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CIVIL

Treece v. Calley, 2023 Ark. App. 493 **[nonexclusive easement]** The circuit court entered an order recognizing the existence of a nonexclusive easement in the deed of the appellants' property. The circuit court's order permanently enjoined the appellants from attempting to block or restrict their neighbors, appellees, from using the driveway easement. On appeal, the appellants argued that the circuit court erred because the appellants' predecessor in title did not "convey" or "grant" an easement to the appellees. Exclusive easements are not generally favored, and an instrument creating an easement must be construed as creating a nonexclusive easement unless the instrument clearly shows an intention that the easement is to be exclusive. Here, the appellants purchased a parcel that adjoined appellees' property, and the deed described a "non-exclusive easement for use as ingress and egress." Because the ingress and egress easement was not exclusive to the appellants, the circuit court did not err in entering a permanent injunction so that the appellees could use the easement to access their property. (Williams, L.; 26CV-21-994; 11-1-23; Klappenbach, N.)

Benton School District v. Greer, 2023 Ark. 160 **[qualified immunity]** The circuit court denied, in part, two school district employees' motion for summary judgment for qualified immunity under

Ark. Code Ann. § 21-9-301. This statute provides immunity from both suit and liability for certain officials except to the extent that they may be covered by liability insurance. The Arkansas Supreme Court held that Ark. Code Ann. § 21-9-301 does not apply to a federal claim under 42 U.S.C. § 1983, but it does apply to claims brought under the Arkansas Civil Rights Act. Thus, the circuit court did not err in ruling that Ark. Code Ann. § 21-9-301 immunity, subject to the insurance exception, applied to claims arising under the Arkansas Civil Rights Act. However, it did err in concluding that the state-law statutory immunity contained in Ark. Code Ann. § 21-9-301 limited appellants' qualified immunity under federal law, making them subject to suit even though any liability would be covered by insurance. (Houston, B.; 63CV-20-522; 11-9-23; Wood, R.)

Macom v. Cresce, 2023 Ark. App. 530 **[default judgment; common-defense doctrine]** The circuit court granted appellee's motion to strike appellant's answer which resulted in default judgment. On appeal, appellant alleged that the circuit court erred in entering a default judgment because she had a common defense with another defendant in his answer. Arkansas has recognized the common-defense doctrine, which provides that an answer that is timely filed by a codefendant inures to the benefit of a defaulting codefendant. The true test is whether the answer of the non-defaulting defendant states a defense that is common to both defendants, because then a successful plea by one operates, as a discharge to all the defendants, but it is otherwise where the plea goes to the personal discharge of the party interposing it. A general denial of each and every material allegation contained in the complaint is the assertion of a common defense. Likewise, a defense on the merits that equally applies to the other defendant is the assertion of a common defense. A defaulting defendant does not have to demonstrate the criteria listed in Ark. R. Civ. P. 55(c) for setting aside a default judgment if the defaulting defendant was entitled to the benefit of a timely filed answer under the common-defense doctrine. Here, one of the defendants' answer stated a specific common defense when he denied the defendants had materially and substantially breached their oral contract with the plaintiffs. Additionally, the defendant alleged a general denial. These denials went to the existence of the plaintiffs' cause of action and asserted a defense common to both defendants; therefore, the answer inured to the benefit of appellant. Thus, the circuit court erred in granting default judgment against appellant. (Ratton, R.; 68CV-21-5; 11-15-23; Barrett, S.)

Cude v. Jill Pettersen Fam. Revocable Trust, 2023 Ark. App. 545 **[attorney's fees; injunctive relief]** The circuit court awarded attorney's fees to appellee. On appeal, appellant argued that the circuit court erred in awarding the appellee attorney's fees because it sought only injunctive relief in its cause of action. Attorney's fees are not allowed except where expressly provided for by statute; they are not recoverable in injunction or declaratory-judgment cases, even when the underlying dispute arises from a contract. Because the appellee's claim was one for injunctive relief, attorney's fees are not recoverable. Thus, the circuit court erred in its award of attorney's fees. (Weeks, A.; 68CV-22-94; 11-29-23; Barrett, S.)

CRIMINAL

Roberts v. State, 2023 Ark. App. 502 **[Rule 37 petition]** The circuit court dismissed appellant's petition for postconviction relief filed pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. On appeal, appellant argued the circuit court erred in concluding it did not have jurisdiction due to a lack of an explicit assertion in the petition that he was in custody. Rule 37 of the Arkansas Rules of Criminal Procedure provides that a petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on four enumerated grounds may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected. If a petitioner is not in custody, the circuit court lacks jurisdiction to consider the merits of his Rule 37 petition. Rule 37 of the Arkansas Rules of Criminal Procedure, however, does not require that the petitioner assert he is in custody. It just requires him to be in custody. Here, the first paragraph of appellant's petition stated, "[Appellant] pleaded guilty to all counts as charged in exchange for the maximum possible sentence on each count for an aggregate 3 sentence of 30 years imprisonment." Additionally, the petition later provided that "[a] sentencing order was entered on August 3, 2022, sentencing him to an aggregate term of 30 years imprisonment." There was nothing in the record to affirmatively indicate that appellant was not in custody at the entry of the order disposing of his petition. Thus, the circuit court erred in finding that it was without jurisdiction solely on the basis of the pleadings. (Dunham, J.; 58CR-22-193; 11-1-23; Murphy, M.)

Ray v. State, 2023 Ark. App. 515 **[sufficiency of the evidence; trifurcation]** The circuit court entered a sentencing order convicting appellant of first-degree domestic battering, first-degree terroristic threatening, and aggravated assault on a family or household member. On appeal, appellant argued that the evidence was insufficient to support his conviction for first-degree domestic battering and in denying his request to trifurcate the proceedings. A person commits domestic battering in the first degree if the person (1) commits any act of second- or third-degree domestic battering as defined in Ark. Code Ann. § 5-26-304 or 5-26-305, and (2) the person has on two previous occasions been convicted of any act of battery or aggravated assault for conduct that occurred within the ten years preceding the commission of the current offense against a family or household member. Here, the State erroneously informed the jury of the dates of appellant's "convictions," instead of presenting the jury with the dates on which appellant's prior conduct "occurred," as required by Ark. Code Ann. § 5-26-303(a)(5)(B). The jury was left to speculate as to when the conduct occurred that resulted in appellant's convictions. Thus, the appellate court reduced the punishment to the lesser-included offense of third-degree domestic battering. **[trifurcation]** Arkansas Code Annotated § 16-97-101 establishes a bifurcated procedure that governs jury trials which include any felony charges. This statute provides for a guilt phase and a penalty phase. It does not contain a mechanism for further separating the guilt phase of trial as to each element of an offense. AMI Crim. 2d 2610 provides that the jury will be instructed on both elements of Ark. Code Ann. § 5-26-303(a)(5), together, in the guilt phase of trial. The prior-conviction element in Ark. Code Ann. § 5-26-303(a)(5)(B) is not a sentencing enhancement but is an element that forms the substantive offense of first-degree domestic battering. Thus, the circuit

court did not err in denying appellant's motion to trifurcate and in receiving the State's prior-conviction evidence in the guilt stage of the trial. (Johnson, L.; 60CR-20-1681; 11-8-23; Wood, W.)

PROBATE

Reinkoester v. Reinkoester (In re Est. of Reinkoester), 2023 Ark. App. 517 **[estate distribution]** The circuit court entered an order authorizing the distribution of appellant's father's estate. On appeal, appellant argued that the circuit court erred as a matter of law because the distribution was directly contrary to the language in the father's will. Devises of an estate vest at the death of the testator unless a later time of vesting is clearly expressed by the words of the will or by necessary implication therefrom. Here, appellant's father died leaving the remainder of his estate to his three children. All three were alive when the deceased died, and all three inherited an equal share of his estate at his death. One of the three brothers then died ten months after he inherited a one-third share of his father's estate. The circuit court distributed one-third of the deceased's estate to the administrator of the appellant's brother's estate. There was no language in the will stating or even suggesting that the devises under the will vested at any time other than the date of death. Thus, the circuit court did not err in its distribution of the father's estate. (Dyer, C.; 26PR-21-170; 11-8-23; Wood, W.)

McKirch v. Myers (In re Adopt. of Minor Child.), 2023 Ark. App. 522 **[adoption; consent]** The circuit court entered an adoption decree. On appeal, appellant argued that the decree should be reversed and dismissed because his consent was required, and the circuit court erred in finding that the adoption was in the child's best interest. A natural parent's consent is not required in an adoption if the parent for a period of at least one year has failed significantly without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. A significant failure is one that is meaningful or important and is unjustifiable if it is voluntary and intentional, i.e., arbitrary and without adequate excuse. Here, a divorce decree was previously entered providing that appellant was to have no contact with the child's mother or the child after appellant was abusive in their marriage. Additionally, an order of protection was entered against appellant after he sent harassing and abusive emails to the child's mother. In order to receive future visitation with the child, appellant would have to demonstrate not only that visitation with him is in the child's best interest but also that he has the ability to comply with court orders, has learned healthy communication boundaries, and has received intensive psychological treatment. At the time the appellee filed his petition for stepparent adoption, it had been over two years since appellant had any contact with the child, and at the time of the hearing, it had been nearly three years. Appellant presented no evidence that he had demonstrated that he could comply with court orders, had learned healthy communication boundaries, and had received intensive psychological treatment, all as required by the divorce decree, or that he had completed batterer's treatment at Conway Counseling, as required by the order of protection. Appellant made no effort to establish a connection with the child. The evidence

before the circuit demonstrated that appellant was a dangerously violent individual whose intentional misconduct resulted in circumstances that justifiably prohibited him from contacting the child. Therefore, appellant's conduct could not be used as a shield from the application of Ark. Code Ann. § 9-9-207(a)(2). **[best interest]** Here, there was evidence that appellant had engaged in violent and threatening conduct toward the child's mother in the child's presence. In contrast, life with appellee was one of support and love, within which the child was happy and thriving. Thus, the circuit court did not err in finding that appellant's consent was not required as a condition to adoption, and the adoption was in the child's best interest. (Horwart, C.; 04PR-21-1067; 11-15-23; Abramson, R.)

Carpenter v. Patterson, 2023 Ark. App. 551 **[undue influence; mental capacity]** The circuit court dismissed appellants' claims contesting the validity of the second codicil to the will of their grandmother. On appeal, appellants argued that the circuit court erred in finding that (1) they failed to prove their brother, the appellee, exhibited undue influence over the deceased; (2) appellee overcame his burden of proof that the deceased had testamentary capacity at the second codicil signing; and (3) appellee overcame his burden of proof that the deceased was not unduly influenced. **[undue influence]** Appellants first argued the circuit court erred in finding that they failed to present any evidence to prove undue influence because it was appellee's burden to prove. Here, the court found that there was no evidence presented by the contesting parties to prove that the appellee exhibited undue influence over the deceased. Immediately following this finding, the circuit court specifically found that appellee had met his burden to rebut the presumption that the deceased was unduly influenced. The circuit court did not erroneously shift the burden of proof; rather, the circuit court weighed the evidence and found that appellee had met his burden, and appellants had presented nothing to counteract it. **[mental capacity]** If a testator has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration at the time the will is executed, then he possesses sufficient mental capacity to execute a will. Evidence of the testator's mental condition, both before and after the execution of the will at issue, is relevant to show his mental condition at the time he executed the will. With respect to the ability to know the extent and condition of the property to be disposed of it is unnecessary that he actually has this knowledge. It is sufficient if he has the mental capacity to understand the effect of his will as executed. Here, the evidence established that the deceased had the requisite testamentary capacity to execute the second codicil. The attorney who drafted the codicil recommended evaluations by doctors and visited her multiple times to ensure that she wanted to change the will, including an unannounced visit at the nursing home where she recognized him without prompting. The deceased's brother-in-law and nurse's testimony also supported the court's finding as well. Additionally, the doctors gave favorable opinions supporting the deceased's capacity. Thus, the appellate court found no error. **[undue influence]** Undue influence is not the influence that springs from natural affection; rather, it results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and it must be specially directed toward the object of procuring a will in favor of particular parties. Here, there was no evidence of coercion that would indicate that the will was not a reflection of the deceased's intent at the time the will

was drafted. Changing her will was something that the deceased wanted to do on her own, and appellee was not aware of the second codicil until after her death. In light of the evidence and testimony presented at the hearing, the appellate court could not say that the circuit court erred in finding that appellee rebutted the presumption of undue influence. (Hannah, C.; 59NPR-13-22; 11-29-23; Murphy, M.)

DOMESTIC RELATIONS

Grant v. Grant, 2023 Ark. App. 492 **[property-settlement agreement]** The circuit court entered an order interpreting the parties' property-settlement agreement and requiring him to reimburse the appellee. On appeal, appellant argued that the circuit court modified the agreement without jurisdiction and erred in its interpretation. A court has no authority to modify a separate and independent property-settlement agreement that has been incorporated into a divorce decree. However, the agreement is still subject to judicial interpretation, and questions relating to the construction, operation, and effect of independent property-settlement agreements are governed, in general, by the rules and provisions applicable to other contracts generally. In construing any contract, the courts must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. In construing a contract the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. Here, the property-settlement agreement stated that appellant was entitled to fifty percent (50%) of the civil service retirement of appellee. Appellee filed a "Motion for Retirement Order and Motion for Refund," alleging that although appellant was awarded only one-half of her retirement that existed at the time of the divorce, appellant had been receiving one-half of her total retirement benefits, including the benefits that accrued after the date of divorce. The circuit court found that the property-settlement agreement was clear and unambiguous and contemplated only a division of the retirement benefits that were earned during the parties' marriage and were divisible at the time of the divorce. Additionally, the circuit court granted appellee a judgment in the amount appellant had received in excess of the agreement. The appellate court held that the circuit court did not modify the property-settlement agreement. Rather, the circuit court construed the agreement in accordance with the plain meaning of the language employed. The agreement purported to divide marital property, and all of the retirement benefits of both parties were marital. Accordingly, the appellate court held that the circuit court did not err in finding that the agreement made no distribution of benefits earned after the divorce and instead provided that appellant would receive one-half of the retirement benefits that existed at that time. (Gray, A.; 60DR-99-3015; 11-1-23; Klappenbach, N.)

Baker v. Baker, 2023 Ark. App. 499 **[marital property; alimony]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred in (1) finding that certain real property was marital property; (2) finding that a five-acre tract adjoining that property was marital property; and (3) awarding appellee spousal support pending the parties' divorce. Appellee cross-appealed, arguing that the circuit court erred in denying her request for rehabilitative

alimony. **[real property; marital home]** Arkansas Code Annotated § 9-12-315(b) defines marital property as all property acquired by either spouse subsequent to the marriage. However, Ark. Code Ann. § 9-12-315(b)(1) excludes from the definition of marital property acquired by gift. Here, the property was acquired subsequent to the parties' marriage. The parties also executed a mortgage on the property in favor of appellant's parents that was paid with marital funds. Thus, the circuit court did not err in finding that appellant failed to prove that the property was a gift to him from his parents. **[real property; land tract]** Here, the parties purchased a five-acre tract during the marriage with money that was provided by appellant's parents. However, the evidence reflects that the money was deposited in the parties' joint personal checking account, and a cashier's check in that amount was drawn on the account to pay for the five-acre tract. The circuit court found that the only evidence that the money was a gift to appellant was his own testimony, and the court found that his testimony was not credible. Thus, the circuit court did not err in finding that the five-acre tract was marital property. **[alimony]** Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is charged. The primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. Arkansas Code Annotated § 9-12-309(a)(1)(A)(1) allows for maintenance during the pendency of a divorce action. Rehabilitative alimony has been defined as alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support. Here, in considering appellee's request for seven years of rehabilitative alimony, the circuit court considered her need; appellant's ability to pay; their financial circumstances, including their income, resources, assets, and earning capacities; her education and employability; the distribution of marital property; and the length of the marriage. The circuit court concluded that appellee was not entitled to rehabilitative alimony because she was highly employable as a registered nurse, had a high likelihood of securing a full-time position at a competitive salary, and her decision to remain at home and not work full-time was a choice. Considering all the court's findings, the appellate court found that the circuit court did not err in awarding appellee spousal support and in denying rehabilitative alimony. (Dyer, C.; 26DR-20-367; 11-1-23; Wood, W.)

Hopper v. Hopper, 2023 Ark. App. 504 **[order of protection]** The circuit court entered a final order extending an order of protection against appellant for ten years. On appeal, appellant argued that the circuit court erred by granting an order of protection on the basis of controlling behavior and that due process of the State of Arkansas demands that a person violates the domestic-violence statute in order to obtain an order of protection. Under Ark. Code Ann. § 9-15-205, when a petition for an order of protection is filed under the Domestic Abuse Act, the circuit court may provide relief to the petitioner upon a finding of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. Here, when the circuit court asked appellant whether he objected to an order of protection being entered, he responded no. Therefore, this response was construed as acquiescence. Even if appellant's actions were not an acquiescence, the circuit court did not err in its decision to extend the order of protection. Appellee testified about the abuse she endured during her marriage with appellant as well as what she perceived as threats

following their separation. Appellee alleged that appellant told her that she was "going to end up like the dead kitten in [their bathtub]." Appellee's testimony that she considered the dead-kitten reference in the many messages sent to her by appellant to be veiled threats was sufficient to support the circuit court's order granting the final order of protection for ten years. (Settle, C.; 17DR-22-198; 11-1-23; Brown, W.)

Wright v. Wright, 2023 Ark. App. 512 **[service of process; order of protection]** The circuit court entered a final order of protection in favor of appellee, against the appellant for the term of one year. On appeal, appellant argued that the circuit court lacked personal jurisdiction over him because there was no valid service of process. Proceedings filed under the Domestic Abuse Act are special proceedings; therefore, to the extent that the statutes creating the special proceedings provide for a procedure that is different from our rules of civil procedure, the rules of civil procedure do not apply. Service of valid process is necessary to give a court jurisdiction over a defendant; however, the defense of personal jurisdiction may be waived by the appearance of the defendant without raising an objection. Any action on the part of a defendant, except to object to jurisdiction, which recognizes the case in court, will amount to an appearance. Here, the first pleadings filed by appellant were an entry of appearance and motion for continuance, neither of which objected to jurisdiction, but rather expressly acknowledged the circuit court's jurisdiction over both parties. Thus, appellant's later objection at the hearing regarding service of process and his motion to dismiss for lack of personal jurisdiction was untimely. Thus, the circuit court did not err in denying appellant's motion to dismiss. (Hannah, C.; 73DR-21-321; 11-8-23; Gladwin, R.)

Dixon v. Dixon, 2023 Ark. App. 519 **[unequal division of marital property]** On appeal, appellant argued that the circuit court erred in the distribution of the parties' marital and nonmarital property. A trial court has broad powers to distribute both marital and nonmarital property to achieve an equitable division. In accordance with Ark. Code Ann. § 9-12-315(a)(1), at the time of entry of a divorce decree, the trial court shall distribute all marital property one-half to each party unless it is determined that such distribution would be inequitable; if the property is not divided equally, then the trial court must state the reasons and bases for not doing so, and the bases and reasons should be recited in the order. All nonmarital property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division it deems equitable taking into consideration the factors enumerated in Ark. Code Ann. § 9-12-315(a)(1), and the trial court must state in writing its reasons and bases for such division. However, while the trial court must consider the statutory factors and state its reasons for dividing property unequally, the court is not required to list each factor in its order nor is it required to weigh all the factors equally. Here, the divorce decree made the requisite findings stating its reasons and bases for dividing the marital property unequally and awarding appellee a portion of appellant's nonmarital property. In awarding appellee an unequal division of the property, the circuit court considered the extensive assets that appellant brought into the marriage and would retain after the divorce, including substantial real estate, investment accounts, and companies. Additionally, the circuit court considered that appellant commingled marital and nonmarital assets and had led appellee to believe that she was a partner

in his companies during the marriage and that he held her out as such. The circuit court also declined to award alimony to appellee in part because of its unequal award of marital and nonmarital property to her. Property division and alimony are complementary devices that the trial court may utilize in combination to make the dissolution of marriage equitable. Thus, the appellate court found the circuit court did not err in its unequal distribution of property. (Johnson, A.; 53DR-20-84; 11-8-23; Hixson, K.)

Smith v. Smith, 2023 Ark. App. 521 **[child support; division of property]** The circuit court entered a decree finalizing the parties' divorce. On appeal, appellant argued that the circuit court erred in refusing to award any child support. Administrative Order No. 10 provides that each parent's share is that parent's prorated share of the two parents' combined income. Income is intentionally broad and designed to encompass the widest range of sources consistent with the State's policy to interpret "income" broadly for the benefit of the child. Additionally, Administrative Order No. 10(III)(2) defines gross income to include "earnings generated from a business," "distributed profits or payments from . . . [a] trust fund" and "assets available to generate income for child support." Section (III)(2) of Administrative Order No. 10 also specifically contemplates including an inheritance as income: "One-time sources of money like an inheritance, gambling or lottery winnings, or liquidating a Certificate of Deposit, for example, is income for these Guidelines purposes." Here, the circuit court erred in not considering assets and income from appellee's trust and LLC as a source of income in calculating child support. Although those entities were inherited by the appellee and were nonmarital property, that income should have been attributed to appellee under Administrative Order No. 10's directive to interpret income broadly to encompass the widest range of sources. Thus, the circuit court must reconsider the issue of child support. Additionally, the circuit court must also reconsider the issues of alimony and property distribution because all these issues are inextricably intertwined. In awarding alimony one the factors to consider is the amount of child support awarded. Moreover, property division and alimony are complementary devices that a circuit court uses to make the dissolution of marriage as equitable as possible. Therefore, the circuit court must consider these issues in arriving at an equitable result. (Shirron, S.; 30DR-20-251; 11-15-23; Harrison, B.)

Sanchez v. Weeks, 2023 Ark. App. 531 **[division of property; marital debts]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred in its division of the marital assets and debts. **[division of property; marital home]** All earnings or other property acquired by each spouse after marriage must be treated as marital property unless it falls into one of the statutory exemptions contained in Ark. Code Ann. § 9-12-315(b). Arkansas Code Annotated § 18-12-401(a) provides that a deed of conveyance of real property located in this state by an individual to his or her spouse shall convey to the grantee named in the deed the entire interest of the grantor in the property conveyed, or the interest specified in the deed, as if the spousal relation did not exist between the parties to the deed. Thus, under the statute, a quitclaim deed executed by one spouse to the other conveys the grantor spouse's interest therein to the grantee spouse. Here, prior to the divorce, the appellee quitclaimed his interest in the property to appellant in exchange

for being released from the liability on the mortgage. The quitclaim deed of the property from appellee to appellant in appellant's individual name resulted in a transfer or gift of appellee's property to appellant, and the property became the separate property of appellant. Thus, the circuit court erred in finding that the home was martial property. **[division of property; retirement account]** All property acquired subsequent to the marriage is considered to be marital property. Retirement benefits based on contributions not made during the marriage constitute nonmarital property. Likewise, the increase in value of property acquired prior to marriage, including retirement plans, is excepted from the definition of marital property. Conversely, retirement benefits based on contributions made during the marriage constitute marital property, as does the associated gain in value of such plan. Here, any contributions made prior to the marriage, along with the corresponding associated growth, constituted appellant's nonmarital property. Any contributions made after appellant married appellee, along with its corresponding associated growth, constituted marital property subject to division between appellant and appellee. Under normal circumstances, the appellee would be entitled to one-half of the retirement contributions made by appellant to the retirement account during the marriage, which is what the circuit court gave to him. However, there was a previously entered QDRO in a separate case dividing appellant's 401(k) equally between appellant and his ex-wife as of February 2020, which was over four years into appellant and appellee's marriage. Because the circuit court erred in failing to give full credit to the QDRO entered in the separate case, and because the QDRO allocates to appellant's ex-wife an interest in the marital property of the parties, the circuit court must recalculate the interests in the retirement fund. **[marital debts]** While Ark. Code Ann. § 9-12-315 provides that all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable, that statute does not apply to the division of marital debts. Here, the circuit court could have found that appellant's payment of the marital debt using his nonmarital funds was a gift to the marriage. Thus, the circuit court's refusal to order repayment of the marital debts was not erroneous. (Schrantz, D.; 04DR-19-1313; 11-15-23; Thyer, C.)

Townshend v. Townshend, 2023 Ark. App. 532 **[division of property]** In the divorce decree, the circuit court awarded the home the parties lived at to appellee as her sole and separate property. On appeal, appellant argued that the home was jointly owned by the parties pursuant to a written agreement and that the circuit court erred in the division of the parties' personal property. **[non-marital home]** Arkansas Code Annotated § 9-12-315(a)(1) provides that all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable, in which event the trial court must state its basis and reasons for not dividing the marital property equally. All property shall be returned to the party who owned it prior to marriage unless the court shall make some other division that it deems equitable, in which event it must state its basis and reasons for the unequal distribution. Here, the parties entered into an agreement prior to marriage that appellee would return a deposit to appellant if either party broke their engagement. The circuit court found that the trigger in the agreement was the engagement being broken. The engagement was not broken; therefore, the agreement was no longer relevant. Because the agreement did not resolve the issue of ownership of the property in the event the parties did marry; the property was subsequently deeded and mortgaged in appellee's name alone; and the parties married six months

later, the appellate court concluded that there was no error in awarding the property to appellee as her separate nonmarital property. **[personal property]** Once property is placed in the names of both husband and wife without specifying the manner in which they take, such property is presumed to be held by them as tenants by the entirety. Here, the appellee testified that during the marriage the parties acquired two automobiles that were titled in both parties' names. Thus, based on the record the circuit court did not err in awarding each party the automobile in his or her possession. (Blatt, S.; 66FDR-22-40; 11-15-23; Hixson, K.)

Iacampo v. Hoffpauir, 2023 Ark. App. 533 **[custody; child support; contempt]** The circuit court entered an order modifying custody, visitation, and child support, and held appellant in contempt. On appeal, appellant argued the circuit court erred in their order. **[custody]** To make changes to custody or visitation, the moving party must first demonstrate a material change in circumstances. Hostility, interference with visitation, and evidence of parental alienation is sufficient to support a material change for purposes of custody. Here, the circuit court found that appellant was hostile toward appellee and attempted to interfere with her visitation. Furthermore, one of the grown children testified that appellant tried to prevent them from having a relationship with their mother. Thus, the record supported the finding that appellant's actions constituted a material change in circumstances. **[retroactive child support]** Retroactive modification of a court-ordered child-support obligation may be assessed from the time that a petition for modification is filed. Here, the circuit court explained in its letter opinion that appellee had provided support to the children by providing costs of transportation to and from her home in Houston, provided clothing for the children, and provided for their extracurricular activities, despite not having a court-ordered duty to pay support. Additionally, the circuit court found that an award of retroactive support would not be fair or reasonable under the facts of the case. Therefore, the circuit court did not abuse its discretion in declining to award retroactive support under the facts. **[child support]** The Arkansas Supreme Court issued *In re Implementation of Revised Administrative Order No. 10*, 2020 Ark. 131, on April 2, 2020, and that order provided that circuit courts, when setting child support, may use the new guidelines as of that date but that all support orders entered after June 30, 2020, shall use the new guidelines. Both the old and new versions of Administrative Order No. 10 provided that child-support orders contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the chart. Here, the order in this case was filed on April 24, 2020, and the appellate court was unable to determine which guidelines the circuit court used. Thus, the circuit court must make additional findings in compliance with Administrative Order No. 10, and because any order now would be entered after June 30, 2020, the new guidelines shall be followed. **[contempt]** Before one can be in contempt for violating a court's order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. In order to establish contempt, there must be willful disobedience of a valid order of a court. Here, appellant did not disagree that he interfered with appellee's visitation and access to medical and educational records. He attempted to justify it by saying that the appellee did the same things. The decree of divorce was clear, as was the evidence the appellant violated it. Thus, the circuit court did not err in finding appellant in contempt. (Honeycutt, P.; 47BDR-09-299; 11-15-23; Murphy, M.)

Fraser v. Fraser, 2023 Ark. App. 540 **[alimony]** The circuit court entered an order denying appellant's request to terminate his spousal support obligation. On appeal, appellant argued the circuit court erred in its denial of his petition to terminate alimony because their incorporated agreement provided that his spousal-support obligation terminated upon appellee's cohabitation. A court has no authority to modify an independent contract that is made part of a divorce decree. Alimony, in instances where there is an agreement, arises from a contract right, not an equitable right. While the agreement is still subject to judicial interpretation, courts must apply the rules of contract construction in interpreting the agreement. Here, the agreement stated that alimony shall terminate upon appellee's death, remarriage, cohabitation, or any other circumstance provided for in Ark. Code Ann. § 9-12- 312. Arkansas Code Annotated § 9-12-312 provides in part that unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the earlier of the establishment of a relationship that produces a child or children and results in a court order directing another person to pay support to the recipient of alimony. Additionally, the statute provides that unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the earlier of the establishment of a relationship that produces a child or children and results in a court order directing the recipient of alimony to provide support of another person who is not a descendant by birth or adoption of the payor of the alimony. Appellee gave birth to a child fathered by her boyfriend, whom she testified that she was no longer romantically involved with. Appellee had not requested child support from the child's father, and they did not spend the night together or keep clothes or toiletries at each other's homes. The appellee's and the child's father's only contact was for a couple of hours in the evening a few days a week when the child's father came to her home to visit his child. The child's father provided diapers and other necessary items for the child but did not provide any financial support for the appellee, leave any personal items at her house, or sleep at her home. Thus, the circuit court did not err in its denial of appellant's petition to terminate his spousal support obligation. (Threet, J.; 72DR-18-720; 11-29-23; Virden, B.)

Fowler v. Fowler, 2023 Ark. App. 543 **[distribution of property; business valuation]** The circuit court entered a divorce decree dividing the parties' property. On appeal, appellant argued that the circuit court erred in its valuation of the pharmacy corporation owned by the parties. A circuit court has broad powers to distribute property in a divorce to achieve equitable distribution; mathematical precision is not required. Arkansas law requires the use of the "fair market value" standard for valuing businesses in a marital-property context. Here, a valuation expert testified on the amount he believed the pharmacy corporation was valued at and was deemed credible by the circuit court. The expert witness stated that he worked to determine the fair market value, and he testified that corporate goodwill belonged to the company and was embedded in the value of the company, meaning that he took into consideration the employees, customer lists, trademarks, reputation, and name of the company. Appellant failed to offer his own expert or personal opinion on what the pharmacy corporation was worth. Thus, based upon the evidence the circuit court did not in its valuation of the pharmacy corporation. (McSpadden, D.; 33DR-20-99; 11-29-23; Klappenbach, N.)

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Copp v. Ark. Dep't of Human Servs., 2023 Ark. App. 491 **[TPR-aggravated circumstances; little likelihood]** No clear error in terminating Appellant father's parental rights on aggravated-circumstances ground when, for almost two years, Appellee worked with Appellants on parenting skills during visitation and offered multiple services, such as parenting classes, counseling, visitation, transportation, hands-on parenting training, housing assistance, couples counseling, and anger-management classes. Additionally, Appellee allowed Appellants an unsupervised weekend visit with a safety plan that required Appellant father to supervise all contact between the child and Appellant mother. However, despite the services, Appellant father left the child alone with Appellant mother who then abused the child. Additionally, Appellant father failed to comply with anger-management classes, and Appellants continued to remain in an abusive relationship with each other. Further, although all the evidence demonstrated that Appellant mother could never independently parent or be alone with the child, Appellant father refused to accept this and maintained that it would be safe to leave the child alone with her if he returned to their custody. Even if Appellant father could independently parent the child, he admitted that there would undoubtedly be instances in which he would need to leave the child alone with Appellant mother because he had no other support system, and he felt there was no issue with this, despite the evidence to the contrary. Appellant father's argument merely asked the appellate court to reweigh the evidence on appeal, which it would not do. **[TPR-best interest; potential harm]** There was sufficient evidence of potential harm because Appellant father failed to resolve his domestic-violence issues with Appellant mother, and even after she was determined to have abused the child, Appellant father stated it would be fine for her to supervise the child alone. (Smith, T.; CV-23-138; 11-1-23; Gladwin, R.)

Spears v. Ark. Dep't of Human Servs., 2023 Ark. App. 494 **[TPR-failure to remedy]** When the condition of the home had been an issue at removal and throughout the case, despite knowing what to do, it was clear from the record that the Appellant parents were unwilling to maintain the home. Keeping the home in a sanitary and safe condition for a five-year-old without needles, marijuana paraphernalia, or spoiled food accessible to the child was always in the parents' control even without the assistance of homemaking services that had been referred by the Appellee. That those services had not yet been in the home to help clean it did not constitute a lack of meaningful efforts by the Appellee. Less than two weeks before the termination hearing, the home remained in an environmentally unsafe condition; other evidence established that the parents' failure to comply with certain court orders left questions about drug use and Appellant mother's lack of control of her diabetes. The appellate court could not say that the circuit court clearly erred in finding that the parents had failed to remedy the conditions that caused removal. **[TPR-best interest; potential harm]** Appellants argued that there was insufficient evidence that termination was in the child's best interest. They pointed to their compliance with the case plan and their bond with the child. However, even full compliance with the case plan was not determinative; the issue was whether the parents had become stable, safe parents able to care for their child. Returning the child to a home that the Appellants would not maintain in an environmentally safe condition posed a threat

of potential harm. A parent's past behavior is often a good indicator of future behavior. Furthermore, this was the second time the child had been in foster care, and this case had gone on for nearly eighteen months. Thus, there was no clear error. (Blatt, S.; CV-23-173; 11-1-23; Klappenbach, N.M.)

Beavers v. Ark. Dep't of Human Servs., 2023 Ark. App. 508 **[TPR-aggravated circumstances]** Despite many services offered to Appellant, including drug screens, counseling, parenting classes, and a psychological evaluation, Appellant "failed multiple drug screens; she failed to maintain employment; she was inconsistent with counseling; she consistently denied her drug addiction; and she lost the privilege of unsupervised visitation due to her falling asleep at visits." In addition to drug use and unstable employment, an inability to demonstrate sufficient parenting skills to regain custody of one's children or to be trusted with a trial placement or unsupervised visitation can support an aggravated circumstances finding. Termination on the basis of aggravated circumstances was not clearly erroneous. **[TPR-aggravated circumstances; services]** A finding of aggravated circumstances does not require proof that meaningful services were provided, nor is there any time-based requirement. Appellant waived any services argument on appeal when she failed to request any of the specific services that she later claimed were necessary to remedy the cause of removal. Specifically, she never requested those services, she denied needing services for drug treatment, and denied needing services to assist her to find a job. **[TPR-best interest; potential harm]** A parent's continued illegal drug use and instability remain sufficient to demonstrate potential harm to support a best-interest finding in a termination-of-parental-rights case. Under these facts, including the continuous denial of a drug addiction despite positive drug tests, it was not clearly erroneous for the court to conclude that Appellant's past behavior and relapse from unsupervised to supervised visitation demonstrated potential future harm to the children. (Sullivan, T.; CV-23-309; 11-8-23; Abramson, R.)

Freedman v. Ark. Dep't of Human Servs., 2023 Ark. App. 514 **[TPR-aggravated circumstances]** Appellant had been offered all the services available to her multiple times. Yet she continued to make poor decisions that placed her children in harm's way again and again. She allowed her children to be around people who brought drugs into her house, causing her two youngest children to test positive for methamphetamines after a hair-follicle test while refusing to take a hair-follicle test herself, despite being court-ordered to do so. Even though Appellant had undertaken all the services Appellee had to offer multiple times, she still had failed to internalize the lessons from those services. Appellant's argument was essentially asking the appellate court to reweigh the evidence in her favor and to reach a result contrary to that of the circuit court, which the court would not do. No clear error in finding Appellee had proved the "aggravated circumstances" ground in this case. **[TPR-best interest; potential harm]** Appellant argued that Appellee failed to prove her children would be subject to potential harm if returned to her custody. There was no requirement to find that actual harm would occur if the children were returned to her care or to affirmatively identify a potential harm. Evidence regarding potential harm was viewed in a forward-looking manner and in broad terms; Appellant's past behavior was often a good indicator

of future behavior. Given the facts listed above, with due deference to the trial court's credibility determinations, there was no clear error in finding termination of Appellant's parental rights in the children's best interest. (Elmore, B.; CV-23-307; 11-8-23; Potter Barrett, S.)

Park v. Ark. Dep't of Human Servs., 2023 Ark. App. 546 **[recusal; bias]** Adverse decisions based on the record before the trial court at the time the decisions were made does not give rise to bias or prejudice against the Appellants, especially considering that at the time of these decisions, Appellants were not even parties in the dependency-neglect proceeding. Further, the court's failure to formally acknowledge Appellants' counsel was not a clear indication of bias when there had been no motion to intervene filed and Appellants were still not a party. There was no abuse of discretion in denying a motion to recuse. **[dismissal of non-party pleading]** There was no error in dismissing Appellant's petition for guardianship while granting Appellee's petition to terminate parental rights; Appellants were not parties at the time of the hearing and had no standing to challenge the termination of parental rights. **[placement; relative preference]** Where Appellants did not seek intervention until after termination of parental rights, any preference for placement they might have enjoyed as biological relatives of the child ended when parental rights were terminated. **[adoption; best interest]** There was no clear error in finding it in the child's best interest to be adopted by her foster family with whom she had lived for almost the entirety of her young life and with whom she had developed a tremendous bond. (Weaver, S.; CV-23-256; 11-29-23; Thyer, C.)

Holland v. Ark. Dep't of Human Servs., 2023 Ark. App. 548 **[TPR-aggravated circumstances; little likelihood]** Despite all the services provided and offered to Appellant mother over nearly three (3) years, the evidence demonstrated that she was unable or unwilling to protect her children from the harm that caused their removal; her continued inability to protect and care for her children and failure to benefit from the services provided were sufficient to demonstrate little likelihood that further services would result in a successful reunification. **[TPR-best interest; potential harm]** Appellant mother was unable or unwilling to protect her children from the harm that caused their removal: she continued to reside with Appellant father, who was emotionally and physically abusive to her and the children, and the evidence demonstrated that Appellant father's volatile behavior continued the day of the termination hearing; continuing in a relationship with the abuser of one's child is evidence of potential harm. In addition to the instability in the home, Appellant mother did not maintain a drug-free lifestyle; instability, illegal drug use, or failure to comply with court orders constituted sufficient evidence of potential harm. (Hendricks, A.; CV-23-129; 11-29-23; Wood, W.)

Baker v. Ark. Dep't of Human Servs., 2023 Ark. App. 549 **[TPR-best interest; adoptability]** Adoptability was not an essential element of proof in a termination case but merely a factor that must be considered by the circuit court in determining the best interest of the child. Here, the circuit court clearly considered adoptability when it stated that adoption was not likely due to the

children's behavioral barriers, but that the barriers to adoption were likely to be reduced with the juveniles in Appellee's custody because the services being provided to the juveniles "could improve their potential to become adoptable." **[best interest; adoptability]** When children wanted finality in their lives, to never return to Appellant's care, coupled with their therapist's testimony that further contact with Appellant would jeopardize their mental health, there was no clear error in finding it in the children's best interest to terminate parental rights, even if the children didn't at that point wish to be adopted. (Batson, B.; CV-23-484; 11-29-23; Wood, W.)