyment of land is substantially certain to result from one's conduct, the invasion is intentional. Here, there was no evidence that the appellant knew the plans it approved were substantially certain to lead to flooding on the property. The appellate court held that appellees failed to put forth sufficient proof to support an inverse-condemnation claim, and the claim amounted to at most negligence. Because the claim sounds in negligence, the tort-immunity state is applicable. Therefore, the circuit court erred in denying appellant's motion for summary judgment. (Griffen, W.; 60CV-18-453; 2-15-23; Klappenbach, N.)

*Swindle v. Benton County Prosecuting Attorney's Office*, 2023 Ark. App. 98 [**summary judgment; standing; dismissal with prejudice**] The circuit court granted appellees' motions for dismissal and for judgment on the pleadings and denied appellant's motion for summary judgment. On appeal, appellant argued that the circuit court erred: (1) in considering and ruling on the appellees' motions because they lacked standing to object to appellant's attorney lien; (2) in granting the appellees' motions; and (3) in the alternative, any dismissal should have been without prejudice. [**standing**] Under Arkansas law, only a claimant who has a personal stake in the outcome of a controversy has standing. When declaratory relief is sought, all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights or persons not parties to the proceeding. Here, appellant filed a lawsuit pursuant to the Declaratory Judgment Act, Ark. Code Ann. § 16-22-304, in which appellant, a licensed attorney, claimed an attorney's lien on restitution ordered in a criminal case against a defendant that injured a client appellant represented in a separate civil suit but that involved the same injury that resulted in the criminal case. Appellant argued the appellees lacked standing because they did not have a personal stake in the outcome of the matter. The appellate court held that the appellees did have a personal stake in the outcome of the matter because they were named defendants in the suit he filed against them. [**motions**] A motion for judgment on the pleadings is appropriate if the pleadings show on their face that there is no merit to the suit. A lien only applies to the cause of action specifically enumerated in the notice. Further, an attorney is only entitled to a lien on the proceeds of the same cause of action for which the attorney was employed to represent the client. Here, appellant was only entitled to a lien on the proceeds from the civil case in which he was hired to represent the injured party. Additionally, appellant failed to join his client who was a necessary party to this case because the restitution funds appellant claimed he had an attorney's lien on belonged to his client. Therefore, the circuit court did not abuse its discretion in granting the appellees' motions for dismissal and judgment on the pleadings. [**dismissal with prejudice**] When a pleading is dismissed because it is legally insufficient, it is proper to dismiss the complaint with prejudice. Accordingly, the circuit court did not err in its order dismissing appellant's petition with prejudice. (Scott, J.; 04CV-21-861; 2-22-23; Barrett, S.)

*Ivy v. Nugent*, 2023 Ark. App. 97 [**wrongful-death; pleading; summary judgment**] The circuit court entered an order dismissing appellant's wrongful-death complaint with prejudice. On appeal,

appellant argued that the circuit court erred in granting summary judgment against the heirs at law. Pursuant to Ark. Code Ann. § 16-62-102(b), every action for wrongful-death in Arkansas “shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person.” For the purposes of the wrongful-death statute, the term “heirs at law” as used in Ark. Code Ann. § 16-62-102(b) means “beneficiaries” as used in Ark. Code Ann. § 16-62-102(d). When there is no representative at the time of filing, all statutory beneficiaries must be joined as plaintiffs to the action. Every action authorized by the statute must be commenced within three years after the death of the person alleged to have been wrongfully killed. Here, appellant filed a wrongful-death action against appellees and later requested a voluntary nonsuit in lieu of dismissal. Appellant did not meet the necessary requirements to file a wrongful-death action as the personal representative of the estate, and when the second suit was filed the statute of limitations had expired. Appellant argued, however, that the second complaint should relate back because the first wrongful-death complaint was “alternatively pled to include the second possible route—a claim by the heirs at law.” The appellate court held that a general reference to “all beneficiaries” of a deceased person does not satisfy the wrongful-death statute. Caselaw interpreting the wrongful-death statute requires that all the heirs be named as parties. The first complaint failed to join and name all the heirs, making it a nullity, and there could be no relation back. Therefore, the circuit court’s grant of summary judgment was proper. (Thyer, C.; 18CV-20-428; 2-22-23; Gruber, R.)

## **CRIMINAL**

*Basham v. State*, 2023 Ark. App. 17 [**probation revocation**] The circuit court revoked appellant’s probationary sentence. On appeal, appellant argued the circuit court erred in not granting his motion for directed verdict and revoking his probation in the absence of proof that he received and signed conditions of his probation and that he knew the exact terms of his probationary sentence. When probation is imposed, Ark. Code Ann. § 5-4-303(e)(2) provides that defendants shall be given a written statement explicitly setting forth the conditions under which he or she is being released. The purpose of this written-notice requirement is to assist a defendant in leading a law-abiding life and to avoid any misunderstanding that a violation of the conditions of a probation sentence may result in its revocation. Here, the revocation case brought by the State relied on a single legal theory—that appellant violated specific conditions of his probation. The State failed to produce any documentation to demonstrate that appellant had ever received and acknowledged any specific conditions of his probation—specific conditions alleged by the State to have been violated. No intake packet was introduced into evidence during appellant’s probation officer’s testimony, and the circuit court ruled against the State’s belated attempt to have it introduced after the close of all the evidence. Additionally, it wouldn’t have been proper for the circuit court to rely on the content of exhibits not introduced into evidence. The appellate court held there was insufficient evidence that appellant received—or understood—the exact and specific conditions of his probation. Therefore, the circuit court erred in not granting appellant’s motion for directed verdict and revoking his probation. (Jones, C.; 46CR-19-296; 1-25-23; Gladwin, R.)

*Logan v. State*, 2023 Ark. App. 70 [**jury instruction; aggravated assault**] A jury convicted appellant of rape and aggravated assault. On appeal, appellant argued the circuit court erroneously gave Arkansas Model Jury Instruction-Criminal 206. The instruction stated that “[a] confession of a defendant will not warrant a conviction unless accompanied with other proof that the offense was committed or supported by substantial independent evidence establishing the trustworthy [sic] of the confession.” A statement amounts to a confession only if there is an admission of guilt as to the commission of a criminal act. Here, appellant told police during his interviews that were played for the jury that the victim’s bag was caught on something when he tried to remove it from his tent causing him to pull it “quite hard” to “free it.” Appellant surmised that this pulling on the bag could have caused the strangulation marks on the victim’s neck. Appellant did not confess to the crimes for which he was charged. Therefore, the appellate court held that because there was no confession, the court erred in giving AMI Crim. 2d 206. (Karren, B.; 04CR-19-2471; 2-15-23; Gruber, R.)

*Lewis v. State*, 2023 Ark. 12 [**CGI; sexually explicit conduct involving a child**] Appellant was convicted of twenty-five counts of possessing or viewing matter depicting sexually explicit conduct involving a child. On appeal, appellant argued that substantial evidence did not support his convictions. A person violates Ark. Code Ann. § 5-27-602(a)(2) if he or she “possesses through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.” A “child” is defined as a person under seventeen years of age. For purposes of the Arkansas Criminal Code, with exceptions inapplicable here, a “person” is a natural person. Thus, although Ark. Code Ann. § 5-27-602(a)(2) includes possession of CGI, the criminal act is limited to possession of images depicting or incorporating the image of a child—a natural person under seventeen years of age—engaging in sexually explicit conduct. Arkansas Code Annotated § 5-27-602(a)(2) necessarily excludes CGI that does not depict or incorporate the image of a child under the statutory definition. Here, the State failed to present evidence on each of these counts that the underlying images—which were identified as computer-generated images by the State’s forensic expert—depicted or incorporated the image of a child. This constituted a failure of proof sufficient to sustain appellant’s convictions. (Batson, B.; 10CR-20-36; 2-16-23; Kemp, J.)

## **DOMESTIC RELATIONS**

*Hayes v. Hayes*, 2023 Ark. App. 19 [**contempt**] The circuit court entered an order finding appellant in contempt of courts incorporated into the parties’ divorce decree that required the parties to keep the children in a proper and wholesome environment, to enjoin and restrain them from making derogatory comments about the other parent in the presence of the children, and to, in good faith, endeavor to maintain in all the children respect and affection for the other party. On appeal, appellant argued that the finding of contempt was not supported by the evidence. Contempt is a

matter between the judge and the litigant and not between the two opposing litigants. Willful disobedience of a valid order of a court is contemptuous behavior. 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. Here, the situation involved an isolated incident where appellant took her daughters with her to watch appellee's wedding from the outside. Although appellee's contempt petition alleged that the wedding incident was an example of an "ongoing and systematic effort" on appellant's part to alienate the affections of the children from their father, the circuit court's ruling that found appellant in contempt was based on the wedding incident. Contempt is not a matter between two opposing litigants but a matter between the judge and the litigant. What may be taking place between the parties should not be the subject of a contempt proceeding unless the court has clearly and unequivocally ordered a party to do or not to do some specific thing. The appellate court held that the specific facts, in this case, did not support a violation of the orders relied on by the circuit court. Therefore, the circuit court erred in holding appellant in contempt. (Hendricks, A.; 66FDR-18-468; 1-25-23; Gruber, R.)

*Nauman v. Nauman*, 2023 Ark. App. 41 [**alimony**] The circuit court denied appellant's motion to cease alimony. On appeal, appellant argued the circuit court erred in denying his motion. Modification of an alimony award must be based on a material change in the circumstances of the parties, and the burden of showing such a change in circumstances is on the party seeking the modification. Changes in circumstances are not material if they were contemplated at the time of the original award. The primary factors to be considered in making or changing an award of alimony are the need of one spouse and the ability of the other spouse to pay. Secondary factors that may be considered include the financial circumstances of both parties, the couple's past standard of living, the amount and nature of the parties' current and anticipated incomes, the extent and nature of each party's resources and assets, the amount of income of each that is spendable, the health condition and medical needs of each party, the duration of the marriage, the amount of child support, and the earning ability and capacity of each party. Here, the circuit court found that appellee's needs were met by alimony plus her income; thus, no material change occurred, and alimony should remain the same. The circuit court was not prohibited from considering expenses related to the children's needs in determining if appellee needed alimony. Additionally, it was not mandatory for the circuit court to consider the secondary factors. Rather, they are factors that a circuit court "may consider" in determining whether to award alimony. The appellate court held that the circuit court performed the required analysis in deciding that a material change in circumstances did not occur. [**underestimation**] Appellant next contended that the circuit court underestimated appellee's monthly spendable income and did not consider her other income-generating assets. The amount of alimony awarded should not be reduced to a "mathematical formula" because the need for flexibility outweighs the need for relative certainty. Here, in light of the appellate court's standard of review, the discretionary nature of alimony awards, and the evidence before the circuit court, the appellate court was not left with a definite and firm conviction that the circuit court has made a mistake. [**permanent alimony**] Appellant also argued the circuit court awarded appellee "permanent alimony," which is against public policy. Arkansas Code Annotated § 9-12-312(2) sets forth multiple contingencies that can trigger the automatic cessation



of alimony, including death, remarriage, and cohabitation, and also states that either party may petition the court for “review, modification, or both . . . at any time based upon a significant and material change of circumstances.” Court-ordered alimony is always subject to modification. Here, appellant may petition the circuit court to modify the award of alimony and the circuit court will determine whether the alimony should be modified or terminated. Therefore, the circuit court did not err. (Reif, M.; 60DR-15-879; 2-8-23; Virden, B.)

*Mitchell v. Mitchell*, 2023 Ark. App. 60 [**unequal property division**] The circuit court entered a divorce decree after a hearing. On appeal, appellant argued that the circuit court erred by unequally dividing the marital home in favor of appellee. In accordance with Ark. Code Ann. § 9-12-315(a)(1), at the time of entry of a divorce decree, the circuit court shall equally distribute all marital property one-half to each party unless it is determined that such a distribution would be inequitable; if the property is not divided equally, then the circuit court must state the reasons and basis for not doing so, and the basis and reasons should be recited in the order entered in the matter. While the circuit court must consider the factors set forth in the statute and state its reasons for dividing property unequally, it is not required to list each factor in its order or to weigh all the factors equally. Here, the circuit court found that appellee was entitled to an unequal division under Ark. Code Ann. § 9-12-315(A)(1)(a)(viii), which states that the contribution of each party in acquisition, preservation, or appreciation of marital property is a factor the court may take into consideration when making a division of property on some other basis than an equal distribution. The circuit court found appellee’s testimony that she solely paid for the house credible, and appellant’s testimony that he contributed to the housing expenses not credible. The appellate court held the circuit court did not err given the circumstances. (Tucker, C.; 60DR-20-3167; 2-15-23; Abramson, R.)

## **JUVENILE**

*Lawson v. Ark. Dep’t of Human Servs.*, 2023 Ark. App. 36 [**TPR-Wicks exception**] No issue was preserved for appeal. Moreover, Appellant’s absence at the termination hearing coupled with her counsel’s failure to put on a case or examine witnesses were not indicative of egregious or flagrant errors that would have required the circuit court to intervene on its own motion, triggering the application of the third Wicks exception. Under the undisputed facts of this case, specifically Appellant’s sporadic visitation, non-compliance in case plan services, and absence from most hearings, there was no reasonable probability that Appellant’s attendance or further representation of her at the termination hearing would have altered its outcome. Decision affirmed. (Hess, K.; CV-22-402; 2-1-23; Wood, W.)

*Taylor v. Ark. Dep’t of Human Servs.*, 2023 Ark. App. 31 [**ADJ-UCC-JEA**] There was no error in continuing to exert subject-matter jurisdiction beyond the initial emergency proceeding, up to and including this appealed adjudication, in the absence of credible evidence of a custody order or

a current custody proceeding in another state. The adjudication order became a final determination making Arkansas the home state of the child. **[ADJ-sufficiency of the evidence/parental unfitness]** When at the adjudication hearing, multiple witnesses testified that Appellant stated that she could not care for her child anymore; stated he was interfering with her life and she was done with him; stated that the responding law enforcement officer could have him; stated she did not want to get angry and have something bad happen to him; appeared volatile and emotionally unstable; and the child described being punched in the nose by his mother, resulting in injury, and he described being held underwater in a bathtub, the totality of the evidence was sufficient to find the child was subjected to parental unfitness and was at substantial risk of serious harm. (Sullivan, T.; CV-22-431; 2-1-23; Brown, W.)

*Higgins v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 45 **[ADJ-specific findings]** In adjudicating Appellant's child dependent-neglected based on neglect and parental unfitness, the adjudication order language closely tracked the language of one subsection of the definition of neglect, which, according to Appellant, was inapplicable, rather than language from an arguably more appropriate subsection. However, there was no error in finding neglect as Appellant failed to request a specific finding and, arguably, both subsections were appropriate given the facts of the case. **[ADJ – parental unfitness]** Additionally, Appellant failed entirely to challenge the parental-unfitness finding; a single ground of dependency-neglect is sufficient to uphold an adjudication determination. Even if Appellant had challenged the parental unfitness finding, the record contained ample evidence of parental drug use, which the appellate court has repeatedly held is sufficient evidence to support a finding of parental unfitness. **[DISPO-safety factors]** Appellant's cooperation and appropriate home were insufficient in and of themselves to return the child to her custody, especially considering evidence of her drug use and at least two (2) occasions of inadequate supervision where the child was located outside, some distance from the home, unattended, and inappropriately dressed. (Byrd Manning, T.; CV-22-470; 2-8-23; Gruber, R.)

*Myers v. Ark. Dep't of Human Servs.*, 2023 Ark. App 46 **[TPR-failure to remedy]** There was no error in finding that Appellant Father failed to remedy the cause of the removal, his drug use, when the record indicates he missed thirty-three out of forty-two drug screens, provided no reason for not participating in the requested weekly drug screens, failed to submit to hair-follicle drug testing, and was arrested for a DWI on two separate occasions, which lead to incarceration from a parole sanction. Finally, Appellants testified that substance abuse was not an issue for them throughout this case and did not acknowledge any of their problems. A parent's failure to take responsibility for his or her actions supports a finding that the behavior that caused the removal has not been remedied. **[TPR-subsequent factors]** There was no error in finding that Appellee made reasonable efforts to provide family services when those findings were contained in the probable cause order, adjudication order, review order, and two permanency planning orders, especially when no appeal was taken from any of the aforementioned orders; further, Appellee has no affirmative duty to reprove factual findings made by the circuit court in earlier orders. **[TPR-subsequent factors]** There was no error in finding returning the Minor Child to Appellant Father's custody would be

contrary to the Minor Child's health, safety, or welfare; and no error in finding that Appellant Father was incapable or indifferent to remedying the subsequent issues that prevented the Minor Child from being placed in his custody when after the adjudication hearing, the father had not resolved all criminal charges, had acquired two (2) DWI charges in the months prior to the termination hearing, was incarcerated at the time of the termination hearing on a probation violation from those new charges, and failed to demonstrate sobriety by not participating in the court-ordered hair-follicle drug screens and by participating in only a handful of the weekly urine drug screens. **[TPR-Aggravated circumstances, little likelihood]** A caseworker's testimony that there are no further services that DHS can provide to reunify a parent with his or her child supports a finding that there was little likelihood additional services to the family would result in successful reunification. **[TPR - best interest - potential harm]** A parent's past behavior is an indicator of likely potential harm should the child be returned to the parent's care and custody. Further, Appellants demonstrated a lackadaisical approach to following court orders, which itself is sufficient evidence of potential harm. Appellants' failure to make measurable and sustainable progress toward alleviating the cause of the Minor Child's removal demonstrates they remain a risk of potential harm to the Minor Child. (Warren, D.; CV-22-480; 2-8-23; Potter Barrett, S.)

*Fulmer v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 56 **[TPR-best interest]** Completion of case plan services is irrelevant when the parent continues to make decisions that are contrary to the best interest of the child. **[TPR-aggravated circumstances]** Caseworker testimony that there was no other service that could be offered that would lead to reunification is enough to support a finding of aggravated circumstances, especially considering that Appellant was unable to verbalize why the case was opened or why his wife posed any harm to his child. Unfortunately for appellant, the circuit court was not convinced that his completion of the case plan achieved the intended result of making him capable of caring for his child. (Sullivan, T.; CV-22-507; 2-8-23; Brown, W.)

*Dye v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 61 **[TPR-best interest]** A parent's failure to comply with the case plan and court orders, failure to maintain stable housing and employment, and failure to demonstrate sobriety may demonstrate potential harm, as well as being used to support statutory grounds for termination. **[TPR-best interest/potential harm]** Appellant's argument that she did not pose a harm to this child because she maintained custody of an after-born sibling was unpersuasive; as in prior cases, the appellate court held that "when making its best-interest analysis, the circuit court must make an individual determination whether termination is in each child's best interest and cannot treat the children as an amorphous group in which the best interest of one will meet the interests of all." **[TPR-best interest/potential harm]** Appellant's argument that there could be no potential harm because what few drug screens she did complete were all negative was unpersuasive; given her long history of methamphetamine use, those few drug screens were wholly insufficient to demonstrate sobriety. (Zimmerman, S.; CV-22-584; 2-15-23; Abramson, R.)

*Blankenship v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 63 [**TPR-paternity**] The appellate court found error in terminating Appellant Ross's parental rights because the record was silent as to evidence or finding of paternity; he was listed as a putative parent on initial pleadings and as a parent on subsequent pleadings, but there was never an explicit finding that he had been determined to be the biological parent, which was necessary to apply any statutory ground that required one be a "parent." The appellate court reversed the termination of his parental rights and remanded to circuit court. [**TPR-relative placement**] No error found when the circuit court terminated Appellant Blankenship's parental rights, despite evidence in the record of interested relatives, as the Juvenile Code lists permanency goals in order of preference, prioritizing a plan for termination and adoption unless the juvenile is already being cared for by a relative, the relative has made a long-term commitment to the child, and termination of parental rights is not in the child's best interest; there was no evidence in the record that any of those requirements were met. [**relevancy – testimony**] Prior testimony established that the LeMasterses' home study was approved but the written copy had not been received; there was no error and no demonstrated prejudice against Appellants by excluding the LeMasterses' testimony upon finding it irrelevant to the question before the court, especially considering placement statutes prevented the child from going to the LeMasters home without an approved home study. Additionally, there was no request to hold open the record to receive the home study, or a proffer made regarding the LeMasterses' anticipated testimony apart from the already-established fact that the home study had been approved. [**continuance – lack of diligence**] No error in denying the request for a continuance to allow time to receive the written ICPC home study from the approving state; counsel for Appellants did not act diligently when they failed to request a continuance upon learning at least a week prior to the hearing that the written report was not available and failed to request a continuance at the beginning of the hearing when the report remained unavailable. (Warren, D.; CV-22-310; 2-15-23; Virden, B.)

*Gonzales v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 69 [**TPR-aggravated circumstances**] There was no error in the court finding little likelihood that services to the family would result in reunification when the court found that Appellant had failed to show that she had benefited from the services offered, that Appellant participated in precious few services, and that the caseworker testified that there was no other services available that had not already been offered to Appellant throughout the course of the case. [**TPR-best interest/adoptability**] A caseworker's testimony that there were no barriers to the adoption of Appellant's children was sufficient to support the adoptability factor. (Casady, K.; CV-22-550; 2-15-23; Klappenbach, N.)

*Lyall v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 81 [**TPR-best interest**] There was no error in terminating Appellant's parental rights to children MC1 and MC2 as Appellant's instability, drug-use, and criminal activity still posed potential harm; the trial court made no finding regarding adoptability as it was unnecessary and not required under the circumstances: the children were in their father's custody and were expected to remain; adoptability remains simply a factor to be

considered, and not a necessary finding, when determining best interest. (Hendricks, A.; CV-22-417; 2-15-23; Hixson, K.)

*Franklin v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 83 [**TPR-failure to remedy**] No error in terminating parental rights on the failure-to-remedy ground when, after adjudication on parental unfitness and environmental neglect, Appellant remained unfit: she failed to maintain stable and appropriate housing, failed to maintain employment, used illegal drugs, failed to consistently attend therapy, refused to be available for random drug screens, and failed to develop a plan to obtain childcare; any progress she had made early in the case was lost when she had regressed and was incarcerated on new criminal charges. [**TPR-failure to remedy/meaningful effort**] Appellant never challenged any earlier reasonable-efforts finding, failed to request the specific services she now feels are necessary, and therefore waived any services argument on appeal. [**TPR-best interest/potential harm**] No error in finding potential harm in Appellant's continued drug use and failure to provide stability through housing or income. [**TPR-best interest/adoptability**] No error in the adoptability finding when the caseworker testified the child was adoptable; there is no requirement that a specific adoptive home be identified at the termination hearing. (Sullivan, T.; CV-22-502; 2-15-23; Murphy, M.)

*Nault v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 84 [**TPR-subsequent factors**] There was no error in terminating Appellant's parental rights for subsequent factors when Appellant waited six (6) months to begin services; started individual counseling a month prior to the termination hearing; missed a month of visitation in the months prior to the termination hearing; acquired employment and housing only days before the hearing: failure to comply with a case plan, along with instability, remains sufficient to support termination on the subsequent-factors ground. [**TPR-best interest/potential harm**] A parent's failure to comply with court orders remains sufficient evidence of potential harm. At the time of the termination hearing, Appellant was employed, had a home, and had achieved sobriety from her original drug of choice; however, after drug treatment she continued her addictive behaviors and merely replaced illegal drugs with alcohol. Decision affirmed. (Warren, D.; CV-22-591; 2-15-23; Murphy, M.)

*Minchew v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 95 [**TPR-best interest/potential harm**] There was no error in terminating Appellant's parental rights, instead of custody or guardianship to relatives, based upon a potential harm finding when Appellant's progress was inconsistent and unreliable; the statutory grounds for termination relied upon factual findings that demonstrated evidence of potential harm: Appellant failed or refused multiple drug screens throughout the case; she was noncompliant with outpatient drug treatment; she failed to attend counseling; her visits with the children were inconsistent; and she lived with a man who was admittedly abusive to her. Additionally, an appellate court will not reweigh evidence. (Johnson, S.; CV-22-630; 2-22-23; Gladwin, R.)