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CIVIL

Horton v. Boggs, 2024 Ark. App. 291 **[unjust enrichment; inter vivos gift]** The circuit court entered an order finding that appellant would be unjustly enriched if he was allowed to keep one-half of the net proceeds from the sale of a house that he owned with appellee as joint tenants with right of survivorship. On appeal, appellant argued that there was no basis for the circuit court's application of unjust enrichment; that there was no conditional gift subject to a separate agreement between the parties; and that such a condition could not be asserted using "testamentary contingency" when there was no evidence presented at the hearing to support that finding. Whether unjust enrichment has occurred is a question of fact; for a court to find unjust enrichment, a party must have received something of value to which he or she is not entitled and that he or she must restore. There must be an operative act, intent, or situation to make the enrichment unjust and compensable. For an inter vivos gift to occur, it must be proved by clear and convincing evidence that (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. Here, appellee added appellant's name to a deed for an Indiana property. Appellee testified that she placed appellant's name on the deed only because she believed they were going to get married. The parties moved to Arkansas, selling the Indiana house, and used a large portion of the proceeds

to purchase the new house. The warranty deed listed the purchasers of the house as appellant and appellee "as joint tenants with full right of survivorship." The appellate court held that appellee made an unconditional inter vivos gift to appellant when she placed his name on the deeds as a joint tenant and had the deeds recorded with no conditions. Therefore, there was no conditional gift and, thus, no unjust enrichment. The circuit court erred in its decision finding that appellant would be unjustly enriched if he received one-half of the net proceeds from the sale of the house. (Copeland, J.; 03CV-21-263; 5-1-24; Barrett, S.)

Stevens v. Hillenburg, 2024 Ark. App. 295 **[adverse possession]** The circuit court entered an order quieting title of ten acres of real property to appellee. On appeal, appellant argued that the circuit court erred by finding that appellee and his father, the other appellee, adversely possessed the property. To prove the common-law elements of adverse possession, a claimant must show that he has possessed the contested property continuously for seven years and that the possession has been actual, open, notorious, continuous, hostile, and exclusive, and it must be accompanied with an intent to hold against the true owner. **[hostility]** The hostility element should be determined by behaviors and not primarily by inquiring into a claimant's subjective intent. Here, appellee's former wife purchased the property in 1987, and appellee mistakenly placed their mobile home north of the true property line, on the property that appellant had purchased in 2019. Even though appellee testified about the initial mistake, his actions of dwelling on and maintaining the property established his intent to hold the property as his own, and there was no dispute that the appellees possessed the contested property without permission. Given the circumstances, the circuit court did not err in finding that the hostility element was met. **[extent]** Next, appellant argued that the appellees presented insufficient evidence that they possessed the entire ten acres of the contested property. The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over his own property and would not exercise over that of another and that the acts amount to such dominion over the land as to which it is reasonably adapted. For adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised over the premises continuously for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. Here, the circuit court specifically found that the appellees maintained the property, cut the timber, hunted, and held the contested property for their exclusive use and dwelling since 1987. Most significantly, the appellees' hand-drawn map showed the locations of the structures, trails, and driveway across the entire ten acres. Thus, the appellate court held that the circuit court did not err in finding that the appellees possessed the ten acres of contested property. (Meyer, H.; 69CV-21-14; 5-8-24; Abramson, R.)

Wadley v. Hatton, 2024 Ark. App. 297 **[writ of scire facias]** The circuit court entered an order denying the estate's petition for writ of scire facias to revive a deficiency judgment obtained during foreclosure proceedings against the appellees. On appeal, appellant argued that the circuit court erred in determining that the ten-year period for revival, or renewal, of a judgment via writ of scire

facias began to run from the date of the initial foreclosure decree—not the deficiency judgment—because the initial foreclosure decree did not dismiss the parties from the case or put the final judgment as between these parties into execution. Scire facias is not the commencement of a new suit but is a continuation of the old one, and its object is not to procure a new judgment for the debt but to execute the judgment that has already been obtained. Arkansas Code Annotated § 16-65-501 governs the issuance of a writ of scire facias and provides, in pertinent part, that the plaintiff or his or her legal representatives at any time before the expiration of the lien of a judgment may sue out a scire facias to revive the judgment. No scire facias to revive a judgment shall be issued except within ten years from the date of the rendition of the judgment, or if the judgment shall have been previously revived, then within ten years from the order of revivor. The deficiency judgment here was more than an acknowledgment of the debt found by the original foreclosure judgment. A judgment must be tested by substance and not form. A judgment for money must be a final determination of the rights of the parties in an action, must specify the amount the defendant is required to pay, and must be capable of enforcement by execution or other appropriate means. The deficiency judgment was a final judgment discontinuing the action. It specified the parties and the exact amount that the appellees were required to pay the deceased or his estate, and it specifically stated that it was a judgment "for which execution may issue." There was nothing in Ark. Code Ann. § 16-65-501 that would prevent the deficiency judgment from being revived independently of the foreclosure judgment. Thus, the circuit court erred in finding that appellant could not revive the deficiency judgment. (Riner, A.; 49CV-09-73; 5-8-24; Virden, B.)

Highlands Oncology Grp., P.A. v. Garner, 2024 Ark. App. 310 **[preliminary injunction; rule of non-review]** The circuit court granted a preliminary injunction entered in favor of appellee. On appeal, appellant argued that the circuit court erred by not following the rule of non-review and by granting appellee's motion for preliminary injunction. **[rule of non-review]** In *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 701 S.W.2d 103 (1985), the Arkansas Supreme Court held that a private hospital has a right to set its own policies regarding medical treatment and reasoned that there is no compelling reason to conclude that a private hospital which is following appropriate state regulations must also be subject to judicial scrutiny as to the reasonableness standard of public hospitals. The rule of non-review does not apply when a hospital's conduct has violated state law. The Arkansas Supreme Court has also recognized a limited review for alleged violations of medical-staff bylaws and has restricted the relief available to injunctive relief, not damages. The rule of non-review is generally applied to a private hospital's credentialing or other policy decisions unless one of the exceptions applies. Here, appellee did not challenge the validity of any of appellant's policies or bylaws as applied to him. Instead, he alleged that the board breached its employment contract with him by terminating his employment without just cause. The appellate court held that the rule of non-review thus did not apply in this case. **[injunctive relief]** When deciding whether to issue a preliminary injunction pursuant to Rule 65 of the Arkansas Rules Civil Procedure, the circuit court must consider two issues: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. Harm is normally considered irreparable only when it cannot be adequately compensated by money damages or redressed in a court of law. Here,

appellee's employment agreement had specific provisions regarding its entitlement to terminate his employment and the appellee had not violated any terms of his employment when the hospital board made the vote at issue. The hospital board vote required appellee to stop working for appellant prior to appellee son's start date because of the hospital's anti-nepotism policy. The hospital board's decision to hire appellee's son was not, arguably, a basis on which appellant could terminate appellee's employment contract. Thus, appellee provided sufficient proof to demonstrate a likelihood of success on the merits. The appellate court also held that the circuit court did not abuse its discretion in finding that appellee's doctor-patient relationships would suffer irreparable harm absent the issuance of the preliminary injunction. (Martin, D.; 72CV-22-1207; 5-15-24; Harrison, B.)

Southeastern Commercial Masonry, Inc. v. CR Crawford Constr., LLC, 2024 Ark. App. 312 **[service; out of state defendant]** The circuit court entered a default judgment against the appellant, in a breach-of-contract action in a construction case. On appeal, appellant argued that the circuit court erred by denying the motion to set aside default judgment under Rule 55(c)(2) because appellee failed to obtain proper service under the Arkansas Rules of Civil Procedure. Arkansas Rule of Civil Procedure 55(c) provides instances in which a court may, upon motion, set aside a default judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown. Service outside of the state is governed by subsections (h) and (g) of Rule 4 of the Arkansas Rules of Civil Procedure. Rule 4(g)(2)(B) of the Arkansas Rules of Civil Procedure states that the process must be delivered to the defendant, or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained. Here, service was out of state and performed by a commercial delivery company. There was no signature of the defendant or an agent of the defendant on the FedEx proof of delivery. The record provided a FedEx receipt with the notation that it was signed for by: "G. Posey" and an affidavit from the president of the appellee, Jeffery Posey, stating that "G. Posey" was an employee of the appellee, however, he was not an officer of the company and had no authority to accept service of process on behalf of the company. Appellee's registered agent is "Jeffery Posey." Thus, the default judgment was void due to insufficient service of process under Rule 4(g)(2) of the Arkansas Rules of Civil Procedure. (Martin, D.; 72CV-22-2049; 5-15-24; Abramson, R.)

Jackson v. Miss. Cnty. Hosp. Sys., 2024 Ark. App. 321 **[summary judgment]** The circuit court entered an order granting summary judgment to appellee and dismissed appellant's complaint for negligence. On appeal, appellant argued the circuit court erred in granting summary judgment. Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. Summary judgment is not proper when the evidence reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. Summary judgment should not be granted when reasonable minds could differ as to the conclusions that can be drawn from the facts presented. The standard is whether the evidence is sufficient to raise a factual issue,

not whether the evidence is sufficient to compel a conclusion. Summary judgment is not proper where it is necessary to weigh the credibility of statements to resolve these issues. A property owner generally owes no duty to a business invitee if the condition of the premises that creates the danger was known by or obvious to the invitee. "Known" in this context means not only knowledge of the existence of the condition or activity itself but also appreciation of the danger it involves. A dangerous condition is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Here, while at the hospital for a medical procedure, appellant was injured when she slipped and fell in some water as she exited the elevator. The circuit court's order of summary judgment was based, in part, on its conclusion that towels and a warning sign were near the puddle of water that caused appellant to slip and fall. To reach this conclusion, the circuit court had to make a credibility finding as to appellant's testimony that she did not see any signs near the puddle. Fact questions remained about whether the alleged danger was open and obvious or if the appellee properly warned appellant of a condition known to it but not—in the exercise of ordinary perception, intelligence, and judgment—known to appellant. The circuit court also found that appellant failed to "establish" that there was a recurring leak where she fell. However, the appellee presented no evidence to suggest what caused this puddle of water. The only theory was that it came from a leak in the ceiling. Appellant knew this because someone told her and because she had seen "plastic and stuff in the top of the ceiling, where it was leaking" with buckets on the floor when she had been in the building before the incident. A hospital employee also testified about a leak and said there was "a steady leak from the ceiling" in the area where appellant fell. The combined testimony of appellant and the hospital employee created a question of fact on the issue of whether there was a recurring leak in the area where appellant fell. Therefore, viewing this evidence in the light most favorable to appellant, the appellate court held that the circuit court's finding that there was not a recurring leak in the ceiling in the area where appellant fell is premature. (Alexander, T.; 47BCV-19-221; 5-15-24; Wood, W.)

Thurston v. League of Women Voters of Ark., 2024 Ark. 90 **[constitutionality; voting acts]** The circuit court held Acts 736, 973, 249, and 728 of 2021 (the Acts) unconstitutional and permanently enjoined their operation and enforcement. On appeal, appellants argued the circuit court erred in holding the Acts unconstitutional. **[fundamental right to vote]** While the right to vote has been held to be fundamental, the right to vote in a particular manner is not guaranteed. Many courts have noted that absentee voting is not a fundamental right. Similarly, there is no fundamental right to vote by affidavit, rather than by photo identification, such that strict scrutiny should automatically be applied. Here, the Arkansas Supreme Court found that upon examination of the plain language of the Acts, the fundamental right to vote was not at stake. Thus, the State was not required to prove a compelling state interest. The circuit court's conclusion that strict scrutiny applied across the board to these four Acts was an error of law. **[equal protection]** In deciding whether an equal-protection challenge is warranted, there must first be a determination that there is a state action that differentiates among individuals. There are two ways to prove the existence of a classification: (1) showing that a distinction exists on the face of the law; or (2) by demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose.

When the language of the challenged provision contains no classification of any kind and has a similar effect on all persons similarly situated, it cannot deny equal protection. Here, the Acts were neutral on their face. The laws were not yet in effect at the time of their challenge. While several witnesses testified as to what they believed would be the potential discriminatory impact in application, the evidence provided was only speculative. Because the Acts were facially neutral and did not contain any discriminatory classes, equal protection was not invoked. The circuit court's conclusion that the Acts violated article 2, section 3 of the Arkansas Constitution was incorrect as a matter of law. **[free and equal election]** A free and equal election in Arkansas has long been understood to be one in which qualified voters can vote in accordance with rules and processes established by the legislature. This provision has been narrowly interpreted as a protection against fraud and voter intimidation. A qualified voter, pursuant to this clause, is ensured the ability to exercise the right to vote free from outside influence. Generally, the remedy for a violation of this sort is to void an election. Thus, the remedial focus of the free and equal election clause is postelection—as it will allow a court to void an election when the result was rendered uncertain by fraud and intimidation or where the voters have received insufficient notice. Unless the specific language of the challenged Act implicates the rights afforded under the free and equal election clause, the courts need not decide whether the Act had a rational basis or whether it survives strict scrutiny. Here, the circuit court made a conclusory finding that each Act violated the free and equal election clause but failed to conduct the requisite analysis. The Arkansas Supreme Court held that the circuit court erred as a matter of law when it subjected the Acts to a strict scrutiny analysis, but also in its peculiar finding that the Acts violated the free and equal election clause. **[voter qualifications]** Except as otherwise provided by the Arkansas Constitution, any person may vote in an election in the State of Arkansas who is (1) a citizen of the United States; (2) a resident of Arkansas; (3) at least eighteen years of age; and (4) lawfully registered to vote in the election. The General Assembly may not add voter qualifications beyond those contained in article 3, section 1. The circuit court summarily found that both Act 736 and Act 973 violated the voter qualification clause of the Arkansas Constitution. Both Act 736 and Act 973 amended the law regarding the mechanics of absentee voting. They do not impose additional qualifications beyond those in the constitution. Neither matching an absentee voter's signature nor setting a deadline for absentee ballot delivery alters who is qualified to vote. **[Amendment 51, Section 19]** Amendment 51, section 19 of the Arkansas Constitution provides a comprehensive regulatory scheme governing the registration of voters. Amendment 51, section 19 states that the General Assembly may, in the same manner as required for amendment of laws initiated by the people, amend Sections 5 through 15 of this amendment, so long as such amendments are germane to this amendment and consistent with its policy and purposes. The constitution requires a voter to provide valid photographic identification. While the constitution says the legislature "may" pass laws providing for exceptions to this requirement, because this language is permissive, the legislature may choose, as it has done here, to eliminate any exceptions. Thus, because Act 249 was germane to Amendment 51 and consistent with its policy and purpose, it is therefore constitutional. **[free speech and free assembly]** One cannot challenge a statute on the ground that it may be applied in hypothetical situations not before the court. An appellant may challenge a law as being facially invalid only if he shows that the application of the law will restrict First Amendment rights. The mere fact that a legislative Act might operate unconstitutionally under

some conceivable circumstances is insufficient to render it wholly invalid. The First Amendment allows time, place, and manner restrictions on speech, so long as the restriction is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. Here, Act 728 states that a person shall not enter or remain in an area within one hundred feet of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes. Given the procedural posture of appellees' argument constituting a facial challenge, and because the Arkansas Supreme Court could not say there was a clear incompatibility between the Act and the Constitution, it was thus improper for this Act to be struck as unconstitutional. (Griffin, W.; 60CV-21-3138; 5-16-24; Hiland, C.)

Davis v. Jefferson Hosp. Ass'n, 2024 Ark. App. 332 **[service; dismissed with prejudice]** The circuit court dismissed appellant's complaint for medical malpractice against appellees. On appeal, appellant argued that the circuit court abused its discretion in dismissing her complaint against one of the appellee doctors on the basis of insufficiency of service of process. Rule 4(g)(1)(A)(i) of the Arkansas Rules of Civil Procedure governs service of process by mail; it requires that service of process shall be by certified mail, addressed to the person to be served with return receipt requested, with delivery restricted to the addressee or the agent of the addressee. The savings statute applies if a timely, completed attempt at service is made but later held to be invalid. Here, the appellate court held that the circuit court properly dismissed one of the appellees from the lawsuit because appellant failed to show that she had properly served her. While service was found by the circuit court to be defective, there was a timely completed attempt to serve appellee. Appellant sent the summons and complaint certified mail, restricted delivery with return receipt requested. There was no assertion that the certified mail was sent to an incorrect address, and the return receipt came back with the purported signature of the addressee, although illegible. Therefore, because there was a timely completed attempt of service, although defective, appellant should be afforded the benefit of the savings statute. The dismissal of one of the appellees should have been without prejudice. (Wyatt, R.; 35CV-20-530; 5-22-24; Barrett, S.)

Cochran v. Cromer, 2024 Ark. App. 337 **[damages; easement]** The circuit court found that the appellees were owners of the disputed property after they filed a petition to quiet title. On cross-appeal, the appellees argued the circuit court erred by failing to award them damages for appellant's interference with their use of the disputed property. An easement owner or landowner is entitled to compensation for loss of use of the property and any specific losses are determined on a case-by-case basis. Here, the circuit court additionally found that an easement existed in favor of the appellees but denied their claim for damages for interference with their easement to access the disputed property. The circuit court found that the proper measurement of damages was the reasonable rental value of the land in question down to the time of assessment. Appellant blocked their access to the land in question, a hayfield, by parking a vehicle across the road and putting up a gate. The appellees stated they would not be able to feed their cattle without being able to harvest the hay they had prepared. The circuit court was not limited to considering the reasonable rental

value of the land in determining whether damages could be awarded. Rather, the circuit court was to consider damages for any specific losses caused by the loss of use of their property. Thus, the circuit court erred in denying the appellees' claim for damages for interference with their easement to access the property. (Sutterfield, D.; 36CV-19-211; 5-22-24; Hixson, K.)

CRIMINAL

Bush v. State, 2024 Ark. 77 **[motion in limine; officer testimony]** Appellant was convicted of capital murder, aggravated residential burglary, aggravated robbery, and theft of property. On appeal, appellant argued that the circuit court erred in denying his motion in limine to exclude improper expert testimony. Arkansas Rules of Evidence 701 and 702 govern opinion testimony. Lay witnesses may provide opinion testimony when the opinion is rationally based on the perception of the witness, and the opinion is helpful to a clear understanding of their testimony or the determination of a fact in issue. Expert witnesses may provide opinion testimony if scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert witness is not required to identify blood. An officer's opinion testimony based on his or her work experience and observations is admissible. Here, an officer testified that the blood on the counter of the appellant's apartment went from being "fresher" to "dried." The officer's testimony about those physical changes could have been given by any layperson, and she used photographs to show the differences between earlier photos and later photos of how the blood looked. Appellant cross-examined the officer on her analysis of the blood changes as well as her seemingly inconsistent statements about the time between photos and why she only recently stated that the blood was "fresher" when she had previously indicated no such thing. The officer further testified that she had been to approximately 1700 crime scenes over her eight years of experience, more than half of which contained blood. Although appellant thoroughly impeached the witness, the jury was free to determine how much weight to give the officer's testimony. The circuit court did not abuse its discretion in allowing the testimony because the court determined that the officer's opinion was rationally based both on her experience as a crime-scene specialist and her observation of the crime scene and its photographs. Thus, the circuit court did err in denying appellant's motion in limine and admitting the officer's testimony. (Compton, C.; 60CR-20-708; 5-9-24; Hudson, C.)

Hicks v. State, 2024 Ark. App. 316 **[evidence 404(b)]** Appellant was convicted of aggravated assault, fleeing by vehicle with extreme indifference to the value of human life, criminal mischief in the second degree, and fleeing on foot. On appeal, appellant argued that the circuit abused its discretion in admitting evidence of a subsequent fleeing allegation in another county. Arkansas Rule of Evidence 404(b) allows evidence of other crimes, wrongs, or acts to be admitted for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but evidence is not admissible under Rule 404(b) to prove the character of a person in order to show that he acted in conformity therewith. For evidence to be admissible under Rule 404(b), it must have independent relevance, which means that it has a tendency to make

the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Here, appellant filed a motion in limine to prevent the State from introducing evidence at trial regarding subsequent allegations of fleeing in Washington County. The circuit court allowed evidence of appellant's pending charge in Washington County to be presented to the jury. The appellate court found that admission of the incident in Washington County was not independently relevant to establish appellant's identity as the person who led police on the high-speed chase in Benton County. These two incidents were similar only because they involved vehicles without license plates fleeing from police at high rates of speed in adjacent counties. The vehicles were not the same, nor were there any other unique facts that would have justified using the Rule 404(b) identity exception in this instance. As such, the appellate court held that the circuit court abused its discretion in allowing evidence of the Washington County allegation into evidence. (Karren, B.; 04CR-20-2838; 5-15-24; Barrett, S.)

State v. Bailey, 2024 Ark. 87 **[motion to suppress; warrantless search]** The State filed an interlocutory appeal from a pretrial order suppressing evidence in a felony prosecution. Arkansas Code Annotated § 16-93-106 requires probationers and parolees to agree to a waiver allowing law enforcement to conduct warrantless searches of their persons, residences, motor vehicles, property, and more. For purposes of this case, the statute places two relevant limitations on law enforcement's search of the probationer under these waivers. First, the search must be of his or her person, place of residence, or motor vehicle. Second, the warrantless search must be conducted in a reasonable manner. Here the novel issue was to what degree of certainty must law enforcement believe that a place is a probationer's residence before conducting a warrantless search of it pursuant to the residence-waiver provision within a probationer's signed search waiver? The appellee signed a waiver under Ark. Code Ann. § 16-93-106 as a term and condition of his probation. The circuit court granted appellee's motion to suppress after holding that law enforcement must have probable cause to believe that the place to be searched is the probationer's residence and finding it did not. The Arkansas Supreme Court held that law enforcement need only have a reasonable suspicion that the probationer is residing in the place to be searched for officers to execute a warrantless search pursuant to a residence-search waiver. This is evaluated based on the totality of the circumstances. In the present case, the police relied on the waiver to execute their search of the motel room, the police knew that appellee's name was on the guest-registration list, they had seen him enter the room with a bag and then leave the room, and they had found the room key in his pocket. Based on the totality of the circumstances, the Arkansas Supreme Court held that the police had a reasonable suspicion or belief that appellee was residing in the motel room. Because the circuit court employed the wrong standard, the circuit court erred in granting the motion to suppress. (Compton, C.; 60CR-20-3108; 5-16-24; Wood, R.)

DOMESTIC RELATIONS

Cheri v. Cheri, 2024 Ark. App. 288 **[property division; annuity]** The circuit court distributed the parties' personal property within their divorce proceeding. On appeal, appellant argued that the

circuit court erred in the manner in which it distributed his federal annuity. On cross-appeal, appellee argued the circuit court erred by failing to make the award of her marital portion of appellant's annuity retroactive to the filing of the complaint. **[annuity]** At the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. If the circuit court finds that an equal division of marital property will be inequitable, then the court shall make some other division that the court deems equitable taking into consideration factors outlined in Ark. Code Ann. § 9-12-315(a)(1)(A)(i)–(ix). While the circuit court must consider the factors outlined in the statute and state its reasons for dividing the property unequally, it is not required to list each factor in its order or to weigh all the factors equally. Here, there was a substantial difference between appellant's premarital income and his income at retirement. The circuit court accounted for that difference by awarding appellee 44.5 of the total monthly annuity payment, as proposed by the appellee. While an unequal division of the total annuity payment occurred, it was in appellant's favor, considering his premarital years of service. The marital portion of the annuity was divided equally. Because the circuit court divided the marital portion equally, a discussion of the factors in Ark Code Ann. § 9-12-315 was not required. The appellate court found that the circuit court was within its discretion to account for that difference. **[retroactivity]** Here, both parties relied completely on the monthly annuity for income after appellant retired and prior to appellee filing for divorce. Appellant paid for the mortgage of the martial home during the divorce, which was sold with the proceeds divided evenly. Additionally, appellee relied on a credit card during the divorce, which was paid by appellant. The record also reflected that appellee had not paid any bills during the pendency of the divorce. While appellee was not directly provided with any portion of the annuity payment, she did receive some benefit from it during the pendency of the divorce. The appellate court held that given the way the circuit court divided the parties' property overall, the circuit court's decision to deny a retroactive application of the annuity award was not in error. (Copeland, J.; 05DR-20-376; 5-1-24; Gruber, R.)

Snider v. Snider, 2024 Ark. App. 317 **[modification of custody]** The circuit court entered an order modifying custody and awarding appellee sole custody of their child. On appeal, appellant argued that the circuit court erred because there was not a material change in circumstances and modification of custody was not in the child's best interest. Modification of custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; and second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. **[material change in circumstances]** Failure of communication, increasing parental alienation by a custodial parent, and inability to cooperate can all constitute a material change in circumstances sufficient to warrant modification of custody. Here, the parties previously shared joint legal custody of the child with appellant receiving full physical custody subject to appellee's alternating weekend visitation. The circuit court made specific findings of fact to show there had been a change in circumstances by appellant's attempts to micromanage any contact the child had with appellee, did not allow the child to have phone communication without the phone being on speaker for her to hear, did not allow the child to use a cell phone that appellee provided to him,

and did not encourage communication with the appellee. Appellant also had a "boyfriend" whose children are the child's cousins, which confused the child. The circuit court also found appellant had proved that she did not understand the concept of joint custody in that she believed she was in total control of every aspect of the child's relationship with appellee, such as whether appellee saw the child or whether appellee was allowed to be present to help pick out the child's glasses or attend a doctor's appointment. The combined, cumulative effect of particular facts may together constitute a material change. Thus, the circuit court did not err in finding that there had been a material change in circumstances. **[best interest]** There are a number of cases in which the appellate court has found that a pattern of alienating behaviors by one parent is detrimental to a child's best interest. The circuit court recognized that appellant's pattern of behavior was an effort to minimize appellee's ability to communicate with the child and establish a healthy relationship. Having reviewed the circuit court's findings, the record as a whole, and the applicable case law, the appellate court concluded that the circuit court's finding of a material change in circumstances and the change of sole custody to appellee was in the child's best interest and was not erroneous. (Thomason, M.; 70DR-19-126; 5-15-24; Barrett, S.)

Baker v. Baker, 2024 Ark. App. 331 **[child custody; best interest]** The circuit court entered a divorce decree awarding the parties joint legal custody of their child and awarding appellee primary physical custody of the child with summer visitation to appellant, who lives in Florida. On appeal, appellant argued the circuit court erred in awarding appellee primary physical custody of the child because it was in the child's best interest. In an action for an original child custody determination in a divorce or paternity matter, there exists a rebuttable presumption that joint custody is in the best interest of the child. This presumption may be rebutted if the court finds by clear and convincing evidence that joint custody is not in the best interest of the child. The value of keeping siblings together is a factor to be considered in determining what is in a child's best interest, but it cannot rise to the level of a presumption contradicting the statutory best interest standard. The general rule regarding full siblings is that young children should not be separated from each other absent exceptional circumstances. This prohibition against separating siblings in the absence of exceptional circumstances does not apply with equal force where the children are half-siblings. Here, appellant argued at the hearing's conclusion that the best interest of the child was with an award of primary physical custody to him, and the appellee argued the same. The circuit court's award of joint legal custody was not challenged by the parties on appeal. Nor did the parties challenge the circuit court's order that the statutory presumption for joint custody was overcome by the parties' living in separate states with significant mileage between them. The circuit court explicitly, and sua sponte, referred to the probate code as the determining factor to address its concerns about the child's connections to the half-sibling. The court's written order specifically stated, "Based upon Ark. Code. Ann. § 28-1-101 et seq., more specifically because of the minor child's relationship with her half-sibling, . . . the court finds it is in the minor child's best interest that [appellee] maintain primary physical custody." In determining that primary physical custody with appellee was in the child's best interest, the circuit court explicitly and solely relied on the Probate Code and the child's relationship with her half-sibling. The circuit court erred in its analysis. Thus, the circuit court must conduct a best-interest analysis under the legal standards

governing an original determination of child custody. (Johnson, S.; 60DR-20-2040; 5-22-24; Gruber, R.)

Wise v. State of Arkansas, Office of Child Support Enforcement, 2024 Ark. App. 336 **[child support; modification; expert fees]** The circuit court entered an order modifying and extending his child support obligation for the two children. On appeal, appellant argued that the circuit court erred in finding a material change in circumstances warranting a modification of support, determining the amount of support owed, imputing income, and awarding expert witness fees to the Office of Child Support Enforcement (OCSE). **[change in circumstances]** Arkansas Code Annotated § 9-14-237 sets forth that a parent ordinarily has no legal obligation to support a child beyond age eighteen or upon reaching the milestones that traditionally signal emancipation. However, the statute does not automatically terminate a parent's continuing common-law duty to support a child who is disabled upon attaining his majority and who needs further support. Further, Ark. Code Ann. § 9-12-312(a)(6)(B) states that a court may provide for the continuation of child support beyond emancipation for an individual with a disability that affects the ability of the individual to live independently from the custodial parent. A change in circumstances must be shown before there can be a modification of child support; the party seeking modification has the burden of showing a change of circumstances has occurred. Here, in 2011, when the last order modifying child support was entered, the children were about nine years old and had not yet been diagnosed with Fragile X, and one child's disorder causing prolonged seizures had not been evident. It was not until the boys were around the age of twelve that they slowly stopped making progress in their therapies. When appellant last saw the children in 2011, the only concern he recalled was the boys' lack of communication. Upon seeing the children at the hearing, appellant conceded that they both appeared completely disabled, which was "absolutely" a change since 2011. Given these facts, the circuit court did not err in finding a material change in circumstances. **[financial need]** It is a rebuttable presumption that the amount contained in the family support chart is the correct amount of child support to be awarded. The circuit court may provide for the continuation of support for an individual with a disability that affects the ability of the individual to live independently from the custodial parent. The evidence established that the boys were not capable of taking care of themselves, either physically or financially. OCSE presented proof of the need for the continuation of support for the children, both of whom suffer from a disability that affects their ability to live independently from the custodial parent. Appellant did not rebut the presumption that the amount contained in the family support chart is the correct amount. **[imputed income]** Administrative Order 10 provides that if a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's lifestyle. Income of at least minimum wage shall be attributed to a payor ordered to pay child support. Here, appellant testified that he was fired from his paramedic job and that he would not be seeking another paramedic job because he had trauma from that line of work. Appellant was unemployed and not seeking work. The payor's choices cannot always take precedence over his obligation to earn income sufficient to provide support. Appellant did not present any evidence that he suffered from a documented mental

or physical disability that precluded his employment as a paramedic or stopped him from seeking other work. OCSE presented testimony regarding appellant's earnings as a paramedic through the child-support specialist. According to the child support worksheet, appellant's monthly gross income was imputed at $5,444.35. The circuit court, in reaching that amount, used appellant's 2022 first-quarter gross income of $32,666.17 (three months) and divided that amount by six months, for an imputed monthly gross income of $5,444.35. Given these circumstances, the circuit court did not thoughtlessly or improvidently impute income to appellant. **[expert fees]** Arkansas Code Annotated § 9-12-309(2) provides that the court may award the wife or husband costs of court, a reasonable attorney's fee, and expert witness fees. Further, Ark. Code Ann. § 9-14-210(d) states that the State of Arkansas is the real party in interest for purposes of establishing paternity, child support obligations, securing repayment of past-due support, and costs in actions brought to establish, modify, or enforce an order of support. In applying our rules of statutory interpretation, we must sensibly reconcile these two statutes. Here, the children's mother assigned her child support rights to OCSE, making it the real party in interest. The expert's testimony aided in proving the boys were disabled, which was necessary because appellant denied they were disabled prior to the hearing. Accordingly, the circuit court properly awarded the expert witness fees to OCSE as the real party in interest. (Bibb, K.; 28DR-04-397; 5-22-24; Murphy, M.)

McCandlis v. McCandlis, 2024 Ark. App. 339 **[grounds; custody]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred by granting appellee's counterclaim for divorce because appellee did not provide corroborating evidence of a ground for divorce and in awarding appellee primary custody of their children**. [grounds]** To obtain a divorce on the general-indignities ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. Conditions arising from adultery give rise to indignities. Evidence of the grounds for divorce must be corroborated, but the evidence of corroboration need only be slight when a divorce case is sharply contested, and it is not necessary that the testimony of the complaining spouse be corroborated on every element or essential fact. Here, appellee proved and corroborated the general-indignities ground. Appellee testified about appellant's violent behavior and his relationship with his girlfriend during the marriage, and the children's testimony corroborated appellee's statements. Given the lenient standard for proving and corroborating grounds for divorce, the appellate court could not say the circuit court erred. **[custody]** While there is a statutory preference for joint custody, this preference does not override the ultimate guiding principle, which is to set custody that comports with the best interest of the child. Each child custody determination ultimately must rest on its own facts. In its written order, the circuit court found that joint custody was not in the children's best interest due to appellant's work schedule, his alcohol use around the children, his multiple threats of physical harm toward appellee, the older child's preference for living with appellee, and older child's expressed fear of appellant. Significantly, the court noted its observation of appellant's angry demeanor during the trial, and it ordered him to complete anger-management classes before exercising visitation. The appellate court held that the circuit court did not err in finding that appellee had rebutted the

presumption for joint custody by clear and convincing evidence. (McSpadden, D.; 33DR-22-90; 5-29-24; Abramson, R.)

Wells v. Wells, 2024 Ark. App. 348 **[relocation; modification of custody]** The circuit court entered an order modifying custody in favor of primary custody with the appellee and denied appellant's request to modify the parties' divorce to allow her to relocate with the child to Kansas. On appeal, appellant argued the circuit court erred by placing the burden of proof on her to establish a reason for her relocation and finding that a change of custody was in the child's best interest. In *Hollandsworth v. Knyzewski,* 353 Ark. 470, 109 S.W.3d 653 (2003), the Arkansas Supreme Court pronounced a presumption in favor of relocation for custodial parents with sole or primary custody, and the noncustodial parent was given the burden of rebutting the presumption. This presumption, however, should be applied only when the parent seeking to relocate is not only labeled the "primary" custodian in the divorce decree but also spends significantly more time with the child than the other parent. In *Singletary v. Singletary*, 2013 Ark. 506, at 8, 431 S.W.3d 234, 239, the Arkansas Supreme Court clarified *Hollandsworth* and held that the presumption does not apply when the parents share joint custody of a child. The *Singletary* court recognized that the proper analysis for a court facing a change-in-custody request due to relocation of one parent when the parents have joint custody is essentially the same as a change-in-custody analysis when relocation is not involved. *Hollandsworth* also held that relocation alone is not a material change in circumstance for a custodial parent with primary custody. Here, the parties' decree stated that they would share "joint physical custody"; however, the custody agreement set forth in the decree did not reflect joint custody. The circuit court held that appellant "constructively" held primary custody of the child. Therefore, appellant no longer had the responsibility to prove a real advantage to herself and the child in relocating. The circuit court held that a change of circumstances sufficient to justify modification of custody had occurred because appellant "moved out of state without sufficient justification." Appellant's relocation to Kansas in and of itself was not a change in circumstances sufficient to modify custody, thus, the circuit court erred in granting appellee sole custody of the child. The *Hollandsworth* court set forth the following factors to be considered in determining the best interest of the child in the matter of a relocation request: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and child will relocate; (3) the visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent 12 and children will relocate as well as in Arkansas; and (5) the preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference. The presumption in favor of relocation is automatic. Appellee, as the noncustodial parent, had the burden to rebut the presumption. The appellate court found that appellee failed to rebut the presumption in favor of relocation. Appellee presented no testimony disputing appellant's reasons for wanting to relocate or testimony regarding the quality of schools in either location. Appellee's primary concern with relocation was the negative effect it would have on his visitation with the child and time with extended family. However, *Hollandsworth* presupposes that visitation and communication between the child and the noncustodial parent will be impaired. Nevertheless, if there continues to be meaningful visitation, the presumption in favor

of relocation is not rebutted. Appellant testified to being flexible with appellee and that she would encourage regular visitation. The appellate court held that the circuit court erred in finding that appellant's relocation constituted a material change in circumstance justifying modification of custody to appellee and in shifting the burden to appellant to prove an advantage to her relocation to Kansas with the child. (Wilson, R.; 03DR-19-466; 5-29-24; Gladwin, R.)

JUVENILE

Krusen v. Ark. Dep't of Human Servs., 2024 Ark. App. 294 **[TPR; failure to remedy]** Appellants challenged the circuit court's failure-to-remedy finding as the ground for termination. The children were removed from the Appellants' custody and were adjudicated dependent-neglected on the basis of abuse, neglect, and parental unfitness due to environmental concerns and drug issues. Appellant mother argued that the conditions that caused removal (the condition of the home and her drug usage) had both been remedied at the time of the termination hearing, and the circuit court erred in finding otherwise. The evidence showed that Appellant mother had been drug-free since the beginning of the year. However, she still lacked a safe, suitable, and appropriate home for herself and the children. Although she was currently living with her adult son, this was temporary and not a permanent placement. The evidence showed that every home Appellant mother lived in since the opening of the case was in bad condition environmentally. Even after she successfully completed inpatient drug treatment, she was still unable to keep a clean and appropriate house. Although she had almost twenty-two months, Appellant mother was still unable to remedy her housing issue. While she was on a waiting list for an apartment, there was no timeline given for when she would be able to move into the apartment. However, this was a last-minute effort and would not outweigh other evidence demonstrating a failure to comply and to remedy the situation that caused the children to be removed in the first place. Additionally, even after an appropriate house was found, Appellant mother would need more time to prove that she could maintain a clean and environmentally safe home for the children. The children's need for permanency and stability overrode the mother's request for more time to improve her circumstances. Thus, sufficient evidence supported the failure-to-remedy ground as a basis for termination Appellant mother's parental rights. Likewise, Appellant father argued that the conditions that caused removal had been remedied. He maintained that it was his sickness, Appellant mother's drug use, and a tree on the roof of his house that led to removal of the children. However, despite what he says, his drug usage was also a concern from the beginning of the case. The issue with the home was not just the fact that a tree had fallen through the roof—the home was filthy and altogether inappropriate for a young child. Appellant father tested positive for methamphetamine at the beginning of the case, and he tested positive for THC the day before the termination hearing. He also failed to complete inpatient treatment as ordered. At the time of the termination hearing, Appellants still did not have a safe, stable, and appropriate home for the children, which was a continuing issue throughout the case. Thus, sufficient evidence supported the termination. **[TPR; best interest; potential harm]** Appellants also argued that termination of their parental rights was not in the children's best interest, challenging the circuit court's finding that the children would be subjected to potential harm if returned to their custody. The parents' continued drug use and failure to provide a stable

home both supported the potential-harm finding. Moreover, considering past behavior as a predictor of likely potential harm should the children be returned to the parents' care and custody, Appellants' past behavior showed that they were unable to keep a clean and environmentally suitable home for their children for any length of time. Additionally, Appellant father had been unable to maintain sobriety. (Williams, L.; CV-24-5; 5-1-24; Brown, W.)

Robison v. Ark. Dep't of Human Servs., 2024 Ark. App. 298 **[virtual testimony; motions]** On appeal, Appellant did not challenge the sufficiency of the evidence supporting termination but instead claimed that the circuit court committed reversible error in refusing to allow her mother and grandmother to testify via Zoom. Appellant argued that Arkansas Rule of Civil Procedure 88 gave the court great discretion in allowing participants to participate virtually as long as fair proceedings can be ensured. She contended that neither the timeliness of her motion (the day of the termination hearing) nor Appellee's objection were proper reasons for denying her motion under the rule. She argued further that Appellee was familiar with the witnesses and that there was no scheduling order that required the disclosure of witnesses by a certain date that would have prevented her from having the witnesses testify in person. Appellant claimed that the denial of her motions resulted in the court foreclosing consideration of the least-restrictive disposition of relative placement. Appellee argued that denial of the motions was proper because, pursuant to Rule 88(d)(2)(ii), a motion such as Appellant's "may not be granted absent an opportunity for all parties to respond under [the Rules of Civil Procedure] and be heard." The appellate court agreed with Appellee that Appellant's motions filed on the day of the hearing did not allow Appellee time to respond under the Rules. **[proffered evidence; prejudice]** Even if there was judicial error in an evidentiary ruling, the court would not reverse unless the Appellant demonstrated prejudice. To challenge a ruling excluding evidence, the Appellant must have proffered the excluded evidence so the appellate court could review the decision and determine whether prejudice resulted from its exclusion. The failure to proffer evidence precluded review of the evidence on appeal. In arguing her motion below, Appellant's attorney stated only that the witnesses would testify "as to my client's abilities or as to the request replacement [sic] or not." She failed to proffer any evidence that may have shown error in failing to consider or award relative placement with the two witnesses who had been ruled out as placement options prior to the termination hearing. Accordingly, Appellant could not demonstrate prejudice. (Hendricks, A.; CV-23-837; 5-8-24; Klappenbach, N.)

Barnoskie v. Ark. Dep't of Human Servs., 2024 Ark. App. 835 **[TPR; paternity]** Circuit court erred in terminating Appellant's parental rights without first making the requisite findings that he had established paternity and was the child's parent or that, as a putative parent, he demonstrated significant contacts. During the pendency of the case, Appellant was always identified as the child's putative parent. However, the record was silent as to a finding whether Appellant made significant contacts with the child and, consequently, whether his rights as a putative parent attached. Without such a finding, the circuit court's termination of his rights based on the ground applicable to a putative parent was erroneous. Although the termination order provided that Appellant was a parent to the child, there was no evidence presented at the termination hearing to

support that finding. Appellant was never married to the child's mother, he had not signed an acknowledgement of paternity, he had not been found by the court to be the child's biological father or otherwise established paternity, and he testified that he was not listed on MC's birth certificate. Here, throughout the case, Appellant was identified only as MC's putative father. No evidence was presented demonstrating that the issue of MC's paternity had been resolved. Because the statutory requirements to terminate the parental rights of a "putative parent" were not met, nor was the record sufficient to establish that Appellant was a "parent" to the child, it was error to terminate Appellant's parental rights. (Medlock, M.; CV-23-835; 5-15-24; Brown, W.)

Devary v. Ark. Dep't of Human Servs., 2024 Ark. App. 333 **[TPR; failure to remedy]** Appellant's children were removed from the home due to, in part, environmental concerns in the home. Appellant failed to allow the Appellee to view the inside of her home for several months prior to the termination hearing. The caseworker attempted to visit the home, and although the caseworker was not able to access the inside of the home during the last five attempts, the caseworker observed environmental concerns outside the home. Appellant testified she had given up and reported that she could not take care of herself and that she had lost faith in the system. Environmental conditions of the home had not been remedied. No clear error in finding failure to remedy. **[TPR; best interest; potential harm]** Appellant's failure to make measurable and sustainable progress toward alleviating the cause of the children's removal demonstrated there remained a risk of potential harm to the minor children should they be returned to her. Appellant failed to maintain an environmentally safe home, failed to resolve her mental-health issues, failed to take her medication as prescribed, failed to complete parenting classes, and failed to attend counseling. No clear error in finding that termination was in the minor children's best interest. (Sullivan, T.; CV-245-3; 5-22-24; Potter Barrett, S.)

Hasan v. Ark. Dep't of Human Servs., 2024 Ark. App. 349 **[TPR; parental compliance throughout case]** This case was pending for well over a year during which Appellant persistently tested positive for drugs and resisted working the case plan. It was only toward the end of the case, after the goal had been changed to termination, that Appellant began to take the case plan requirements seriously. The circuit court clearly considered and weighed Appellant's compliance throughout the entire case and did not reject her last-minute efforts out of hand when it determined that her recent improvements were not compelling enough to continue services in the case. No clear error in finding that it was in the child's best interest to terminate parental rights. (Byrd Manning, T.; CV-24-59; 5-29-24; Klappenbach, N.)