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CIVIL

El Dorado Ammonia, LLC v. Global Industrial, Inc., 2023 Ark. App. 455 [**materialman's lien**]
The circuit court entered an amended judgment. On appeal, the parties challenged whether the materialmen's lien filed by appellee was perfected. [**original and amended materialman's lien perfected**] Arkansas Code Annotated § 18-44-117(a) mandates that a person wishing to place a materialmen's lien on a piece of property must file a lien account within 120 days after the work was performed. The filing must include, among other information, a correct description of the property to be charged with the lien, verified by affidavit. A street address is not a correct description of the property under Ark. Code Ann. § 18-44-117(a)(2)(A). The materialmen's lien statute is strictly construed because it is an extraordinary remedy not available to every merchant or worker. The test to determine whether a lien account has a suitably specific description of the property is whether it sufficiently describes the improvements of the improved property as to afford information concerning the situation of the property to be charged with the lien and that it is sufficient to enable anyone familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others. Here, the appellate court found that appellee's property description was too broad to comply with the statute. The property description in appellee's original lien and the first amended lien was insufficient. It included hundreds of acres. There were many buildings shown across many acres, but there was no indication by which even

an individual familiar with the locality could identify which specific structures were improved by appellee. Out of the hundreds of acres in the property description, appellee performed work on buildings covering only 3.562 acres of the property. The property description in the original lien and the first amended lien was not sufficient to enable anyone familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others. Thus, neither its original materialmen's lien nor its first amended lien was perfected. **[second amended materialman's lien]** Arkansas Code Annotated § 18-44-117(a)(1) states that a lien account must be filed within 120 days after the performance of the work or provision of materials. All actions must be commenced within fifteen months after filing the lien account. Ark. Code Ann. § 18-44-119 states that a lien expires after fifteen months unless (1) an action shall be instituted as described in the subchapter and (2) a lis pendens is filed under Ark. Code Ann. § 16-59-101. Here, the defective original materialman's lien was timely filed in September 2015. The defective first amended lien was filed on February 23, 2016. The lis pendens was filed three days later on February 26, 2016. The original materialmen's lien would expire unless a lawsuit and a lis pendens properly identifying the property was filed within fifteen months. Appellee filed a second amended lien, with a sufficient legal description in May 2017. This was twenty months after the original materialmen's lien was filed. The second amended complaint, which incorporated the proper description in the second amended lien, was filed twenty-six months after the original materialmen's lien. The amended lis pendens was filed thirty-seven months after the original materialmen's lien. The time period to enforce the lien had long passed by that point. Thus, the circuit court erred by entering an order to foreclose on appellee's lien in its amended judgment. (Guthrie, D.; 70CV-16-76; 10-18-23; Gruber, R.)

Turcios v. Carter, 2023 Ark. App. 476 **[service; prima facie]** The circuit court entered an order dismissing appellant's second amended complaint alleging claims for malicious prosecution and civil conspiracy against appellees. Rule 4(f) of the Arkansas Rules of Civil Procedure provides that personal service inside the state shall be made on a defendant who is a natural person at least eighteen years old by delivering the process to an agent authorized by appointment or by law to receive service of summons on the defendant's behalf. The return of service is prima facie evidence that service was made as stated. The burden then shifts to the party claiming that service was not valid to overcome the prima facie case created by proof of service. Here, appellant presented prima facie evidence of proper service on two of the appellees when he presented the circuit court with two file-marked returns of service filled out by the process server that stated he delivered the summons and complaint to an agent authorized by appointment or by law to receive service of summons on behalf of the appellees. Thus, the burden shifted to appellees to overcome the prima facie evidence created by these returns of service. At a hearing, counsel for appellees argued that the person who was served was not the authorized agent for service for appellees. Appellees' counsel sought to present testimony and affidavits to rebut the prima facie evidence; however, the circuit court did not allow counsel to present any evidence because the court did not want to convert the hearing into a summary-judgment hearing. Therefore, the returns of service were the only evidence submitted on the issue of service. The circuit court then found that the person who was served was not the agent authorized by law to accept service for two of the appellees. Whether

service was had is a question of fact, and the credibility of the evidence to rebut proof of service was a matter for the circuit court to decide. The circuit court erred in excluding the relevant evidence on the question of service offered by the appellees. The circuit court’s dismissal for lack of service rested on an unsupported factual finding because it otherwise excluded evidence relevant to the question of service. Thus, the circuit court must have an evidentiary hearing on the issue of whether the appellees were properly served. (Pierce, M.; 60CV-19-1027; 10-25-23; Wood, W.)

Grayson & Grayson, P.A. v. Couch, 2023 Ark. App. 479 [**unjust enrichment**] The circuit court entered an order finding that a contract did not exist between the parties because the terms were too indefinite and thus denied appellant’s claims for breach of contract and unjust enrichment. On appeal, appellant argued that the circuit court erred in concluding that its unjust enrichment claim was unavailable and failed as a matter of law. The issue of unjust enrichment is a question of fact, and for a court to find, a party must have received something of value to which the party is not entitled and which the party must restore. There also must be some operative act, intent, or situation to make the enrichment unjust and compensable. A trial court that finds unjust enrichment uses its equitable power to impose a quasi-contract, or contract implied in law, in order to do justice. The basis for recovery under this theory is the benefit that the party has received, and it is restitutionary in nature. The absence of an enforceable contract operates as a potential trigger to the application of unjust enrichment and not a bar. When an express contract does not exist, is void, or unenforceable, or does not provide justice, alternative theories may be asserted. The rules of pleading permit both claims—express contract and contract implied in law—to be pursued in the alternative and, in appropriate circumstances, unjust enrichment claims to be successfully asserted when the contract claim fails. Here, the appellate court held that the circuit court erred to the extent that it concluded, as a matter of law, that appellant’s failure to prove the existence of an enforceable contract barred it from recovery on its alternative claim for unjust enrichment. Unjust enrichment is a remedy that does not depend on the existence of an enforceable contract but, rather, may be asserted in the absence of an enforceable contract. Therefore, the circuit court must further consider appellant’s unjust enrichment claim. (Compton, C.; 60CV-06-9369; 10-25-23; Hixson, K.)

St. Vincent Medical Group v. Baldwin, 2023 Ark. 151 [**class certification**] The circuit court certified appellant’s class action lawsuit. On appeal, appellant argued the circuit court erred in certifying the class action because the order certifying the class was founded on an erroneous interpretation of the Patient Right-to-Know Act. [**affected patient**] There are six prerequisites for certification of a class-action complaint: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; (5) predominance; and (6) superiority. The Patient Right-to-Know Act (Act), Ark. Code Ann. § 20-6-201, defines an “existing patient” as “one who is seen for a medical diagnosis or treatment, or both, by a healthcare provider within the previous twelve (12) months...” However, the Act did not define an “affected patient,” the term intended to define those patients impacted by noncompliance with the Act. Here, appellee claimed that appellant, after terminating his primary-care physician, failed to provide the physician with a list of his patients or to send his patients notice of his new location, thus violating the Act. On appeal, appellant specifically argued that the

circuit court erroneously concluded that all of the physician’s “existing patients” were “affected patients.” The Supreme Court found that existing patients and affected patients were not synonymous terms—not all “existing patients” were “affected patients” as the circuit court concluded. Thus, “affected patients” under the Act means those “existing patients” who were harmed because of the healthcare provider’s failure to provide the patient with his or her physician’s new practice location or misled the patient about the new practice. **[predominance]** The starting point in examining predominance is whether a common wrong has been alleged against the defendant. The courts must decide whether the issues common to all plaintiffs “predominate over” the individual issues. The mere fact that individual issues and defenses may be raised regarding recovery of damages cannot defeat class certification. Appellee’s claim was based on appellant’s failure to respond to the physician’s letter. Under the Act, patients could have been affected only if appellant misled them or failed to provide the physician’s new practice location or contact information upon request. A patient would not have been affected, and therefore would not be a class member if he requested and received the physician’s new practice information from appellant directly. Existing patients were not necessarily affected patients. In order to establish liability, the circuit court would have to determine which of the physician’s existing patients were affected. Because no one set of operative facts could establish whether appellant violated the Act as pled, the Supreme Court concluded that these individual fact questions predominated over common questions. Therefore, the circuit court erred in its class certification. (Welch, M.; 60CV-20-5603; 10-26-23; Wood, R.)

Cherokee Nation Bus., LLC v. Gulfside Casino Partnership, 2023 Ark. 153 **[amendment 100; casino licensing]** The circuit court held that a Pope County casino license issued by the Arkansas Racing Commission (ARC) to Cherokee Nation Businesses, LLC (“CNB”), and Legends Resort and Casino, LLC (“Legends”) was a “legal nullity, void and of no effect.” On appeal, appellant argued the circuit court erred in finding that the ARC’s decision to issue the license jointly to Legends and CNB was an ultra vires act and unconstitutionally issued in violation of Amendment 100 to the Arkansas Constitution. Amendment 100, section 2(b) of the Arkansas Constitution defines “casino applicant” as “any individual, corporation, partnership, association, trust, or other entity applying for a license to conduct casino gaming at a casino.” The amendment also provides that the “Arkansas Racing Commission shall award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat.” Here, the ARC issued the Pope County casino license to both Legends and CNB. Yet at the time of this issuance, CNB had no application pending with the ARC. As CNB’s only application before the ARC was submitted and ultimately rejected, it was not a “qualified applicant” as required by Amendment 100. Thus, the ARC acted ultra vires in issuing the license to CNB. Further, the amendment provides for one license to be awarded to one entity for one casino. “Casino applicant” is singular—not plural. Nowhere in the text did it allow for joint or dual licensing to more than one applicant. The circuit court was correct in finding that the award of the Pope County casino license to Legends and CNB violated Amendment 100, making such action ultra vires. Thus, the circuit court did not err in declaring that the license issued was void. (Fox, T.; 60CV-21-1653; 10-26-23; Hiland, C.)

CRIMINAL

Fleming v. State, 2023 Ark. App. 439 [**police dog sniff**] A jury convicted appellant of possession of marijuana, possession of methamphetamine, possession of amphetamine, and simultaneous possession of drugs and a firearm. On appeal, appellant argued that the circuit court erred in denying his motion to suppress the physical evidence seized from his vehicle during a traffic stop. When a reliable canine gives a positive alert on a vehicle, that positive alert alone is enough to establish probable cause for the presence of a controlled substance. Here, appellant argued that the officers facilitated a police dog's sniff of the interior of his vehicle at the open driver's side door when they ordered him out of his vehicle without allowing him to close the door behind him. However, the police dog alerted at multiple points on appellant's vehicle before he ever approached the open driver's side door. The police dog alerted first at the rear of the vehicle and then alerted again at two different points at the front of the vehicle before coming around to the open door. At the moment the police dog first alerted at the rear of appellant's vehicle, the officers present at the scene had probable cause to search the vehicle. Thus, the circuit court did not err in denying the appellant's motion to suppress the physical evidence seized from the vehicle. (Puryear, C.; 22CR-21-75; 10-4-23; Thyer, C.)

Durkin v. State, 2023 Ark. App. 463 [**hearsay; excited utterance**] A jury convicted appellant of two counts of second-degree sexual assault and sentenced him to two concurrent ten-year prison terms. Arkansas Rule of Evidence 803(2) provides that an excited utterance is not excluded by the hearsay rule, even though the declarant is available as a witness, and that an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In ruling on this exception, the circuit court should consider all the relevant circumstances: the lapse of time between the events and the statement; the declarant's age, mental condition, and physical condition; the characteristics of the event; and the statement's subject matter. The record must show that the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation. Here, the witnesses' statements were given two days after the assaults, and the statements were not spontaneous but were, rather, in response to questions in an interview. The record did not show that the witnesses' condition at the time was such that the statements were spontaneous, excited, or impulsive rather than the product of reflection and deliberation. Thus, the circuit court erred in admitting the testimony. [**illegal sentence**] There is no statute authorizing drug or alcohol treatment as a condition of incarceration, making any sentence containing such a condition illegal on its face. (McCune, M.; 17CR-21-580; 10-18-23; Hixson, K.)

Doerhoff v. State, 2023 Ark. 149 [**non-model jury instruction**] A jury convicted appellant of first-degree murder and sentenced him to a term of life imprisonment. On appeal, appellant argued that (1) the circuit court erred in giving a non-model jury instruction regarding justification and (2) in

refusing to give appellant's proffered jury instruction regarding excessive force. **[justification instruction]** There is a presumption that the model jury instruction is a correct statement of the law. Non-model jury instructions are to be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject at hand. Here, the model jury instruction, AMI Crim. 2d 705, did not accurately state the law. The model jury instruction had not been modified to account for the changes set forth in the "Stand Your Ground" law that were effective at the time of the offense. In recognition of this change, the circuit court gave a modified instruction wherein the entirety of the amended statute section was inserted into the model jury instruction in place of the duty-to-retreat language that existed prior to the enactment of the new law. Thus, the jury was properly instructed on appellant's defense of justification in accordance with the law that was in effect at the time of the offense. **[excessive force instruction]** It is not an error for a court to refuse to give a non-model instruction when a model instruction accurately reflects the law. Here, the circuit court submitted a justification instruction that adopted the language describing the relationship between the defense of justification and the use of excessive force set forth in the model jury instruction, AMI Crim. 2d 705, and this model language accurately reflected the law regarding the defense. Appellant did not object to this portion of the instruction or allege that the model language regarding excessive force was an incorrect statement of the law. Accordingly, the circuit court did not abuse its discretion in refusing to submit appellant's proffered non-model excessive-force instruction to the jury. (Pate, M.; 73CR-22-48; 10-26-23; Baker, K.)

PROBATE

Ellis v. Smith, 2023 Ark. App. 470 **[adoption]** The circuit court entered an order granting appellees' petition to adopt Minor Child (MC). To grant an adoption petition, the circuit court must find that (1) the biological parent consents or consent is excused, and (2) the adoption is the best interest of the child. In determining best interest, courts consider all the evidence, including the child's relationship with family members whose rights the adoption would terminate. It is for the circuit court to weigh the benefits flowing to children from the granting of an adoption, as opposed to disadvantages which may result from the severing of ties between grandparents and grandchildren. Here, appellees were granted legal custody shortly after the child's mother died and later were granted permanent guardianship. Appellant is the child's grandmother, who was formerly married to the appellees' son and the child's mother was their daughter. The court heard testimony that the appellees were loving great-grandparents who had been a stable and consistent part of MC's daily life for over four years. They encouraged contact with the appellant's family and denied contact only during the COVID-19 pandemic before MC was vaccinated. Additionally, the appellees stated that they believed some members of appellant's family displayed inappropriate behavior in front of MC, which upset her; however, the appellees only wanted to limit, not end, contact with the appellant until the issues were resolved. The appellate court found no error in the circuit court's best interest finding. Thus, the circuit court did not err in granting appellees' adoption petition. (Williams, L.; 26PR-20-232; 10-25-23; Virden, B.)

DOMESTIC RELATIONS

Brewer v. Patterson, 2023 Ark. App. 447 [**order of protection**] The circuit court entered an order extending an order of protection. On appeal, appellant argued that the evidence was insufficient to warrant an extension of the order of protection as to his son. 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, the appellee did not allege any abuse by appellant as it related to their child. There was no testimony that their child witnessed the violence, that he was a victim of the violence, or that he was ever in fear of harm from appellant. Thus, the circuit court's order of protection as to the parties' child was erroneous. (Foster, H.; 71DR-22-27; 10-4-23; Brown, W.)

Grayson v. Anderson, 2023 Ark. App. 428 [**custody**] The circuit court entered an order denying appellant's petition for a change in custody with respect to the parties' older daughter and awarded custody of the parties' younger daughter to appellee. On appeal, appellant argued that the circuit court erred by not making a specific finding that appellee, who is a sex offender, posed no danger to the children and for placing the burden of proving that on her. Appellant also argued that appellee did not rebut the presumption in Ark. Code Ann. § 9-13-101(d) that it was not in the best interest of a child to be placed in the custody of a sex offender and that there was no evidence on which to have found the presumption had been rebutted. [**modification of custody; relocation**] In *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the supreme court held that the relocation of the custodial parent and children is not, by itself, a material change in circumstances justifying a change in custody and that a presumption exists in favor of relocation for custodial parents with primary custody, with the burden being on the noncustodial parent to rebut the relocation presumption. Determining whether there has been a change of circumstances requires full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances at the time the change of custody is considered. Here, the circuit court found that appellant did not present evidence to overcome the relocation presumption. Appellee's sex offender status was not a material change of circumstances given that he was a sex offender before the parties married and had children and before appellee was awarded custody of the older child in their divorce decree. The circuit court further found that appellee was "better equipped" to parent their older child and the record did not contain any evidence of improper sexual conduct. Additionally, the best-interest presumption in Ark. Code Ann. § 9-13-101(d)(2) did not apply to appellant's request for modification of custody because the older had already been placed with appellee pursuant to the earlier divorce decree. Therefore, the circuit court did not err in denying appellant's petition for modification of custody as to the parties' older child. [**initial custody determination**] Arkansas Code Ann. § 9-13-101(d)(1) states that the circuit court must make a specific finding that the sex offender poses no danger to the child. Here, the parties reconciled before the entry of the divorce decree and conceived their younger child, born

after the decree was entered. They continued to live together as a family until the parties separated permanently. While the circuit court indicated that appellee's sex-offender status, was not of significance to appellant or that it was not pertinent to his care for the girls, the appellate court held that this finding did not satisfy the explicit requirement of Ark. Code Ann. § 9-13- 101(d)(1). The circuit court must determine whether the appellee poses no danger to the younger child, given that he is a sex offender. A presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. Therefore, the burden is on the appellee to rebut the presumption against his having custody. The circuit court must consider the younger child's best interest in light of the presumption in Ark. Code Ann. § 9-13-101(d)(2). Thus, the circuit court must make specific findings and a best interest analysis as it pertains to the younger child. (Copeland, J.; 05DR-16-237; 10-4-23; Virden, B.)

Burris v. Simmons, 2023 Ark. App. 432 [**grandparent visitation**] The circuit court granted summary judgment to appellees related to appellant's petition for grandparent visitation rights under Ark. Code Ann. § 9-13-103. On appeal, appellant argued the circuit court erred as a matter of law in granting summary judgment on the issue of loss of relationship. Arkansas Code Annotated § 9-13-103 governs visitation rights of grandparents when the child involved is in the custody of a parent; specifically, Ark. Code Ann. § 9-13-103(b)(5)(A) provides that a circuit court may order grandparent visitation only after finding that there is clear and convincing evidence to overcome the presumption that the parental decision is in the child's best interest. To rebut the presumption, the petitioner must prove by a preponderance of the evidence that she has established a significant and viable relationship with the child and that visitation is in the best interest of the child. In order to show a loss of relationship, a petitioner must demonstrate that the relationship had been lost or would be lost. Here, one of the appellees advised appellant that they were disallowing contact between appellant's husband and their child because they believed the husband had been grooming the child for molestation. The parents stated they would be imposing rules for visits going forward, that appellant schedule her visits with the children so that one or both parents could be present, and that appellant avoid any mention of her husband in front of their child. The appellees affidavits and verified motion for summary judgment demonstrated that they were agreeable to appellant having supervised visits with the children both before and after she filed her petition with the circuit court. This evidence supported the circuit court's finding that appellant did not lose her relationship with the child prior to filing her petition—nor was she likely to lose her relationship with the child—as long as she adhered to the appellees' guidelines to protect the child. The evidence established that appellant had a strong relationship with the child up until the time that she filed her petition for visitation, and it also shows that the relationship would continue if the appellant would cooperate with the appellees. The appellant failed to present evidence to show that visitation was altogether denied. Therefore, the circuit court properly awarded summary judgment to the appellees. (McCain, G.; 24ODR-19-135; 10-4-23; Gladwin, R.)

Moore v. Moore, 2023 Ark. App. 436 [**contempt; military benefits**] The circuit court denied appellant's motion that appellee be held in contempt for any actions he has taken regarding his

military retirement or disability payments. On appeal, appellant argued that the circuit court erred in denying her motion for contempt. Before one can be held in contempt for violating the court's order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. Here, the percentage of retirement had been determined at the time of the divorce decree, but the monetary amount was uncertain. The decree provided that appellant's portion would be based on the military's calculations. These calculations were different than the parties anticipated. The parties litigated this issue and reached a settlement. When appellant filed the present contempt action, nothing had changed. Appellant was receiving the same amount she had received since the military issued its first check directly to her. Given the record before the appellate court, the appellate court could not say that the circuit court erred in denying the motion for contempt. (Casady, K.; 63DR-15-1138; 10-4-23; Gruber, R.)

Roberts v. Roberts, 2023 Ark. App. 438 [**alimony**] The circuit court refused to terminate appellant's monthly alimony obligation to his former spouse. Although the circuit court reduced appellant's alimony payments as he requested, he argued that the circuit court erred in the amount of reduction and in failing to make the reduction retroactive to the date he filed his petition to modify alimony. Modification of an award of alimony must be based on a material change in circumstances of the parties, and the party seeking modification bears the burden of proving such a change. The purpose of alimony is to rectify the economic imbalance in earning power and standard of living in light of the particular facts of each case. Here, the circuit court acknowledged that appellant's ability to pay alimony had decreased with his retirement but noted that appellee's needs had not changed; while the circuit court was unwilling to terminate appellee's alimony, it did acknowledge the decrease in appellant's ability to pay and reduced the alimony obligation by \$500 a month accordingly. The circuit court properly considered the alimony factors and recognized appellant's decreased ability to pay while still recognizing appellee's need for alimony; therefore, the circuit court did not err in its decision to decrease alimony but not terminate it entirely. [**retroactive reduction**] Unlike Ark. Code Ann. § 9-14-107(d), the statutory provision providing that child-support modification orders, unless otherwise ordered by the court, shall be effective as of the date the motion is served on the other party, modification of alimony has no such provision. Here, the appellate court could not say it was an abuse of discretion for the circuit court to not make the reduction in alimony retroactive to the date appellant filed his motion. (Schrantz, D.; 04DR-10-620; 10-4-23; Barrett, S.)

Johnson v. Johnson, 2023 Ark. App. 464 [**child support credit; attorney's fees**] The circuit court entered a postdivorce order that resolved issues of child support and contempt. On appeal, appellant argued the circuit court erred in crediting payments made directly to her against appellee's arrearage. Appellee cross-appealed, arguing that the circuit court erred in awarding attorney's fees to appellant. [**child support credit**] In *Guffey v. Counts*, 2009 Ark. 410, the payor voluntarily increased the amount he would pay into the registry each month after his income increased to avoid legal fees because his support obligation increased. Following a later petition to increase the payor's monthly obligation, he stopped making payments, and his child-support

obligation was eventually increased. The payor argued that he was entitled to credit for the years of overpayments, but the circuit court held that the payor's overpayment to the child-support registry was a voluntary expenditure in excess of what was required. Thus, the payor was not entitled to receive a credit for the overpayment against four months of non-payment. Here, there was no overpayment. The appellee made direct payments to appellant that were not in excess of his court-ordered obligation. Appellee testified that during the time periods he was making direct payments to appellant, he largely ceased submitting payments through the Arkansas child-support "Clearinghouse." The circuit court gave appellee credit for the total amount of those direct payments but cautioned that no future credits would be given for payments made outside the Clearinghouse. The record established that appellee's direct payments were consistent with, and in satisfaction of, his court-ordered child-support obligation. Further, because the payments were in accordance with his court-ordered child support, they couldn't be deemed "voluntary" payments for which he is not entitled to credit. Appellant contended only that appellee shouldn't have been given credit for the payments because he failed to utilize the Clearinghouse for the payments. Bypassing the Clearinghouse and making court-ordered payments directly to appellant did not serve to make the payments voluntary or gifts because appellee was legally required to pay the child support to appellant. Thus, the circuit court did not err in giving appellee credit for the total amount of the direct payments. **[attorney's fees]** A circuit court has the inherent power to award attorney's fees in domestic relations proceedings. Determination of the prevailing party can be a relevant consideration. However, there is no requirement that a party prevail in order to be awarded fees. The relative financial ability of each party is a consideration, but it is not determinative. Here, the circuit court provided that appellant may petition for attorney's fees on contempt and child-support arrears. Appellee contended that the award of attorney's fees constituted an abuse of discretion because appellant was not the prevailing party in all matters and appellant contributed to the lengthy litigation. In the case at bar, appellant was awarded just over half of the attorney's fees she requested. The action covered an extended time period, appellee was found to have child-support arrears, and he was held in contempt for multiple reasons. Thus, the circuit court did not err in directing appellee to pay attorney's fees. (Pierce, M; 60DR-05-4859; 10-18-23; Brown, W.)

Hamerlinck v. Hamerlinck, 2023 Ark. App. 475 **[division of property]** The circuit court entered an amended divorce decree in which it restated its initial decree and denied and dismissed all other pending motions. On appeal, appellant argued that the circuit court erred in its division and distribution of the couple's property. 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). An individual retirement account acquired prior to marriage and any increase in value thereof constitutes nonmarital property. All nonmarital property must be returned to the party who owned it prior to the marriage unless the court makes some other division that the court deems equitable, taking into consideration those factors enumerated in § 9-12-315(a)(1)—in which case the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage. **[retirement accounts]** Here, there was evidence before the circuit court that two retirement accounts were comprised of both marital and nonmarital funds. The first account was a Roth IRA that was established six years

before the parties married, but that the appellant made contributions to during the marriage. The second account was a rollover IRA with funds from jobs appellant worked at both before and after the marriage. Thus, the appellate court held that the circuit court erred in finding that the entirety of those accounts were marital property. Therefore, with respect to the Roth IRA and the rollover IRA, the circuit court must either redistribute these two accounts in a manner consistent with the statutes governing the distribution of marital and nonmarital assets, or should it opt to make an equitable distribution of nonmarital property, explain its reasoning for doing so. **[marital home]** There is a presumption that property placed in both spouses' names is held in tenancy by the entirety and is marital property. Moreover, there is a presumption that an equal division of marital property is fair and equitable. Clear and convincing evidence is required to overcome this presumption. Unless that presumption is overcome, the property shall be distributed one-half to each party. Here, appellant failed to acknowledge the presumption in favor of an equal division of marital property and cited no authority in the support of his bare claim that he deserved a greater share of the value of the home. (Dyer, C.; 26DR-18-908; 10-25-23; Thyer, C.)

House v. House, 2023 Ark. App. 477. The circuit court entered an amended divorce decree awarding primary physical custody of the parties' daughter to appellee and standard visitation to appellant. On appeal, appellant argued that (1) the Chief Justice lacked jurisdiction and authority under section 13 of Amendment 80 to the Arkansas Constitution (Amendment 80) to assign a temporary special judge, and (2) the circuit court's award of custody and visitation was clearly erroneous. **[special judge assignment]** Amendment 80 authorizes the Chief Justice to assign a special judge if he or she determines there is other need for a Special Judge to be temporarily appointed. Here, the new circuit judge requested the Chief Justice assign the retired circuit judge to the case for the limited purpose of entering findings of fact and conclusions of law after it had been remanded. Thus, the Chief Justice had the authority and jurisdiction under to assign the retired judge to this case on the basis of his determination of "other need." **[custody and visitation]** An award of joint custody is favored in divorce cases, and when in the child's best interest, custody should be awarded in such a way as to assure the frequent and continuing contact of the child with both parents. The primary consideration in child custody cases is the welfare and best interest of the children; all other considerations are secondary. Here, the circuit court noted that appellee and her mother testified that appellant was unwilling to compromise and extremely controlling. Additionally, appellee testified that appellant was physically violent with her on more than one occasion when her children were present, and that behavior continued since the separation, so much so that they had to sign a coparenting agreement with the school. Each child custody determination ultimately must rest on its own facts, and the record in this case was clear that the circuit court carefully considered all the evidence in its detailed and thorough findings and conclusions. Despite joint custody being favored, our law remains that the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor in determining joint custody. The circuit court determined that the parties' past conduct supported an award of primary custody to the appellee, finding that appellee had been the primary caretaker of the child during the parties' marriage. The circuit court specifically found that appellee woke the child; fed and clothed her; prepared all her meals; dropped her off and picked her up

from daycare; performed all housework; took her to all medical appointments; and planned all birthdays and holidays. Additionally, the circuit court found that an award of primary custody to appellee would promote stability in the child's life. The circuit court also found that the child did not get consistency under the parties' temporary joint-custody arrangement, that she had behavioral issues since the parties' separation, and that appellant did not allow the child to participate in extracurricular activities during his time with her. The circuit court gave great weight to its finding that the level of cooperation and communication that is required for joint custody was lacking here. Thus, the circuit court did not err in finding that it was in the child's best interest for appellee to have primary custody and appellant to have visitation. (Guthrie, D.; 60CV-06-9369; 10-25-23; Wood, W.)

Nicholson v. Matheny, 2023 Ark. App. 478 [**custody; material change**] The circuit court entered an order denying appellant's petition for modification of custody of his child. On appeal, appellant argued the circuit court erred in finding that he failed to prove a material change in circumstances. Custody awards are not to be modified for the purpose of punishing, rewarding, or gratifying the desires of either parent. A violation of a circuit court's previous orders does not compel a change in custody. The violation is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the child's best interest. Instead, to ensure compliance with its orders, a trial court has at its disposal the power of contempt, which should be used prior to the more drastic measure of changing custody. Here, the circuit court considered all of appellant's allegations that he claimed supported a material change in circumstances: appellee violated a proper-conduct clause by allowing overnight visits with men to whom she was not married, appellee drank alcohol and used marijuana in the presence of the child, appellee disciplined the child by striking her with a hairbrush, and appellee removed the child from extracurricular sports activities. The circuit court found that appellant proved none of them. Although the appellee allowed her boyfriend to spend the night, the proper conduct clause in the parties' divorce decree did not prohibit overnight guests; it prohibited the parties from living with someone to whom they were not married. The circuit court also found that appellee had not abused the child, appellee had not engaged in illicit drug use in the child's presence, and appellee's decision to temporarily remove the child from sports had been appropriate. Taking all of the circuit court's findings together, the appellate court concluded that the circuit court did not err in finding that appellant failed to demonstrate the existence of a material change in circumstances. (Huff, M.; 68DR-11-55A; 10-25-23; Wood, W.)

JUVENILE

Cothran v. Ark. Dep't of Human Servs., 2023 Ark. App. 434 [**ADJ-parental unfitness**] After the minor child was discharged from the hospital, there was no clear error in finding parental unfitness when appellant mother expressed an unwillingness to accept doctors' reassurances regarding the minor child's health, provided inaccurate information to the hospital upon her return, provided inaccurate information to the minor child's father, and admitted using Suboxone without a

prescription. Additionally, there was evidence that she was misusing her Adderall prescription. Illegal drug use by a parent makes the parent unfit. Whether appellant's behavior was attributable to drug use, a mental health crisis, or a concussion, doctors were concerned that she would not provide proper care and supervision for her child. (Herzfeld, R.; CV-23-220; 10-4-23; Klappenbach, N.M.)

Jurls v. Ark. Dep't of Human Servs., 2023 Ark. App. 443 [**TPR-jurisdiction**] The circuit court orally ruled that it was terminating appellant mother's parental rights, placing the minor child in the father's permanent custody, and then closing the case as to that child. While the two written orders memorializing the circuit court's oral rulings were filed on different days, the circuit court did not lose subject matter jurisdiction when the written custody order closing the case was filed before the order terminating parental rights. No error was found. [**TPR-aggravating circumstances**] There was no clear error in the circuit court's aggravated-circumstances finding when the evidence presented at the termination hearing included: appellant refusing to attend parenting classes; inconsistently attending her visits; being arrested for stealing water; moving a sex offender into her home; her home remained environmentally inappropriate during the pendency of this case; she refused or avoided home visits; she avoided or tested positive on drug screens; she never had a negative drug test during the eight months the case was opened. Much of this evidence was also admitted by appellant during her psychological evaluation, and the therapist who conducted her psychological evaluation even recommended termination. Given appellant's failure to cooperate and comply with the case plan, with those facts, the appellate court was unwilling to hold that the circuit court clearly erred in its findings (Talley, D.; CV-23-243; 10-4-23; Hixson, K.)

Gonzales v. Ark. Dep't of Human Servs., 2023 Ark. App. 444 [**TPR-best interest; potential harm**] There was no clear error in finding that the children would be at risk of potential harm if returned to appellant. Sufficient evidence at the termination hearing supported the trial court's best-interest finding after considering the potential harm to the children if returned to appellant's care: the appellant was provided appropriate services, but the evidence was clear and uncontroverted that appellant lacked stable housing and financial stability throughout the case. Additionally, even after four years of services by the Department, appellant still had to be redirected during visits. Four of the children were removed from appellant's care twice due to a failed trial home placement. Appellant's argument on appeal was a request to reweigh the evidence, which the appellate court would not do. (Blatt, S.; CV-23-163; 10-4-23; Murphy, M.)

Richardson v. Ark. Dep't of Human Servs., 2023 Ark. App. 451 [**TPR-aggravating circumstances**] There was no clear error in the circuit court's aggravated-circumstances finding when the evidence demonstrated—and the court found—that appellant had attempted to remedy and correct the issues through participating in services offered by appellee but seemed to lack the capacity to independently exercise appropriate parenting judgment. There was also evidence on

which the court could have concluded that appellant was not willing to rehabilitate the circumstances that prevented the placement of the children in her custody, such as her unwillingness to consent to a guardianship or a home-health aide. **[TPR-best interest]** No error in the circuit court finding that termination was in the juveniles' best interest as there was sufficient evidence on which the court could conclude that potential harm would be likely if the children were returned to the unsupervised care of their mother: appellant had not made progress in her ability to provide a stable home, benefited from the services provided by appellee, or shown objective improvement to the benefit of the children. Under those facts, it was not clearly erroneous for the court to conclude that appellant's past behavior and ongoing behavior at supervised sessions demonstrated potential future harm to the children. (Sullivan, T.; CV-23-246; 10-18-23; Abramson, R.)

Noblitt v. Ark. Dep't of Human Servs., 2023 Ark. App. 462 **[TPR-parent]** In its adjudication order, the circuit court adjudicated appellant the legal father of the minor child. Although appellant was identified in the caption of several subsequent orders as a "putative parent," he was identified in the body of every order after the adjudication order—and treated by the circuit court—as the child's "parent," "father," or "legal father." Appellant argued that the evidence presented at the subsequent termination hearing was insufficient to prove the element of the statutory grounds that he was a parent. The court found that appellant was the father at the adjudication hearing, and the adjudication order was entered into evidence at the termination hearing, which led the court to make two specific findings that appellant was the legal father and parent of the child and precisely stated the basis for these findings in its termination order. Because paternity had long been established before the termination hearing, the fact that the acknowledgment of paternity was not introduced at the termination hearing was not determinative. There was no error found by the appellate court. (Sullivan, T.; CV-23-251; 10-18-23; Wood, W.)