

# APPELLATE UPDATE

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## CIVIL

*Gates v. Walther*, 2023 Ark. 74 [**summary judgment; tax**] The circuit court entered an order granting summary judgment to the Department of Finance and Administration (DFA). The order upheld DFA's amended and corrected notices of a final assessment of the appellants' tax burden for 2015, 2016, and 2017. On appeal, appellants argued that DFA failed to provide sufficient evidence to meet its prima facie burden of proof for summary judgment. Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to material fact. In summary-judgment cases, the courts decide whether the evidentiary items presented by the moving party left a material question of fact unanswered. Summary judgment is not proper where evidence although not in material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. In tax cases, DFA carries the initial burden of proving the imposition of the tax by a preponderance of the evidence. The agency claiming the right to collect a tax bears the burden of proving that the tax law applied to the item sought to be taxed. Here, the appellants failed to file tax returns or pay individual and corporate state taxes for the years 2012–2017. One appellant pleaded no contest to one criminal count for failure to file a tax return or pay taxes and was ordered to file tax returns for the years 2015–2017. DFA audited those returns to determine the appellants' tax liability, penalty, and interest for those years. The appellants protested DFA's initial assessment. To meet their prima facie burden, DFA

had to prove the appellants' net taxable income and resulting tax liability for 2015-2017. The appellants argued that their income tax returns and 1099s were not prima facie proof of DFA's calculation of the appellants' net taxable income. It is undisputed that the appellants had some taxable income based on their filed tax returns. However, the Supreme Court held that a material dispute of fact existed regarding the amounts of their taxable income for 2015–2017. Based on the record before the Supreme Court, the net taxable income DFA calculated was greater than the amounts the appellants reported, plus their 1099 income. The appellants admittedly ran many personal expenses through their business, but the burden fell first on DFA to prove the initial taxable income amount and show how it arrived at that number. Considering this evidence, DFA did not meet its prima facie burden of proving the total amounts of taxable income that it had calculated for 2015, 2016, and 2017. Because DFA's motion for summary judgment lacked this prima facie evidence, the Supreme Court conclude that DFA did not meet its burden of proof at the summary-judgment stage of the proceedings. Therefore, the circuit court erred in granting DFA's motion for summary judgment. (Arnold, G.; 26CV-21-100; 5-4-23; Wood, R.)

*Absolute Roofing & Construction, LLC v. Paradise Developments, LLC*, 2023 Ark. App. 270 **[motion to strike]** The circuit court entered an order striking appellant's counterclaim and third-party complaint. On appeal, appellants argued the circuit court erred in granting the motion to strike without giving appellants an opportunity to respond. Rule 6 of the Arkansas Rules of Civil Procedure provides in part that "a written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 20 days before the time specified for the hearing. Any party opposing a motion shall serve a response within 10 days after service of the motion. The movant shall then have 5 days after service of the response within which to serve a reply. The time periods set forth in this subdivision may be modified by order of the court and do not apply when a different period is fixed by these rules, including Rules 56(c) and 59(d)." In the present case, there was no order entered modifying the time periods. Appellee filed a motion to strike the counterclaim and third-party complaint. The circuit court entered an order the next day, striking the counterclaim and third-party complaint upon finding that they were untimely filed. There was no hearing or time to respond before the circuit court's ruling. Therefore, the circuit court erred in striking the appellant's counterclaim and third-party complaint. (James, P.; 60CV-21-3345; 5-10-23; Klappenbach, N.)

*Thomas v. Gray*, 2023 Ark. App. 281 **[complete attempt at service; motion to dismiss]** The circuit court granted appellees' motion to dismiss with prejudice after it found that no service was made. On appeal, appellants argued the circuit court should have held that appellees were barred from presenting the no-service arguments, or alternatively, that the circuit court should have dismissed without prejudice on the facts. If a plaintiff sues within the limitation period and, in the time Rule 4(i) of the Arkansas Rules of Civil Procedure requires, completes good service on the defendant, then the suit commences under Rule 3 of the Arkansas Rules of Civil Procedure, and the limitations clock stops. These are so-called "good service" cases. If, however, the plaintiff neither completes nor attempts service in that time, then the suit must be dismissed, and the

limitations clock keeps ticking. These are called “no service” cases. The rule for distinguishing a “completed attempt at service” from “no service” is this: If a plaintiff should reasonably believe after service is attempted that at least defective service is complete, then there has been a “completed attempt at service”—and the action commences—even if, from the defendant’s perspective, “no service” has occurred. Here, the process server could not testify with any certainty whom he had served on one day nearly three years earlier. The process server did not ask for their identification or see any name tags. But he also said he took the papers to hospital administration and told them whom he needed to serve. The administration told him to go to the back side of the ER, and they would send the defendant out. The process server handed the papers to a man who came out. A woman in hospital administration said she was calling the defendants in to get the papers. The process server handed her the other two sets of papers and stood there until she handed them off to people who came in to receive them. In the circumstances the process server described, he could reasonably have concluded that the three people who accepted process were the defendants and that service was complete. Under current precedent, the appellate court held this case fell into the “completed attempt” line of cases, not the “no service” cases that the circuit court applied. Consequently, the savings statute applies, and the circuit court’s dismissal should have been without prejudice. (Harrod, L.; 25CV-18-69; 5-17-23; Harrison, B.)

*Angel v. Helena Renaissance I, L.P.*, 2023 Ark. App. 297 [**landlord tenant dispute**] The circuit court granted summary judgment in favor of the appellees. On appeal, appellants argued the circuit court erred in granting summary judgment. [**summary judgment**] The appellants first argue that the circuit court erred when it determined that the testimony of a medical expert was necessary to raise a question of fact regarding “specific causation” or, in other words, whether the tenants’ exposure to mold caused the illnesses that they claimed of in their complaint. Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. The object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried. A circuit court errs when it grants summary judgment on a breach of-contract claim because proof of causation was lacking. Nominal damages may be recovered for a breach of contract unaccompanied by any actual damage. Here, appellants claims were based on the appellees’ alleged failure to perform the duties they assumed under the lease agreement. The appellants’ main complaint was that the appellees’ poor maintenance of the building exposed them to toxic levels of mold, causing them to suffer allergic reactions. The appellate court held that the possibility of an award of nominal damages was sufficient to preclude summary judgment in this case. Therefore, the circuit court erred in granting summary judgment to appellees. [**mold and mildew addendum**] Unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute, be compelled to do so or be held liable for repairs. A landlord may contractually agree to repair or maintain leased premises, however, and that is what the lease agreement provides. Exculpatory clauses must also have the essential elements of a contract, including (1) competent parties; (2) subject matter; (3) legal consideration; (4) mutual agreement; and (5) mutual obligations. Mutuality of obligation means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus,

neither party is bound unless both are bound. Here, in reviewing the lease agreement, the appellate court agreed with the tenants that the appellees expressly assumed the duty to repair mold conditions in the mold and mildew addendum itself, and the exculpatory clause, which purports to release the appellees from liability under “any legal theory,” is unenforceable. Specifically, the addendum provided that a tenant must notify the landlord immediately of any circumstances involving excess moisture or water leakage and of any mold growth on surfaces inside the unit that could not be removed by the tenant. Additionally, the tenants agreed to allow the landlord to enter the unit to inspect and make any necessary repairs. The exculpatory clause in the mold and mildew addendum was sweeping in its scope, and it disclaimed liability for more than negligent conduct. It provided that the tenant shall not seek to hold the landlord responsible under any legal theory for any damages whatsoever caused by mold or any other agent. A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract. Therefore, the appellate court held that the circuit court erred when it determined that the tenants waived the appellees’ liability for the alleged breaches of the covenants in the lease. **[quiet enjoyment]** Every residential lease has an implied covenant of quiet enjoyment. Arkansas law does not provide much guidance on whether constructive eviction is necessary for a lessee to maintain a cause of action for breach of the covenant of quiet enjoyment in a lease. Here, the circuit court broadly granted summary judgment on all the tenants’ claims because there were some tenants still in the apartments and no evidence was presented to rise to an action on the quiet enjoyment issue. The circuit court erred in treating this case as though it was filed as a class action and should address each tenant’s claim individually. **[nuisance]** Arkansas defines a nuisance as conduct by one landowner that unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property that disturbs the peaceful, quiet, and undisturbed use and enjoyment of a nearby property. Here, the definition did not include the type of nuisance claim that the tenants advanced in the complaint, in which they alleged nuisances affecting their use and enjoyment of the same property owned by the offending landowner. The appellate court’s view is in accord with other jurisdictions that have held that a tenant cannot raise a cognizable nuisance claim against his or her landlord. Therefore, because Arkansas defines a private nuisance in the same manner as the vast majority of other courts, and that definition has been persuasively applied to exclude tenants’ nuisance claims against their landlords, the circuit court did not err in dismissing appellants’ nuisance claims. (Proctor, R.; 54CV-18-216; 5-24-23; Virden, B.)

*Hall v. Arkansas State Highway Commission*, 2023 Ark. App. 301 **[counterclaim; timeliness]** The circuit court entered an order dismissing appellants’ counterclaim with prejudice upon finding it untimely under Rule 12(a)(1) of the Arkansas Rules of Civil Procedure and denied their motion for reconsideration. On appeal, appellants argued that their counterclaim was a permissive counterclaim that was timely and properly brought pursuant to Rules 13 and 15 of the Arkansas Rules of Civil Procedure. When a pleader fails to assert a counterclaim, he shall be entitled to assert such counterclaim by amended or supplemental pleading subject to the requirements and conditions of Rule 15 of the Arkansas Rules of Civil Procedure. A claim that either matured or was acquired by the pleader after filing his pleading shall be presented as a counterclaim by

supplemental pleading, provided that if such counterclaim matures or is acquired after all issues are joined, it may be asserted by the pleader in a separate action. With the exception of pleading the defenses mentioned in Rule 12(h)(1) of the Arkansas Rules of Civil Procedure, a party may amend his pleadings at any time without leave of the court. A party may at any time without leave of court file a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment or a supplemental pleading, the court may strike such amended pleading or grant a continuance of the proceeding. A compulsory counterclaim does not have to be filed with the defendant's answer; instead, it is compulsory in the sense that it must be raised within the pending action. Here, appellee filed an eminent-domain action against appellants in 2011. The case was eventually set for trial in November 2021. In October 2021, appellants filed a counterclaim for declaratory judgment. The circuit court found that appellants' counterclaim was untimely pursuant to Rule 12(a)(1) of the Arkansas Rules of Civil Procedure. Whether the counterclaim existed at the time appellants filed their answer, as contended by appellee, or whether it was acquired thereafter, as argued by appellants, Rule 13 of the Arkansas Rules of Civil Procedure permitted its filing beyond the thirty days appellants had to file their answer. (Meyer, H.; 12CV-11-190; 5-24-23; Klappenbach, N.)

*Wilmington Sav. Fund Soc'y v. Smith*, 2023 Ark. App. 326 **[tolling; statute of limitations]** The circuit court entered summary judgment in favor of appellees, ruling that appellant's efforts to foreclose on a note and mortgage that appellee executed in 2007 were barred by the five-year statute of limitations applying to actions to enforce written obligations, duties, or rights. On appeal, appellant argued the circuit court erred when it determined the statute of limitations had not run in this case. In *Michell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943) a bank exercised its option to accelerate the entire indebtedness when two notes became delinquent in 1931 and filed two suits for foreclosure. Another bank obtained judgment liens on the tracks of land and eventually assigned its judgments to two other parties the following year. The circuit court dismissed the original foreclosure suits without prejudice seven years after they were filed in 1938. Two years later the bank again filed foreclosure suits on the notes alleging the delinquencies occurred in 1939. The supreme court held that when the acceleration clause is of an optional type, then the creditor has the privilege of declaring the acceleration and likewise waiving the acceleration. The right to accelerate the indebtedness is exercised by the unilateral act of the creditor; and likewise, the right to waive the acceleration may be exercised by the unilateral act of the creditor, in the absence of any claim or showing that the debtor has changed position because of the acceleration. Because the bank waived its acceleration, and there was no allegation or showing that any of the parties changed position by reason of the acceleration being declared, the mortgages were reinstated for all purposes, and with all provisions in full force and effect. The mortgagee would have the right on subsequent default to avail itself again of the right of acceleration. In *Dunnington v. Taylor*, 198 Ark. 770, 131 S.W.2d 627 (1939) the supreme court held that the payment of the insurance premiums by the mortgagee was sufficient to toll the statute of limitations as to the entire debt. For years, the statute of limitations in Ark. Code Ann. § 16-56-

111(a) provided that actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward. The General Assembly amended the statute in 1989 to also say that the cause of action shall be deemed to have accrued at the time when the creditor first has the legal right to demand payment in full of the entire unpaid principal of the instrument, but that partial payment or written acknowledgment of default shall toll this statute of limitation. There was no indication that the General Assembly, by adding the foregoing tolling provision, intended to overrule *Mitchell*, *Dunnington*, and all other judicially recognized tolling principles. Therefore, the appellate court held that the circuit court erred to the extent that it found that the 1989 amendment overruled *Mitchell* and *Dunnington*. Here, the maturities in the debt that occurred when the bank exercised its option to accelerate in May and December 2010 were extinguished when the bank waived the accelerations by filing the notices of cancelation in July 2010 and February 2011. The note did not mature again until appellant exercised the option to accelerate in 2016. Accordingly, appellant's complaint for foreclosure, which it filed three years later, in June 2019, was not barred by the five-year statute of limitations. Therefore, the circuit court erred in entering summary judgment in favor of appellees. (Compton, C.; 60CV-16-1605; 5-31-23; Gladwin, R.)

## CRIMINAL

*Stanton v. State*, 2023 Ark. 81 **[attorney disqualification]** The circuit court entered an order disqualifying appellant's defense attorney as his counsel. On appeal, appellant argued that the circuit court's disqualification of counsel violated his right to counsel of his choice. Disqualification of an attorney is an absolutely necessary measure to protect and preserve the integrity of the attorney-client relationship; yet it is a drastic measure to be imposed only where clearly required by the circumstances. *Weigel v. Farmers Ins. Co.*, 356 Ark. 617, 158 S.W.3d 147, 150 (2004) established a three-prong test for considering whether Rule 3.7 of the Arkansas Rules of Professional Conduct prohibits an attorney from representing a client: (1) that the attorney's testimony is material to the determination of the issues being litigated; (2) that the evidence is unobtainable elsewhere; and (3) that the testimony is or may be prejudicial to the testifying attorney's client. Where there was no motion to disqualify counsel or any consideration of the *Weigel* factors, we have held that a circuit court's decision to impose the drastic measure of disqualifying counsel constituted an abuse of discretion. The burden of proof regarding the disqualification of counsel rests with the moving party. Here, the Supreme Court held that the circuit court erred by relying on an earlier disqualification decision from appellant's second trial and refusing to allow a hearing on the issue. Additionally, the State failed to present any evidence or argument regarding the need for appellant's defense attorney to act as a witness at a new trial. Therefore, the circuit court erred in disqualifying appellant's attorney. (Haltom, B.; 46CR-15-503; 5-11-23; Wynne, R.)

*Lucas v. State*, 2023 Ark. App. 306 **[sufficiency of evidence]** A jury found appellant guilty of one count of possession of methamphetamine with purpose to deliver and one count of possession of

a Schedule VI controlled substance (marijuana). On appeal, appellant argued the circuit court erred in denying his motions for directed verdict. Possession may be established by proof of actual possession or constructive possession. Constructive possession can be inferred when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. However, while constructive possession may be established by circumstantial evidence when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. Circumstantial evidence is evidence from which a fact may be inferred. Here, officers came into contact with appellant at his father's house. Appellant was asleep in a lawn chair under the carport when officers arrived. There was ultimately a search of "a vehicle that belonged to the defendant," which was a statement used in part of the State's questioning, not the officer's answer. The truck where the drugs were found was about twenty yards away from where appellant was sleeping, where it was parked close to the road with the windows down. There were no keys to the truck in the vehicle or on the appellant's person, and the officer did not run the tags on the truck. The State's only other witness, a forensic chemist from the Arkansas State Crime Laboratory, testified that the substance found in the floorboard of the truck was methamphetamine and did not test a "green vegetable material" found on the passenger seat. The State's case was premised entirely on circumstantial evidence. Neither of the State's two witnesses testified that the contraband was found in a place immediately and exclusively accessible to appellant and subject to his control. There was no evidence regarding the ownership of the truck. The officer testified that he "just knew" it to be appellant's truck because he had seen him driving it before. There was no evidence concerning when appellant last drove the vehicle or even whether he was the last person to have driven the vehicle. The truck was found unlocked, and there was no evidence that the keys were ever located. Thus, there was no evidence that the truck –and, concomitantly, the drugs found therein—were in appellant's sole, exclusive possession. Therefore, the evidence was insufficient to show that appellant constructively possessed the drugs. (Puryear, C.; 02CR-21-135; 5-24-23; Thyer, C.)

*Jones v. State*, 2023 Ark. App. 310 [**jury-trial waiver**] After a bench trial, the circuit court found appellant guilty of one count each of aggravated robbery, first-degree battery, theft of property, and the enhancements for employing a firearm in commission of the crimes. On appeal, appellant argued the circuit court erred in failing to obtain a valid jury-trial waiver before proceeding to a bench trial. The constitutional right to a jury trial is inviolate, and a party may waive the right only in the manner prescribed by law. Should a criminal defendant desire to waive the right to a jury trial, the waiver must be expressly made in writing or in open court, where the proceedings must be preserved. The transcript of appellant's trial established that a circuit court judge, not a jury, sat as the trier of fact. The record on appeal contained no jury-trial-waiver form. Nor did the record on appeal contain any indication that appellant waived his right to be tried on felony charges by a jury. Therefore, the circuit court erred in not obtaining a valid jury-trial waiver. (Compton, C.; 60CR-20-4172; 5-24-23; Murphy, M.)

*Franklin v. State*, 2023 Ark. App. 318 [**DWI; mistrial**] Appellant was convicted by a jury of driving while intoxicated (DWI) and refusal to submit to a chemical test. On appeal, appellant argued that the circuit court erred when it denied his two separate motions for a mistrial. 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. There are instances, however, where a statement is so prejudicial that an admonishment could never cure the prejudicial effect. The results of a portable breath test (PBT) are not admissible to prove a person is guilty of driving while intoxicated. Here, an officer testified that appellant's PBT registered 0.17 percent, and acknowledged that he was aware the result was inadmissible. The prejudicial testimony was then compounded by another officer's subsequent mention of the PBT, bringing the PBT results to the jury's attention again. The jury was also specifically instructed that the defendant is guilty if his blood alcohol was 0.08 percent or more. While an admonition to the jury may in certain circumstances cure a prejudicial statement, the appellate court held that it could not unring the bell that had been rung here. Therefore, the circuit court erred in not granting appellant's motions for a mistrial. (Ramey, J.; 64CR-21-75; 5-31-23; Virden, B.)

## PROBATE

*Spurlock v. Est. of Ladd*, 2023 Ark. App. 253 [**recusal; substantial compliance; fiduciary duty**] The circuit court entered an order distributing the estate of the appellee's mother. On appeal, appellant argued: (1) the circuit court erred in denying his motion to recuse; (2) the circuit court erred in finding that the inventories and accountings filed by the estate's administrator were substantially compliant with the probate code; and (3) the circuit court erred in finding that the estate's administrator had not breached his fiduciary duty. [**recusal**] Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise. In order to determine whether there has been an abuse of discretion, the appellate court reviews the record to determine if prejudice or bias was exhibited. The fact that the circuit court ruled against the appellant is not sufficient to demonstrate bias. Arkansas Code of Judicial Conduct Rule 2.11 governs recusal. It mandates that a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. Here, after joining a hearing by phone, appellant stated that could not make a show-cause hearing because of a flight delay when he had not purchased an airplane ticket. Appellant provided a boarding pass, and the circuit court instructed his assistant to contact the airline. The assistant was told that the ticket provided by appellant was for a flight his wife had taken several months before. The circuit court held the appellant in contempt. The show-cause hearing at issue was a collateral matter that did not involve the final issue in the Estate case. Appellant had disobeyed an order of the court by not providing weekly status updates. According to the contempt order, the circuit court relied on appellant's delay in carrying through with the purchase of the farm and his failure to report the loan status when holding him in contempt, rather than the conversation with the airline or anything else that happened during the show-cause hearing. Although the circuit court included extraneous



comments in the orders following the show-cause hearing, those two phrases do not rise to the level of requiring recusal due to a personal dispute. Appellant had not shown actual bias or prejudice, and the circuit court's comments did not evidence a personal dispute that would require the Judge to recuse himself. **[substantially compliant]** Within two months after being appointed, the administrator of an estate must file an inventory of all property owned by the decedent at the time of death, which includes a description of the property and the administrator's appraisal of the fair market value. The administrator must correct any errors or omissions by filing a supplemental inventory or in a filed accounting. No reversible error exists when there is substantial compliance with the statutory requirements, no evidence of wrongdoing, and there is no prejudice to the heirs. Here, the appellant did not identify any specific prejudice that resulted from the allegedly deficient inventory and accountings. Additionally, appellant never argued any specific deficiency in the lists of payments. Appellant had information about all of the Estate's property and failed to pursue alternative valuations. The appellate court held the circuit court did not err in its order declaring the inventories and accountings to be substantially compliant. **[fiduciary duty]** For a breach of fiduciary duty to be grounds for reversal, the appellant must demonstrate prejudice. An executor of an estate occupies a fiduciary position and must exercise the utmost good faith in all transactions affecting the estate and may not advance his own personal interest at the expense of the heirs. Here, the specific instances appellant points to did not qualify as self-dealing or a breach of appellee's fiduciary duty. In reviewing the record, the appellate court was not left with a definite and firm conviction that a mistake was committed. Therefore, the circuit court did not err in entering its orders. (Ritchey, D.; 16LPR-15-35; 5-3-23; Gruber, R.)

*Alexis v. Ashmore*, 2023 Ark. App. 283 **[adoption; best interest of the child]** The circuit court granted appellee's petition to adopt Minor Child, who is appellant's biological child, and found that appellant's consent to the adoption was not required. On appeal, appellant argued the circuit court erred in finding that he failed to communicate or support the child without justifiable cause for at least one year and that the adoption was in the child's best interest. **[consent to adoption]** A person who wishes to adopt a child must prove by clear and convincing evidence that consent is unnecessary. Clear and convincing evidence is defined as that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established. Arkansas Code Annotated section 9-9-207(a)(2) provides that a parent's 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. "Failed significantly" does not mean "failed totally." It only means that the failure must be significant, as contrasted with an insignificant failure. Justifiable cause means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. Here, appellee and appellant were married and had one child during their marriage. They separated in 2014 and appellant moved to Canada in 2016. The appellees were married in 2016. In 2020 appellees petitioned for the child's adoption by the child's stepfather, asserting that he had assumed the role of the father to the child for more than four years. Appellant failed to pay his court-ordered child support, and an agreed order established his arrears

of \$26,684.77 and the circuit court found that he had the ability to pay pursuant to their order but failed to do so. That adjudication proved that appellant had no justifiable cause for the arrears. Additionally, appellant never paid more than 34 percent of his child-support obligation from 2016 to 2019. Further, there was no argument that appellant supported the child in other ways by providing clothes, books, school supplies, a cell phone, or other necessary items. The appellate court held that the circuit court did not clearly err in finding that appellant had significantly failed to provide care and support for a period of at least one year without justifiable cause. **[best interest]** Here, the child's stepfather was a consistent, dependable presence in the child's life and cared for the child since he was a toddler. The adoption served to legally recognize their relation and ensure continued stability and care for the child. The appellate court held that the circuit court did not clearly err in holding that the adoption was in the child's best interest. (Huckabee, S.; 43PR-20-429; 5-17-23; Harrison, B.)

*Rogers v. Ritchie*, 2023 Ark. App. 288 **[guardianship; expenditures]** The circuit court entered an order which disallowed certain expenditures claimed by appellant, in her capacity as the guardian of the ward, her husband, who is now deceased, as allowable expenditures of the guardianship. On appeal, appellant argued that the circuit court err in disallowing (1) one-half of the expenditures for maintenance of both the household in which the ward and appellant lived and their automobile; (2) all expenditures for property and casualty insurance for the residence in which the ward and guardian lived; (3) all life insurance premiums continued during the term of the guardianship; and (4) \$912.40 of storage-unit rent paid through the ward's business account. **[maintenance expenditures]** The appellate court held the circuit court erred in disallowing the expenditures for appellant's benefit that it found would normally be reasonable and proper on the basis that the guardianship estate held funds taken from the ward's judgment creditors. As guardian, appellant had a duty to care for and maintain the ward from the guardianship estate pursuant to Ark. Code Ann. § 28-65-301(a)(1). Appellant was entitled to credit for expenditures, including those for her benefit, that are reasonable, necessary, and proper for the ward's care and maintenance. **[property and casualty insurance]** The circuit court mistakenly concluded that the insurance premiums were life insurance premiums. However, the insurance premiums were property and casualty insurance. Additionally, the "Stipulated Objections and Responses" stated that the premiums were for property and casualty insurance on the ward and appellant's personal residence. Therefore, the circuit court erred in disallowing all expenditures for property and casualty insurance for the residence in which the ward and guardian lived. **[life insurance]** The appellate court held that the circuit court erred in finding that the life insurance premiums should be disallowed on the basis that there is no benefit to the guardianship or the ward's estate. The policies on appellant's life would have directly benefited the ward had she predeceased him because he would have needed those proceeds for his care. Moreover, appellant testified that the ward had purchased and maintained the life insurance policies on his life to provide for her in the event of his death and that he believed that having life insurance was absolutely necessary. Thus, the circuit court erred in disallowing the life insurance premium payments. **[reduction of storage-unit rent]** The circuit court also found that the storage-unit rent was reasonable and proper for the ward's care and maintenance; however, it found that the amount allowed should be reduced by \$912.40, which

represented funds paid from the ward's business account. However, the rent was already included in the figures appellant provided in her accountings and thus should not be a further deduction. Therefore, the circuit court erred in its disallowance of that amount as well. (McGowan, M.; 60PR-04-792; 5-17-23; Gladwin, R.)

*Rogers v. Kemp*, 2023 Ark. App. 302 **[summary judgment]** The circuit court granted summary judgment to appellee on her complaint alleging that appellant breached multiple duties as the sole trustee of two trusts. On appeal, the appellant argued the circuit court erred in granting summary judgment in favor of appellee. Summary judgment may be granted only when there are no genuine issues of material fact to be litigated. **[statute of limitations]** The one-year statute of limitations for an action against a trustee for breach of trust begins to run after a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. Here, although appellant argued a letter disclosed a breach of duty, she did not make an argument that she informed appellee of the time allowed for commencing a proceeding, which is required by the statute. As a result, the statute of limitations did not begin to run with that letter. **[intent]** The cardinal rule in construing a trust is that the intention of the settlor must be ascertained. This intention is determined by viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. When the terms of a trust are unambiguous, it is the court's duty to construe the written instrument according to the plain meaning of the language employed. Extrinsic evidence may be received on the issue of the testator's or grantor's intent if the terms of the will or trust are ambiguous. Here, looking at the four corners of the deceased's trust as amended, the language used was unambiguous. Because the language of the deceased's trust was unambiguous, no genuine issues of material fact remained. Therefore, the circuit court did not err in granting appellee's motion for summary judgment. **[motion to compel]** The information in the motion to compel that appellant sought related to her defenses only would have been considered if the court determined the language of deceased's trust was ambiguous. Because the language of the trust was unambiguous the circuit court did not err in denying the motion to compel as moot. **[accounting]** Arkansas Code Annotated § 28-73-813 provides in part that a trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Here, the appellate court found the order directing appellant to provide an accounting of the deceased's trust was proper because appellant may be responsible to appellee for further amounts, including attorney's fees. **[interest]** From the outset of the case, appellee requested that appellant be ordered to transfer \$250,000 plus interest at 6 percent per annum from the date of the deceased's death. Here, appellee argued that the circuit court's order did not specifically mention prejudgment or post-judgment interest; rather, the interest rate is part of the order directing appellant to comply with the deceased's trust, which states that the trustee must transfer \$250,000, valued at the day of grantor's death. Appellant never argued

a specific rate should be applied. The appellate court held that under the facts, the circuit court did not err in ordering the 6 percent interest. (Welch, M.; 60CV-20-1097; 5-24-23; Gruber, R.)

*Est. of Johnson v. Parker-Green*, 2023 Ark. App. 305 [**heirs; action commenced**] The circuit court entered an order finding appellee to be an heir of the deceased. On appeal, appellants argued that appellee, as the deceased illegitimate daughter, failed to satisfy the requirements of Ark. Code Ann. § 28-9-209 that would allow her to inherit from the estate. Specifically, the issue on appeal was twofold –whether within 180 days of the deceased’s death (1) an action was commenced in a court of competent jurisdiction and (2) at least one of the conditions of section 28-9-209(d)(1)–(6) was satisfied. [**action commenced; competent jurisdiction**] Arkansas Code Annotated § 28-9-209 requires that an action be commenced, or a claim asserted, within 180 days of the death of the father. A court of competent jurisdiction is a court that has both subject-matter and personal jurisdiction over the claim. The circuit court has subject-matter jurisdiction over the administration, settlement, and distribution of decedents’ estates and the determination of heirship. This includes the distribution of decedents’ estates without administration. Arkansas Code Annotated § 28-41-101(a)(1)(D) requires that an affidavit for collection of a small estate be filed with the probate clerk of the circuit court of the county of proper venue for administration. Here, appellee was the deceased’s illegitimate child. She could inherit from her father only if she satisfied the requirements of Ark. Code Ann. § 28-9-209(d). Appellee’s father died on November 23, 2017; thus, to be timely, an action had to have been commenced or a claim filed by May 22, 2018. Appellee filed a letter of objection with the circuit court on March 22, 2018, asserting that the deceased was her biological father; thus, she filed a claim against her father’s estate within 180 days of his passing. Appellants filed an affidavit for the collection of small estate with the Pulaski County Circuit Court, probate division, and the case was assigned a docket number. At the time the case was open and at the time appellee filed her claim, the circuit court had subject-matter jurisdiction over the estate because Ark. Code Ann. § 28-41-101 requires that the small estate be filed with the probate division of the circuit court. As such, the circuit court was a court of competent jurisdiction in which the claim could be filed. [**statutory condition**] Only one of six statutory conditions must be met, in addition to the claim-filing requirement, for an illegitimate child to inherit under Ark. Code Ann. § 28-9-209. Here, in a letter, the deceased granted appellee power of attorney for his legal issues while he was in the hospital. The letter was executed so that third parties could rely on it, and it clearly identified appellee as his “daughter.” The handwritten power of attorney at issue in this case fulfilled one of the conditions under Ark. Code Ann. § 28-9-209—that the man made a written acknowledgment that he was the father of the child. Therefore, the circuit court did not err in determining that appellee satisfied the requirements of Ark. Code Ann. § 28-9-209. (Reif, M.; 60PR-20-1967; 5-24-23; Thyer, C.)

*Hetrick v. Estate of Sams*, 2023 Ark. App. 338 [**breach of fiduciary duty; guardianship**] The circuit court entered a judgment finding that appellant breached her fiduciary duty as guardian of her mother. Appellant served as both guardian of her mother and co-trustee with her mother over a trust benefiting her mother during her lifetime and of which appellant was the sole beneficiary

at her mother's death. On appeal, appellant argued that the circuit court erred in (1) finding that she breached her fiduciary duty as guardian when she transferred her mother's personal funds to the trust; (2) finding that the transfer of her mother's personal funds to the trust required a court order; and (3) calculating damages. **[fiduciary duty]** The duty of a guardian is to exercise due care to protect and preserve the ward's estate. The guardian of the estate of an incompetent person does not become the alter ego of the ward and has no authority to change an act by which the ward exercised personal discretion before becoming incompetent. Self-dealing is a breach of fiduciary duty, even when it is done innocently and without intent. Here, the circuit court found that appellant breached her fiduciary duty as the ward's guardian when she liquidated all of the ward's personal accounts over a nineteen-day period and deposited those funds into a trust that listed appellant as the sole beneficiary. The ward expressly provided in her will that her assets upon her death were not to be placed into the trust and instead to be divided among her grandson and nephew. The will also expressly referenced the trust and appellant, expressly excluding appellant from taking under the will because she had been provided for through the trust. The evidence clearly showed that the ward and the trust sought to benefit different people. For all these reasons, the appellate court held that the circuit court did not err in finding appellant's actions in transferring the ward's personal funds to the trust constituted a breach of appellant's fiduciary duty to the ward. **[court order transfer]** Arkansas Code Annotated § 28-65-308(b) provides that upon a showing that an action would be advantageous to the ward and his or her estate, the court may authorize the guardian to make gifts and disclaimers on behalf of the ward. The Supreme Court has held there is an exception to this statute when the guardian makes donations or expenditures that are consistent with the ward's previous donations and expenditures. Here, appellant failed to obtain court approval before transferring the ward's funds. Additionally, appellant presented no evidence that the ward had been making transfers from her personal accounts into the trust. The ward had opened personal bank accounts instead of depositing her assets into the trust before she became incapacitated. Therefore, the circuit court did not err in finding that appellant was required to obtain court authorization to make gifts into the trust on the ward's behalf. **[damage calculations]** Appellant contended that the ward withdrew certain trust funds and deposited them into her personal accounts and asked the appellate court to reduce the award by the amount withdrawn. Here, appellant failed to prove that the source of the transferred funds was the trust. After reviewing the record, the appellate court was not left with a firm conviction that the circuit court erred in assessing damages in this case. (McCormick, D.; 15CV-18-108; 5-31-23; Wood, W.)

## DOMESTIC RELATIONS

*Saul v. Saul*, 2023 Ark. App. 251 **[custody; property division; contempt]** The circuit court entered a divorce decree that divided marital property, awarded appellant alimony for eighteen months, gave legal and physical custody of the parties' child to appellee, gave appellant visitation rights, and awarded appellee attorney's fees and costs against appellant for her contemptuous behavior. On appeal, appellant argued the circuit court erred by not awarding joint custody, by not "piercing the corporate veil" of appellee's two premarital businesses: and by holding her in contempt and awarding appellee attorney's fees and costs against her. **[custody]** Arkansas law is

well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. Here, the circuit court specifically found that it was in this child's best interest child that appellee be awarded legal and physical custody. Additionally, the circuit court considered the state's custody statute and its policy that an award of joint custody is favored. The appellate court found that appellant's untruthfulness and personality disorder included a degree of maliciousness that could not be in her daughter's best interest. This case did not display mere gamesmanship or petty disagreements that can exist in a joint custody arrangement. The evidence showed that appellant had substantial mental issues, and her malevolent actions toward appellee showed that long-term coparenting was unlikely to be successful. Therefore, the circuit court did not err in granting custody to appellee. **[piercing corporate veil]** In special circumstances, the court will disregard the corporate facade when the corporate form has been illegally abused to the injury of a third party. Here, there was no evidence to prove that the corporate form was illegally abused, and the companies were undeniably premarital. The money that was used for private purposes from the companies' income was repaid to them at the end of the year. The appellate court found that the circuit court's findings regarding appellee's premarital businesses were erroneous. **[contempt]** Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained. In certain cases, a process for contempt may be used to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct. The appellate court held that under the facts and circumstances of the case, the circuit court did not abuse its discretion by granting appellee's petition for attorney's fees and costs. (McCain, G.; 58DR-19-281; 5-3-23; Klappenbach, N.)

*Maner v. Maner*, 2023 Ark. App. 256 **[Admin. Order 14; Admin Order 16; Admin Order 10; child support chart]** The circuit court ordered appellant to continue paying \$7,000 a month in child support for his two children with appellee. On appeal, appellant argued the circuit court lacked authority to enter the child support order, and the circuit court erred by failing to apply the chart-based presumptive amount of child support. **[authority]** Arkansas Supreme Court Administrative Order No. 14 regulates the administration of the circuit courts in Arkansas. Subsection 3 of that administrative order requires each judicial district, by majority vote, to adopt an administrative plan for the assignment of cases; subsection 4 provides that each judicial district's administrative plan be approved by the supreme court. Here, the Fourth Judicial District's administrative plan, effective January 1, 2022, specifically provided, "On December 31, 2021, to implement the above redistribution of the pending Division 7 domestic relations cases, [the Circuit Judge] will recuse from all pending domestic relations cases that do not have related order of protection cases. . . ." All of the sections of Administrative Order No. 14 must be read together, and subsection (3)(c)(1) provides that there must be a plan for recusals, and the recusal process shall be consistent with the requirements of Administrative Order No. 16. That order provides that a judge recusing himself or herself from a case shall file an order of recusal; then the case-management system will randomly assign the case to another judge. Therefore, the administrative plan did not automatically recuse the Circuit Judge from the present case; by the mandates of

Administrative Order No. 16, she was not recused until she signed an order of recusal, and that did not occur until after she entered the order now on appeal. Thus, the circuit court had the authority to enter the child support order. **[deviation]** If an order deviates from the child support chart amount, the order must explain the reason(s) for the deviation in writing, considering all relevant factors, including what is in the children's best interest. A deviation from the guidelines should be the exception rather than the rule. When determining whether to deviate from the chart amount, the circuit court should consider the certain factors listed in Ark. Sup. Ct. Admin. Order No. 10. In cases of joint or shared custody, where both parents have responsibility for the children for at least 141 overnights per calendar year, after the parties complete the child-support worksheet, the circuit court may then consider the time the children spend with the payor parent as a basis for adjusting the child-support amount determined on the worksheet. In determining whether to apply an additional credit, the circuit court should consider the amount of disparity between the income of the parties, giving more weight to disparities of less than 20 percent and considering which parent is responsible for the majority of the nonduplicated fixed expenditures, i.e., routine clothing costs, costs for extracurricular activities, school supplies, and any other nonduplicated fixed expenditures. In the present case, the appellate court held that all of the factors considered by the circuit court, with the exception of the "other factors" catch-all provision, were either neutral or favor a downward deviation in child support. Additionally, there was no consideration of the fact that the parties shared true joint custody of their sons and, the circuit court abused its discretion in considering appellee's needs in setting child support. Therefore, the circuit court erred in its deviation from the child support chart amount. (Taylor, J.; 72DR-13-1985; 5-3-23; Barrett, S.)

*Corter v. Corter*, 2023 Ark. App. 266 **[custody; attorney's fees]** On appeal, appellant argued the circuit court erred in its custody determination and awarding attorney's fees. **[custody]** The primary consideration in child custody cases is the welfare and best interest of the child, with all other considerations being secondary. Special deference is given to the circuit court's superior position to evaluate the witnesses, their testimony, and the children's best interest. Here, appellant physically abused appellee in front of the children. The circuit court found that appellant was the aggressor, supporting the legislative directive that it is not in a child's best interest to be in the custody of an abusive parent. Therefore, the circuit court did not err in awarding custody to appellee. **[attorney's fees]** A circuit court has the inherent power to award attorney's fees in domestic-relations proceedings. Here, appellant did not cite any legal authority in support of his argument that the circuit court's award was unwarranted. Therefore, the circuit court did not err in directing appellant to pay for appellee's attorney's fees. (McSpadden, D.; 32DR-20-155; 5-10-23; Abramson, R.)

*Cameron v. Cameron*, 2023 Ark. App. 278 **[change of custody; material change in circumstance]** The circuit court entered an order dissolving the parties' joint-custody arrangement and awarded the sole custody of the parties' children to appellee, subject appellant's visitation. On appeal, appellant argued that the change of custody was unsupported and not in the children's best interest. To modify a custody decree, the circuit court must apply a two-step process: first, the

court must determine whether a material change in circumstances has occurred since the divorce decree was entered; second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. Here, the court found a material change occurred when appellant was arrested for felony battery in front of her children for physically attacking the children's stepmother. Regarding best interest, the circuit court found that appellee was the parent with the most appropriate behavior and the parent who would foster relationships between the children and the other parent. The appellate court held that the circuit court's best interest finding was supported by the record. Therefore, the circuit court did not err in awarding sole custody of the parties' children to appellee. (Thomason, M.; 70DR-19-388; 5-10-23; Murphy, M.)

*Richardson v. Richardson*, 2023 Ark. App. 279 [**alimony; modification**] The circuit court entered an order denying appellant's motion to modify alimony. On appeal, appellant argued the circuit court abused its discretion by refusing to reduce his alimony obligation to appellee. 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 burden was on appellant to show that circumstances had changed resulting in the need for modification of alimony, and he failed to meet that burden. Appellee testified that her income was not enough to cover her expenses even though she received the alimony in addition to her income from work. Although appellant contended that his income had decreased, the circuit court found that it had increased and that his spending did not reflect a reduction in income. Therefore, the circuit court essentially found that appellee had a need for alimony, appellant still had the ability to pay that amount. Thus, the circuit court did not abuse its discretion by denying appellant's motion to modify alimony. (Blatt, S.; 66FDR-12-21; 5-10-23; Brown, W.)

*Huerta v. Delgado*, 2023 Ark. App. 304 [**UCCJEA; subject-matter jurisdiction**] The circuit court dismissed appellant's divorce, paternity, and child-custody complaint for lack of subject-matter jurisdiction. On appeal, appellant argued that the circuit court erred in finding that no grounds for jurisdiction under the Uniform Child Custody Jurisdictional Act (UCCJEA) existed and failed to properly exercise its discretion to determine the extent or significance of the children's connections with this state. When a state has adopted a version of the UCCJEA, jurisdiction over the issue of custody is determined by application of the Uniform Act, even if jurisdiction over the dissolution action is undisputed. All cases that require a child-custody



determination that may involve other jurisdictions require the circuit court to undergo an analysis under the UCCJEA to determine the appropriate forum. Arkansas Code Annotated § 9-19-201 sets forth the criteria used to determine whether this state has jurisdiction to make an initial child-custody determination. The criteria to be considered in Ark. Code Ann. § 9-19-201(a)(1) is centered initially on the home-state issue. A child must reside in the state for six consecutive months before the commencement of an action for Arkansas to be considered the home state as defined in Ark. Code Ann. § 9-19-102(7). Here, it was shown that the children did not have a home state at the time of the commencement of the divorce, paternity, and child-custody case because the children had not lived in either Arkansas or Mexico for the required six-month period to acquire home-state jurisdiction. Jurisdiction may still be asserted if other criteria set forth in Ark. Code Ann. § 9-19-201 shows that Arkansas is the appropriate forum for the child-custody determination. The appellate court held the circuit court erred by considering only Ark. Code Ann. § 9-19-201(a)(1) and that it did not consider other criteria that may have provided jurisdiction to the court, especially since the evidence showed that neither Mexico nor any other state had exercised jurisdiction over the children and that Mexico, by definition, was also not the home state. When there is no home state identified for the children, the court may consider other criteria to determine if Arkansas is the proper forum to decide the child-custody issues. Thus, because no court had jurisdiction over this proceeding pursuant to Ark. Code Ann. § 9-19-201(a)(1), the circuit court could have exercised jurisdiction under subdivision (a)(2) of the statute if the court found that appellant and the children had a significant connection with this state other than mere physical presence and that substantial evidence was available in this state concerning the children's care, protection, training, and personal relationships. Therefore, the circuit court should have completed the analysis for determining if they had subject-matter jurisdiction. (Galloway, D.; 01SDR-22-79; 5-24-23; Barrett, S.)

*Cathey v. Altazan*, 2023 Ark. App. 314 [**child-support; material change in circumstances**] The circuit court entered an order increasing appellant's child-support obligation. On appeal, appellant argued the circuit court erred in finding a material change of circumstances and in setting the amount of child support. Supreme Court Administrative Order No. 10 mandates that circuit courts use the "Income Shares Model" adopted by the Arkansas Supreme Court, which became effective on June 30, 2020. Administrative Order No. 10 was revised on October 6, 2022; however, the version of Administrative Order No. 10 applicable in this case is an earlier version. Under the revised "Family Support Chart," each parent's share is that parent's prorated share of the two parents' combined income, subject to certain deviations or adjustments. There is a rebuttable presumption that the chart-derived amount is the amount to be awarded. If an order deviates from the chart amount, the order must explain the reason(s) for the deviation in writing, considering all relevant factors, including what is in the children's best interest. In making a deviation, the circuit court should consider the factors listed in Administrative Order No. 10. The Guidelines intend for the court to deviate (in an amount to be determined) on a case-by-case basis when the payor parent has more than 141 nights with a child(ren). [**material change in circumstances**] Arkansas Code Annotated § 9-14-107(a)(1) states that a change in the gross income of the payor or payee parent in an amount equal to or more than twenty percent shall constitute a material change of

circumstances sufficient to petition the court for modification of child support. In determining whether there has been a change in circumstances to warrant an adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. The circuit court's order indicates that it found an increase in income by both parties and an increase in expenses for the children, specifically their daughter's volleyball expenses, as material changes of circumstances warranting modification of child support. The appellate court held that the circuit court did not clearly err in making this finding. **[amount of child support]** The appellate court held that the circuit court did not abuse its discretion in setting the amount of child support. While the method employed by the circuit court specifically applied to split custody in the guidelines at the time, the circuit court was not barred from using this method to determine the child-support amount in this case. Further, there was evidence to support the court's finding that the parties incurred like expenses. (Tucker, C.; 60DR-14-1901; 5-31-23; Harrison, B.)

*Vereen v. Vereen*, 2023 Ark. App. 317 **[modifying custody; contempt]** The circuit court entered orders holding appellant in contempt, modifying custody of her children with her former spouse, and ordering her to pay appellee's attorney's fees. On appeal, appellant argued that the circuit court erred by finding her in willful violation of a court order, and by finding that appellee established a material change in circumstances such that a change in custody was in the children's best interest. **[contempt]** Willful disobedience of a valid order of a court is contemptuous behavior. Before a person may be found guilty of contempt, she must have violated a court order that is definite in its commands and clear as to what duties it imposes. Here, appellee testified that he missed over one hundred visitation days between January and September. The circuit court stated in its order that appellant had control over visitation and that she failed to facilitate visitation and meaningful contact between the children and appellee. The appellate court held that a preponderance of the evidence supported the contempt finding. **[material change in circumstances]** In order to modify a custody decree, the circuit court must apply a two-step process: first, the court must determine whether a material change in circumstances has occurred since the divorce decree was entered; second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. A history of one parent denying visitation to the other parent amounts to a material change in circumstances. Change-of-custody decisions must be based on the particular facts and circumstances of each case in relation to the standard of the best interest of the child. Here, the appellee testified that he missed over one hundred visitation days and that appellant refused to appear for the visitations. The appellate court held that the circuit court did not err by finding that appellee established that a material change in circumstances had occurred such that a modification in custody was in the children's best interest. (Gill, A.; 60DR-10-122; 5-31-23; Abramson, R.)

*Wilkerson v. Durham*, 2023 Ark. App. 327 **[property division]** On appeal, appellant argued the circuit court erred by (1) awarding appellee a portion of the value of appellant's niece's home; (2)

by awarding appellee half of appellant's bonus because it was actually an indebtedness, (3) by not awarding appellant "some" interest in appellee's premarital home; (4) by not awarding appellant "some" interest in appellee's premarital hotrod vehicle; and (5) by not awarding appellant half of the value of appellee's marital IRA. A circuit court has broad powers to distribute property in a divorce to achieve equitable distribution; mathematical precision is not required. The circuit court is required, as the trier of fact, to determine the credibility of witnesses and to resolve conflicting testimony. The division of marital property and an award of alimony are complementary devices that may be utilized by the circuit court to make the dissolution of a marriage financially equitable. The circuit court is vested with a measure of flexibility in apportioning the total assets held in the marital estate upon divorce, and the critical inquiry is how the total assets are divided. Here, the appellate court found that the circuit court attempted to make an even division of marital property, returned ownership of premarital assets to the person who owned it prior to marriage, and allowed normal, necessary living expenses to be expended pending divorce. The circuit court exercised its discretion in denying appellee any alimony, motivated in part by having allowed appellee to cash out part of his IRA and retain the remaining value of his IRA. The circuit court also permitted appellee to have half of appellant's marital sign-on bonus that she had hidden and lied about. In the present case, the appellate court held that the circuit court did its level best to ensure that the overall distribution was fair and equitable, particularly considering its assessment of the credibility of the witnesses and the weight afforded to the evidence presented. Therefore, the circuit court did not err in its findings. (Williams, L.; 26DR-19-402; 5-31-23; Klappenbach, N.)

## JUVENILE

*Minor Child v State of Arkansas*, 2023 Ark. App. 184 [**delinquency petition**] In delinquency proceedings, the petition must set forth any and all sections of the criminal laws allegedly violated. The juvenile alleged that the circuit court did not obtain subject matter jurisdiction over the proceedings because it did not allege that he committed an act prohibited by a criminal statute. The appellate court found that the petition was sufficient to put the juvenile on notice of what he must defend against at trial. [**delinquency illegal sentence**] The juvenile also alleged that he received an illegal sentence because he had multiple dispositions. He argued that the disposition alternatives are listed and that the legislature intended to provide disjunctive alternatives since they used the word "or." The appellate court disagreed and found that the plain language of the statute indicates that the circuit court could sentence multiple dispositions. (Smith, T.; CV-22-474; 4-5-23; Virden, B.)

*Linda Miller v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 249 [**TPR-aggravated circumstances; little likelihood**] Circuit court did not clearly err in terminating Appellant's parental rights based on the aggravated-circumstances ground. Under this ground, Appellee was not required to prove that meaningful services were provided. Even so, the evidence showed that Appellee had provided Appellant with services and returned the children to Appellant's custody. Yet, within eight months, the children were again removed because Appellant had failed to

maintain housing, medically neglected the children, and resumed using illegal substances. At the termination hearing, the caseworker for Appellee testified that after the children's second removal, Appellee offered Appellant services, but she did not participate and did not visit the children. Given these circumstances, there was sufficient evidence for the court to find that there was little likelihood that further services to Appellant would result in a successful reunification. (Haltom, B.; CV-22-766; 3-3-23; Abramson, R.)

*Beanblossom v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 267 [**ADJ - hearsay evidence**] At adjudication, a CACD investigator was permitted to testify as to what a physician, who was unavailable to testify, had included in a medical report that was not admitted into evidence. Appellants argued that the investigator had no personal knowledge of the child's medical condition and relied solely on out-of-court statements by the physician contained in the report to support the investigator's testimony. Appellee argues that the statement was not being presented for the truth of the matter asserted, but instead as a basis for CACD's investigative finding. The appellate court found this argument unpersuasive. The purpose of the investigator's testimony about the content of the physician's report was to prove the child's medical condition and that it was the result of physical abuse; this information was neither cumulative nor received from any other source. As prejudice resulted from the court's decision to allow the inadmissible hearsay testimony, the case was reversed and remanded for a new hearing. (Warren, D.; CV-22-720; 5-10-23; Virden, B.)

*Reynolds v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 287 [**TPR-aggravated circumstances; little likelihood**] Services are not required to be provided in order to argue little likelihood, but in this case, services were provided, and appellant failed to avail himself. His repeated incarceration during the case, including a pending violation at his federal half-way house that could potentially reincarcerate him, coupled with the inability to have his child placed with him at the half-way house, was sufficient evidence to prevent any firm conviction that the trial court had made a mistake in terminating appellant's parental rights. (Weaver, S.; CV-22-793; 5-17-23; Virden, B.)

*Workman v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 294 [**TPR-subsequent factors**] Continuing in a relationship with a dangerous partner was sufficient evidence of factors arising subsequent to removal and could demonstrate a parent's incapacity or indifference. Additionally, failure to comply with court orders can serve as a subsequent factor on which termination of parental rights can be based: Appellant Mother had never been in full compliance with the case plan or court orders as she failed to involve her dangerous partner in the case plan, allowed this partner to be alone with her minor child, and failed to demonstrate the ability to protect the minor child or the ability to keep him from harm. [**TPR-best interest**] The statutory preference for relative placement, as well as it being the least restrictive alternative, was not raised below, and the appellate court would not consider it for the first time on appeal. The failure to raise a challenge or obtain a ruling from the circuit court remains fatal to the appellate court's consideration of the issue on appeal. Decision affirmed. (Warren, D.; CV-22-761; 5-17-23; Wood, W.)

*Johnson v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 296 [**termination of reunification services - aggravated circumstances; little likelihood**] Appellant argued “that the circuit court had to have something upon which to base its decision that additional services would not have resulted in reunification” in an unsuccessful attempt to distinguish her situation from a failure to provide reunification services. The appellate court was unmoved, finding that it was indeed the same argument. Proof of services is not an element of an aggravated-circumstances finding. Furthermore, Appellant failed to cite any legal authority for her contention that without first providing appropriate services, the court could not fully assess whether further services would have resulted in successful reunification. The appellate court indicated it will affirm when an appellant does not cite authority or make a convincing legal argument, and where it is not apparent without further research that the point is well taken. Decision affirmed. (Hess, K.; CV-22-811; 5-17-23; Brown, W.)

*Bradley v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 315 [**TPR-conditions causing removal not remedied**] Appellant argued that the housing-related concerns at removal were environmental issues she had corrected, not her housing instability that developed later. The appellate court found this to be a strained reading of the phrase “conditions that caused removal,” believing it to be inconsistent with the law and the record. [**TPR-best interest; potential harm**] No error in finding potential harm to the child due to Appellant’s continued contact with the child’s violent, mentally unstable father. A parent’s failure to sever a relationship with an abusive partner was evidence of potential harm. (Byrd Manning, T.; CV-22-801; 5-31-23; Harrison, B.)

*Perry v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 323 [**TPR-paternity**] It was error to terminate parental rights of Appellant to one child when there was no evidence in the record indicating that Appellant met any of the statutory requirements to establish paternity and no evidence that he met the definition of “parent” within the Juvenile Code. A finding by the court that Appellant had significant contacts with the child was insufficient. [**TPR-best interest; potential harm**] It was error to terminate parental rights based upon speculation of continued contact with the children’s mother, who was from the record clearly disturbed and mentally unstable, when there is no evidence in the record that Appellant being ordered to have no contact with her or to ensure the children have no contact with her. [**TPR-subsequent factors**] Prior order described Appellant as making significant measurable progress and subsequent order described partial compliance, but there was no mention in the record regarding what had changed. “In the absence of actual proof of other subsequent factors—along with indifference to remedying them—termination is clearly erroneous. Credibility findings alone are insufficient.” (Elmore, B.; CV-22-666; 5-31-23; Virden, B.)

*Sturgeon v. Ark. Dep't of Human Servs.*, 2023 Ark. App. 337. **[TPR/best interest – potential harm]** No error in finding that the children would be exposed to potential harm if returned to Appellant's custody; he had ongoing substance-abuse problems that interfered with his ability to care for the children. The case has been ongoing since 2017; Appellant had been directed to address his alcohol use since at least 2019, when he was first ordered to attend AA/NA meetings and to undergo random drug-and-alcohol tests. Moreover, the record was replete with findings of Appellant's noncompliance with the case plan and its requirements for him to address his alcohol use. His persistent failure to remedy his ongoing alcohol problems (incidentally the same evidence used to support statutory grounds which were not challenged on appeal) supported the finding of potential harm. **[TPR-best interest; potential harm]** Appellant argued that there was no evidence "regarding the therapeutic needs of the children or the therapeutic progress made within this case[;]" complained that no one from DHS sought updates from his therapist regarding his progress relative to his alcohol issues; and complained that no one sought input or updates from the children's therapists. Appellant did not cite any authority for the proposition that testimony from therapists was required, nor was the appellate court aware of any such authority. **[TPR- best interest; potential harm]** Appellant's argument that the lack of evidence about the impact that the termination decision would have on MC1 and MC2 and their relationships with their older siblings, because no evidence was presented regarding the bond between the siblings at trial, did not warrant reversal. Evidence of a genuine sibling bond was required to reverse a best-interest finding based on the severance-of-a-sibling-relationship argument. **[TPR-best interest; potential harm]** Appellant' argument that he and the children were bonded, and the circuit court should have afforded him more time to demonstrate that he could maintain his sobriety, was without merit; termination of parental rights will not be reversed based on a parent's bond with the child. Although recent progress and efforts to comply in the months and weeks leading up to a termination hearing were taken into consideration, it was not a bar to termination of parental rights when a parent fails to demonstrate an ability to remain sober in an unstructured environment for a significant period. (Elmore, B.; CV-23-6; 5-31-23; Thyer, C.)