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CIVIL

Skala v. Comfort Systems USA, Inc., 2024 Ark. App. 491 [**summary judgment; vicarious liability; direct liability; sua sponte**] The circuit court entered an order granting summary judgment in favor of appellees, a company, and its parent company. On appeal, appellants argued that (1) there were genuine issues of material fact in dispute that precluded summary judgment; (2) the circuit court erred in concluding that the going-and-coming rule precluded liability; and (3) the circuit court erred in granting summary judgment on appellant's direct-liability claims. Summary judgment may be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. [**vicarious liability**] As a general rule in workers' compensation cases, an employee traveling to and from the workplace is not within the course of his or her employment. Generally, this rule applies to those claimants who have fixed hours and places of employment and ordinarily prevents an employee from recovering benefits for an injury sustained while the employee is going to or coming from his place of employment. The Arkansas Supreme Court has rejected the application of the going-and-coming rule in respondeat superior cases. Under the doctrine of respondeat superior, an employer may be held vicariously liable for the acts of its employee if the employee was acting within the scope of his employment at the time of the incident. The question of whether an employee is acting within the scope of employment depends on whether the individual is carrying out the object and purpose

of the enterprise as opposed to acting exclusively in his own interest. When an overlap of the business and personal interests are present in an employee's actions, an employer may be vicariously liable under the doctrine of respondeat superior, depending on the circumstances. Here, the facts themselves were not in dispute. Cody Conboy, an employee of appellee, was driving from his home in Greenbrier, Arkansas, to a job site in Ash Flat when the vehicle he was driving struck a fifteen-passenger van. Two people were killed, and another person was injured as a result of the collision. Conboy did not have an office or a fixed location where his services for appellee were to be performed. Rather, appellee would deploy him to various locations to perform work under its contracts. As such, traveling was listed as an "additional requirement" of his employment as a pipe welder, and he was required to authorize and pass a driving records check as part of the employment process. However, Conboy's principal duties as a welder had nothing to do with driving, and there was no evidence that, other than commuting to work, he was required to drive as part of his employment with appellee. While there was no material dispute as to the facts, "reasonable minds" could draw "reasonable" inconsistent hypotheses from them. Reasonable minds could conclude that Conboy was a traveling employee because of the facts. Reasonable minds could also conclude, however, that travel was not a condition of his employment. Because reasonable minds could reach different conclusions as to the inferences to be drawn from the facts, summary judgment was inappropriate. **[direct liability]** When ruling on a motion for summary judgment, a circuit court cannot grant relief beyond that prayed for in the motion. Here, appellee never moved for summary judgment on appellants' direct-liability claims. Thus, the circuit court erred when it sua sponte granted summary judgment to appellee. (Meyer, H.; 32CV-21-245; 10-9-2024; Thyer, C.)

Lewallen v. Progress for Cane Hill, 2024 Ark. 167 **[paid canvassers; local ballot initiative]** The circuit court entered an order requiring appellant, the Washington County Circuit Clerk, to place appellee's local-option ballot initiative on this year's general election ballot. The issue on appeal was whether Ark. Code Ann. § 7-9-103(a)(6)'s residency requirement for paid canvassers applies to local-option ballot initiatives. Paid canvassers—whether for local-option or statewide ballot initiatives—must be residents of Arkansas. Therefore, the circuit court erred in entering the order to be placed on this year's ballot. (Martin, D.; 72CV-24-2711; 10-31-24; Womack, S.)

CRIMINAL

Chambers v. State, 2024 Ark. App. 470 **[entrapment]** Appellant was convicted of two counts of delivery of methamphetamine and one count of maintaining a drug premises. On appeal, appellant argued the circuit court erred in denying his request for a jury instruction on the defense of entrapment. Entrapment is an affirmative defense that occurs when a law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. Here, after receiving a tip that appellant was distributing large amounts

of methamphetamine from his house, the sheriff's office engaged a confidential informant to purchase methamphetamine from appellant. Appellant received the drugs twice from appellant, in exchange for cash. Appellant alleged the informant induced him to deliver methamphetamine to her by promising him sexual favors. The appellate court found that appellant failed to present any evidence that the informant induced him to sell methamphetamine to her by conduct that was likely to cause a normally law-abiding person to commit the offense. Therefore, the circuit court did not err by refusing to instruct the jury on entrapment. (Weaver, T.; 12CR-22-29; 10-2-24; Wood, W.)

Anselmi v. State, 2024 Ark. App. 503 [**motion to suppress; custody**] A jury convicted appellant of permitting the abuse of a minor. On appeal, appellant argued that the circuit court erred in denying her motion to suppress incriminating statements. Specifically, she contends that her interview at the Hamilton Child Advocacy Center (CAC) was a custodial interrogation and that her statements were presumptively involuntary. A person is in custody for purposes of *Miranda* warnings when he or she is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. To determine whether freedom of movement has been restrained so as to amount to custody, all of the circumstances must be examined—including the location and duration of questioning, the presence or absence of physical restraints during questioning, the statements made, and the release of the person when the questioning ends. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. Here, appellant was asked to come to the CAC and to bring the victim's younger sibling for an interview with one of the CAC employees and a law enforcement officer. The victim and her older sibling were already at the CAC being interviewed after they had received information from the victim's school that she had been abused by appellant's boyfriend. The CAC was a "family-friendly" environment for victims and was locked from the inside to keep out offenders or suspects. Appellant was taken to a staff lunchroom to talk about the allegations made by the victim, in which portions were recorded by the officer. The officer testified that both she and the CAC employee left appellant alone in the staff lunchroom at times and that there was nothing to stop appellant from leaving the staff lunchroom and walking out of the CAC. Although the officer developed appellant as a suspect for permitting the abuse of a minor after appellant told her that she had known for years what her boyfriend was doing to the victim, the officer did not communicate that to appellant. The appellant would not have felt that she was not free to leave the CAC. Looking at the situation objectively, a reasonable person in appellant's position would not have felt that he or she was in custody and not free to leave the CAC. Thus, the circuit court did not err in denying her motion to suppress. (Delay, G.; 66FCR-21-905; 10-23-24; Virden, B.)

State v. Clarks, 2024 Ark. 158 [**failure to preserve evidence; motion to dismiss**] The circuit court dismissed the State's five felony charges against appellee. On appeal, appellant argued that the circuit court erred in placing the burden of proof on it when the defendant raised a denial-of-due-process claim for law enforcement's failure to preserve evidence. In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the United States Supreme Court (the Court) held there is a distinction between

material evidence and potentially exculpatory evidence. The Court also held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. In *Illinois v. Fisher*, 540 U.S. 544 (2004), the Court held that the routine destruction of potentially useful evidence subject to a pending discovery request did not demonstrate bad faith by police. The Arkansas Supreme Court had held that bad faith includes official misconduct that shocks the conscience of the court or an officer's actions where the primary purpose is to seek revocation or harass a defendant. The State violates the Due Process Clause when it destroys or loses material evidence (1) whose exculpatory value is apparent before destruction and (2) the defendant cannot obtain comparable evidence by any other reasonable means. The State also violates the Due Process Clause when it destroys or loses evidence (1) that was potentially useful in the defense's case and (2) the government acted in bad faith in the destruction of the evidence. Here, appellee filed a motion for discovery that included a preservation of evidence request. Upon learning the State did not preserve mobile video recordings and body-worn camera video footage evidence, appellee filed a motion to dismiss the charges. The video was overwritten after 60 days under Little Rock Police Department standard procedures. The burden is on the defendant to prove that the evidence was (1) material and had an exculpatory value that was apparent before its destruction and (2) that the defendant would be unable to obtain comparable evidence by reasonable means. In the present case, the circuit court erred in shifting that burden to the State and not focusing on whether there was any proof that the video had exculpatory value. The Arkansas Supreme Court found that its greatest usefulness was as potentially impeaching evidence, which may have been available by other means and witness testimony. Thus, appellant failed to meet his burden on the first test. The Arkansas Supreme Court also found that the circuit court erred as a matter of law when it found that the unintentional deletion of the video, executed as part of the State's routine data management, was done in bad faith. Bad faith is intentional, performed with a sinister motive. Unintentional or negligent omissions, with no record of misconduct or animus, cannot constitute bad faith. Nor did the existence of the appellant's pending discovery motion change the character of the State's failure to preserve the evidence or negate the bad-faith requirement. As a matter of law, the Arkansas Supreme Court held that the State's failure to preserve evidence after appellant filed a motion to preserve was not per se bad faith. The Arkansas Supreme Court cautioned that there may be occasions when conduct by law enforcement is so egregious that it warrants dismissal, but those should be outliers. (Compton, C.; 60CR-23-359; 10-24-24; Wood, R.)

Casey v. State, 2024 Ark. App. 516 [**probation revocation; failure to appear**] The circuit court revoked appellant's probation. On appeal, appellant argued the circuit court did not have jurisdiction to revoke appellant's probation. Ordinarily, the court's jurisdiction to revoke probation ends when probation ends. However, Ark. Code Ann. § 16-93-308 extends the court's jurisdiction to revoke for a "violation of probation" if, before the probation term ends, (1) the defendant is arrested for a violation; (2) a warrant is issued for the defendant's arrest for a violation; (3) a petition to revoke the defendant's probation has been filed, if an arrest warrant is issued within thirty days; or (4) the defendant has been issued either a citation in lieu of arrest under Ark. R. Crim. P. 5 or served a summons under Ark. R. Crim. P. 6 for a violation. A bench warrant (or "alias

warrant”) for failing to appear at a probation revocation hearing is not a warrant for the defendant’s arrest for violation of probation. Here, the State petitioned to revoke appellant's probation for allegations that included violating a condition not to “commit a criminal offense punishable by imprisonment.” The State brought separate felony charges in the same court. The present case is for the revocation matter. After appellant failed to show to one of his court dates, the circuit court issued a bench warrant for failing to appear at the probation-revocation hearing, not a warrant for the defendant’s arrest for violation of probation. Thus, the State failed to properly extend circuit court jurisdiction, so the petition to revoke failed. Therefore, the circuit court erred in revoking the appellant’s probation. (Bibb, K.; 47BCR-17-306; 10-30-24; Harrison, B.)

Tait v. State, 2024 Ark. App. 528 **[jury instructions; juror misconduct]** A jury convicted appellant of second-degree murder. On appeal, appellant argued that the circuit court erred in instructing the jury on the lesser-included offense of second-degree murder and denying his motion for a new trial based on juror misconduct. **[jury instruction]** The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense. An instruction on a lesser included offense is appropriate when it is supported by the slightest evidence. Arkansas Code Annotated § 5-1-110(c) does not delegate the decision regarding the propriety of the proffered instruction to the defendant but requires the circuit court (1) to determine whether it is a lesser-included offense and (2) whether a rational basis exists for a verdict acquitting the defendant of the greater offense and convicting him of a lesser. Here, the circuit court considered the evidence presented and concluded that there was a rational basis to instruct the jury on second-degree murder because there was the slightest evidence that the jury could convict him on that charge. The circuit court specifically relied on the medical examiner’s testimony about how long it would take to cause the victim’s injuries. The medical examiner determined the cause of death to be strangulation, and appellant was the only person with the victim during the time the strangulation occurred. Therefore, the court did not err in giving the second-degree murder instruction. **[juror misconduct]** The party moving for a new trial bears the burden of proving, first, that juror misconduct occurred and, second, that there was a reasonable probability of resulting prejudice. The court does not presume prejudice but rather presumes that jurors are unbiased and qualified to serve, and it is the appellant’s burden to show otherwise. Here, appellant filed a motion for a new trial, alleging juror misconduct. Appellant attached the affidavit of one juror alleging that another juror stated at the beginning of jury deliberations that they guessed the other jurors had checked the appellant out. The circuit court agreed that an inquiry was necessary, summoned the two jurors to a hearing, and questioned them about the allegations. The two jurors had inconsistent testimony, and the circuit court made credibility determinations against the juror who gave the affidavit. Considering the testimony and the circuit court’s credibility determinations, the appellate court could not say that the circuit court abused its discretion in denying appellant’s motion for a new trial. (Puryear, C.; 09CR-21-90; 10-30-24; Wood, W.)

PROBATE

Otwell v. Otwell, 2024 Ark. App. 486 [**adoption; consent**] The circuit court granted appellee's petition to adopt the three children of her stepson, the appellant. On appeal, appellant argued that the circuit court erred in finding that his consent to adoption was waived and that the adoption was in the children's best interest. [**consent**] Under Ark. Code Ann. § 9-9-207(a)(2), consent to adoption is not required of a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree. Justifiable cause means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. Failed significantly does not mean failing totally. Here, the circuit court found that appellant had failed significantly without justifiable cause to provide for the children's care and support as required by law for three periods of time in excess of a year. The first two periods were during which appellant was incarcerated and another period from August 2020 to December 2021. Appellant argued that his lack of financial support was justified because neither his divorce decree to appellee's daughter nor the guardianship orders required him to pay support and appellee, while guardian, never sought support. Imprisonment does not toll a parent's responsibilities toward his child. A father's duty to support his minor child cannot be excused on the basis of the conduct of others unless that conduct prevents him from performing his duty. Although no order had been entered requiring the appellant to pay child support, a parent cannot turn a child's care and support over to another and thereby be excused from the duty of providing support, a duty that exists whether ordered by a court or not. The appellate court could not say that the circuit court erred in finding that appellant failed without justifiable cause to provide for the care and support of the children as required by law during his periods of incarceration. [**best interest**] Parental rights are not proprietary ones and are subject to the performance of duties and obligations of a parent to care for and support a child, and the law protects the rights of parents only so long as the parent discharges these duties. A parent and his relatives' desire for a relationship with a child will not be placed over the child's need for a stable and permanent home. Here, although appellant had made improvements in his life, appellee had been providing consistent care and support for the children for three years, and the children had lived in her home for more than two years. Giving due deference to the circuit court's superior position to observe the witnesses and evaluate the children's best interest, the appellate court could not conclude that the circuit court's finding was erroneous. (Talley, D.; 14PR-21-161; 10-9-24; Klappenbach, N.)

DOMESTIC RELATIONS

Baldwin v. Baldwin, 2024 Ark. App. 471 [**property division; insurable interest**] The circuit court entered a divorce decree in favor of appellee. On appeal, appellant argued that the circuit court erred in awarding appellee half of the insurance proceeds for which she had no insurable interest. In order to recover benefits under an insurance policy, a person must have an insurable interest both at the time of effectuation of the insurance and at the time of loss under Ark. Code Ann. § 23-

79-104(a). Insurable interest means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment. It is not inconsistent that two parties can have independent insurable interests in one piece of property. Having an insurable interest in property does not depend upon ownership. Instead, the party must have some legal basis for the assertion of insurable interest, which may be based, for example on (1) factual expectation of damages, (2) property interests, (3) legal liability, and (4) contract right. A non-owning spouse may be entitled to some benefit of the nonmarital property by reason of marital funds having been used to pay off debts on the owning spouse's nonmarital property. Here, appellee moved into appellant's house in 2017 and procured a homeowner's policy from an insurance company in 2019. The parties married in 2020, later separating in 2021. While married but separated, the house burned down in 2022, and the circuit court awarded appellee half of the insurance proceeds. The circuit court erred by not making any factual findings as to whether appellee had an insurable interest both at the time of effectuation of the policy and at the time of loss. Additionally, the circuit court did not make any specific factual findings as to what interest appellee had acquired on the basis of her contributions to appellant's premarital house. Thus, the circuit court must reconsider the division of the insurance proceeds. (Batson, B.; 10DR-22-32; 10-2-24; Hixson, K.)

Oxley v. Lumpkins, 2024 Ark. App. 480 [**modification of custody**] The circuit court entered an order denying appellant's petition to modify custody, ruling that custody of the child was to remain with appellee, who stood in loco parentis to the child. On appeal, appellant argued the circuit court erred in denying custody to him as the child's natural parent because he had not been found unfit and once he established a material change of circumstances, the circuit court failed to properly consider the presumption in his favor as the natural parent in its best-interest analysis. [**natural-parent preference**] The natural-parent preference is not absolute. The law secures a natural parent's preferential rights only as long as the parent discharges his or her obligations. Here, in awarding custody of the child to appellee, a nonparent standing in loco parentis, in the original custody decree the circuit court stated in its oral ruling from the bench that appellant had not discharged his parental obligations to the child. Appellant did not appeal that decision. Custody modification has a more stringent standard. [**custody modification**] A party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts were unknown to the court when the decree was entered. Custody awards, however, are not made or changed to punish, reward, or gratify the desires of either parent. A violation of the trial court's previous orders does not compel a change in custody. Here, appellee had custody of the child and the child's half-sibling. Appellant alleged among other things that appellee was withholding visitation due to the COVID-19 pandemic and the fact that the child's half-sibling had a medical condition. In its written order, the trial court did not find that appellant proved a material change in circumstances and did not mention best interest. In the absence of a showing to the contrary, the appellate court ordinarily presumes that a court acted properly and made the findings necessary to support its judgment. While the trial court did not choose to hold appellee in contempt, it did enter an order reinstating appellant's visitation. Appellant's violation of the trial court's visitation order during the COVID-19 pandemic was not a material change of

circumstances warranting a modification of custody. Considering the unique facts of the case, including the child's half-sibling's medical records and appellee's testimony that he was following a doctor's medical advice regarding the effect that the child's visitation with appellant could have on the half-sibling's health, the appellate court was not left with a definite and firm conviction that the circuit court erred in denying appellant's motion to modify custody. (Parker, A.; 43DR-16-744; 10-9-24; Virden, B.)

Frazier v. Bland, 2024 Ark. App. 494 [**laches; retroactive child support**] The circuit court awarded appellees, a mother and daughter, retroactive child support. On appeal, appellant argued that the circuit court's finding of laches as it pertained to the mother should have been applied equally to the daughter to preclude a judgment for retroactive child support in favor of the daughter. The appellee mother cross-appealed, arguing that the circuit court erred in applying laches to her claim for retroactive child support. [**laches**] In order to apply the doctrine of laches, it must be shown that there was an unreasonable delay in asserting some right, and because of the delay, the party claiming the protection of laches changed his position to his detriment so as to make it inequitable to enforce the asserted right. The enforcement of a child-support judgment is subject to the equitable defenses that apply to all other judgments. Here, the circuit court found that the mother had the necessary information to locate appellant to establish paternity and child support at all times, and simply chose not to do so until her daughter was almost an adult. When asked why she did not bring a paternity action against appellant to establish child support when their daughter was three months old and appellee mother had sued appellant in small claims court on an unrelated matter, appellee mother testified, "It would be within my right to do it then or now." Further, it appeared that what motivated appellee mother to pursue eighteen years of retroactive child support were the upcoming costs of a college education for appellee daughter. The circuit court, however, did not completely deny appellee mother's claim for retroactive child support, awarding her a self-satisfying judgment so that she could retain the amount appellant had paid on a voided summary judgment. Having considered the evidence, the appellate court held that the circuit court did not err in finding that appellee mother's nearly eighteen-year delay in bringing the action, along with the absence of any reasonable explanation for the delay, created an inequity and that injustice would be done by granting the relief requested and that the trial court did not err by applying the equitable defense of laches. [**laches applied to daughter**] Under Ark. Code Ann. § 9-14-105 a parent having custody of the child may file a petition for child support, and a person eighteen years of age or above to whom support was owed during his or her minority may file a petition for child support. Although the statute contemplates one support obligation that may be pursued by different persons at different times, once a child reaches majority, whoever files the collection action first is allowed the right and ability to collect. When a custodial parent files suit to collect an arrearage for the support of a minor child, that child may not also sue for the same arrearage once the child reaches majority. Here, the circuit court found that laches applied to the mother's claim for retroactive child support but declined to apply laches or any other equitable defense to the daughter's claim. The circuit court awarded the daughter the balance of the entire amount of retroactive child support not awarded to the mother. The appellate court found that because laches applied to the mother's claim for retroactive child support, which resulted in the denial of the claim,

such application barred the daughter's claim. There was a singular obligation of support, and that singular obligation was litigated and barred as to the mother. Therefore, it was also barred as to the adult child. Thus, the circuit court erred in awarding the daughter retroactive child support. (Brock, D.; 73DR-16-361; 10-9-24; Hixson, K.)

Wallace v. Pyle, 2024 Ark. App. 496 [**custody; pattern of domestic abuse; best interest**] The parties were divorced by decree. On appeal, appellant argued the circuit court erred by awarding joint custody. In an original child-custody determination, there is a rebuttable presumption that joint custody is in the best interest of a child. There are two relevant rebuttable presumptions here: (1) if the court finds by clear and convincing evidence that joint custody is not in the best interest of the child and (2) if there is a finding by the preponderance of the evidence that a parent has engaged in a pattern of domestic abuse. [**pattern 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. What constitutes a pattern of domestic abuse is treated as a question of fact. Here, in the twenty-seven-page decree, the circuit court addressed four instances of alleged domestic abuse prior to the marriage and one continuous incident that led to the parties' separation. The circuit court considered the effect of all the incidents together and it did not find appellant fully credible. Appellant's argument on appeal was merely a request to reweigh the evidence. Accordingly, the circuit court did not err in determining that appellant did not establish by a preponderance of the evidence that appellee had engaged in a pattern of domestic abuse such that joint custody was inappropriate. [**best interest**] Each child-custody determination ultimately must rest on its own facts. Here, the circuit court made extensive findings in support of its conclusion that appellant failed to rebut that joint custody was not in the child's best interest. Notably, it found appellee credibly testified that he had stopped drinking other than an occasional social drink, and credited testimony that appellee was a loving father. Additionally, the circuit court found that the parties possessed the ability to sufficiently cooperate with each other. Thus, the appellate court held that the circuit court did not err in finding that the joint-custody presumption had not been rebutted and in awarding the parties joint custody of the child. (Thyer, C.; 16JDR-22-976; 10-9-24; Murphy, M.)

Smith v. Payne, 2024 Ark. App. 515 [**order of protection**] The circuit court granted appellee's petition for a final order of protection against appellant. On appeal, appellant argued there was insufficient evidence to support a domestic abuse finding and the issuance of the three-year final order of protection. The Domestic Abuse Act defines domestic abuse 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 testified that the appellant came to appellee's home, pounded on her door, pushed his way inside her RV, and slammed her body around and onto the ground, resulting in bruises and permanent scars. Without objection, photographs depicting scrapes, red marks, and bruises were admitted into evidence. Appellant testified that appellee had attacked him and attempted to gain control of his gun. Appellant's mother testified denying that appellant had been violent, however, video footage did not show appellant's mother her vehicle at

the park. The credibility of witnesses is within the province of the fact-finder, and the appellate court could not say that the circuit court's findings were erroneous in light of the testimony and evidence presented at the hearing. Therefore, the circuit court did not err in entering the final order of protection against appellant. (J. Graham, 26DR-22-739; 10-23-24; Brown, W.)

Thames v. Thames, 2024 Ark. App. 519 **[property division]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred by awarding appellee interest in the house. Under Arkansas law, nonmarital property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable, taking into consideration certain factors listed in the statute. Earnings acquired subsequent to marriage are classified as marital property. A non-owning spouse is entitled to some benefit by reason of marital funds having been used to pay off debts on the owning spouse's nonmarital property. The property-division statute does not require mathematical precision in property division but only that the property be distributed equitably. Here, appellant argued that the circuit court erred in awarding appellee interest in the house because it was nonmarital property, and he asserted that appellee did not establish entitlement to an interest. Appellant admitted that during their seven-year marriage, the parties used marital income, including appellee's salary, to pay the mortgage and that he gained equity in the house. Additionally, appellee helped maintain and decorate the house. Given the circumstances of the case, the circuit court did not err in awarding appellee interest in the house. (Johnson, S.; 60DR-17-963; 10-30-24; Abramson, R.)

McCarthy v. McCarthy, 2024 Ark. App. 522 **[motion to set aside default divorce]** The circuit court denied appellant's motion to set aside a default divorce decree and motion to reconsider. On appeal, appellant argued that the circuit court erred in failing to set aside the default judgment and the decree was erroneous in granting sole custody of their two children to appellee. When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the Arkansas Rules of Civil Procedure, a default judgment may be entered against him. Rule 55 of the Arkansas Rules of Civil Procedure is a vehicle for relief from a default divorce decree. Here, the circuit court considered the events leading up to the entry of the default judgment, and it found that appellant simply failed to appear or defend and failed to prove grounds to set the decree aside. The appellate court found that the circuit court appropriately exercised its discretion. Therefore, there was no reason to set aside the default judgment. Thus, the circuit court did not err in denying the motion to set aside the default judgment. (Weaver, S.; 23DR-22-435; 10-30-24; Klappenbach, N.)

Ledoux-Syrook v. Ledoux, 2024 Ark. App. 533 **[modification of custody]** The circuit court entered an order modifying custody and visitation from joint custody to primary custody in appellee. On appeal, appellant argued that the circuit court erred in finding that a material change in circumstances had occurred since the entry of the parties' previous custody order and that it was in the child's best interest to modify custody. To modify a custody decree, the circuit court must

apply a two-step process. First, it must determine whether there has been a material change in circumstances since the issuance of the last order of custody. Second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. Here, since the entry of the last custody order, appellant experienced multiple negative material changes in her life affecting her fitness and stability as a parent. Appellant attempted suicide twice in the presence of her children, she was financially dependent on her estranged husband, she admittedly still had stressors that exacerbated her mental health struggles, and she received a diagnosis of borderline personality disorder. Accordingly, the court's finding of a material change of circumstances was not erroneous. Additionally, the record supported the circuit court's finding that appellee was the parent with the most appropriate behavior and stability. The child's best interest was supported by the custody modification. (Blatt, S.; 66GDR-17-272; 10-30-24; Murphy, M.)

Heileman v. Cahoon, 2024 Ark. 164 [**modification of custody**] The circuit court entered an order granting appellee's petition for modification of the custodial arrangement. On appeal, the appellant argued that the circuit court erred in modifying the custodial schedule. Under *Nalley v. Adams*, 2021 Ark. 191, the material-change-in-circumstances analysis is not triggered if neither party seeks an actual change of custody or when there is no issue of visitation because the parties maintain joint custody. In Arkansas, joint custody is favored, with the award of custody being made in accordance with the welfare and best interest of the child. When circuit courts are adjusting parenting time, they should be cognizant of the terminology they use and pay attention to whether an adjustment in schedule might turn into a de facto change in custody. Moving forward, after an award of joint custody is reduced to a court order, the only way to modify away from joint custody, absent an agreement of the parties, is by proving both a material change in circumstances and that the modification is in the best interest of the child. Here, the parties were divorced by decree, wherein their "Stipulation and Property, Child Custody and Support Agreement" stated that the parties shall have joint custody of the children. The circuit court entered an order reducing appellant's parenting time from 50 percent initially to roughly 26 percent now. The facts in the present case were distinguishable from the facts in *Nalley*. The modification sought in *Nalley* was to have the parents move toward exercising true joint physical custody rather than, as in this case, a desire to deprive one parent of the time he or she is currently enjoying with their children. As in *Nalley*, because the initial determination was agreed upon "joint custody," the father simply wanted his physical custodial schedule to mirror the rights already awarded to him by the court. In the present case appellee requested a modification reflecting "full" custody while reducing appellant's time with the children to visitation only. While courts cannot always make the parenting time an even split, the disparity here was too great. While it is understandable that school and work schedules may change as children age, the appropriate response of the courts is to seek ways to modify the custodial schedule consistent with the law, the ability of the parties, and the best interest of the children, rather than to reduce parenting time from roughly half to just two weekends a month, as was done here. There was no evidence presented that an equal or near equal division of time was unworkable or that an equal or near equal division of time would result in a detriment to the children. Without a satisfactory best-interest analysis and a material change in circumstances,

the Supreme Court found that the circuit court erred by changing the custodial arrangement. (Broadaway, M.; 56DR-17-53; 10-31-24; Hiland, C.)

JUVENILE

Rodriguez v. Ark. Dep't of Human Servs., 2024 Ark. App. 469 [**continuance; diligence of movant**] Appellant waited twenty days after an initially scheduled hearing to make contact with counsel; she learned that the hearing was set for that same day. She was unable to attend and her counsel moved for a continuance; there was no clear error in denying that motion when her lack of communication belied her lack of diligence. [**continuance; prejudice to movant**] There was no error in denying the motion for continuance because Appellant made no indication at the trial level what evidence she would have provided if the hearing were continued allowing her to participate in person. [**permanent custody to parent and closing case**] There is no requirement that a motion for no reunification services under section 9-27-365 be filed as a prerequisite for a court's granting a transfer of custody to a noncustodial parent and closing the case. When a court grants permanent custody to a noncustodial parent, the case must be closed because at that point, permanency has been achieved, and the child is no longer dependent-neglected. (Williams, L.; CV-24-111; 10-2-24; Thyer, C.)

Kelley v. Ark. Dep't of Human Servs., 2024 Ark. App. 475 [**TPR; aggravated circumstances; little likelihood**] Appellant had shown some progress and stability, but her efforts did not begin until her child had been in Appellee's custody for approximately one year. It could not be said that she had "remedied" her issues with drug abuse and mental illness after only six months of apparent stability. At a termination hearing, the circuit court's concern is whether Appellant had progressed to a point at which the child could safely be returned to her at the time of the hearing. Appellee testified that there were no other services that it could provide to Appellant, and while there was a "possibility" of reunification if Appellant had been given more time, the standard is whether further services are likely to result in a successful reunification within a reasonable period of time as viewed from the child's perspective. Here, the child had been in Appellee's custody his entire life, approximately nineteen months, and a child's need for permanency and stability may override a parent's request for additional time to improve the parent's circumstances. The finding that there was little likelihood of successful reunification was not clearly erroneous. [**TPR; best interest/potential harm**] There was testimony about Appellant's extensive history with mental-health and drug-abuse issues, which inherently pose a threat of potential harm, and given her history, her period of stability was still relatively new. Likewise, her living situation with the child's father, which contributed to her overall stability, had only been in place for a few months. Finally, Appellant still had a pending felony criminal charge, and while she believed she would receive a probationary sentence, there was no proof of that. The recent stability that Appellant had achieved, while commendable, was not enough to safely place her child in her custody. No clear error in finding that termination of Appellant's parental rights was in the child's best interest

and, in particular, that the child faced potential harm if returned to Appellant's custody. (Sullivan, T.; CV-24-329; 10-9-24; Harrison, B.)

Lang v. Ark. Dep't of Human Servs., 2024 Ark. App. 481 [**hearsay; prejudice**] Appellant, a paternal grandmother and guardian to her granddaughter, could not demonstrate prejudice when objecting to hearsay in one of the child's statements, but not to the second statement which also included allegations of abuse. [**adjudication; some evidence of abuse**] In adjudicating the child dependent-neglected, the trial court clearly considered Appellant's "substantial history" which included a true finding of neglect decades earlier for her failure to protect the child's father and uncle, her sons, from sexual abuse when they were minors. Appellant testified that her sons were sexually abused in her home by her now ex-husband as well as by random people who came into the home for that purpose. Here, the trial court was not required to believe her statements that she and this child were always together in the home. Further, the trial court was astounded by a law enforcement officer's testimony that Appellant had declined to take the child home with her after her interview at the CAC—an option that would have kept the child out of Appellee's custody—because Appellant believed she could not keep the child safe from her two special-needs, adult sons who resided in the home. Moreover, the child's father / Appellant's son, who was a victim of Appellant's failure to protect from sexual abuse in her home decades before, spoke of his daughter's safety and his pleas to remove her from Appellant's home. The trial court was entitled to believe the father's testimony that "something didn't seem right" and that his daughter "started showing signs to [him]" that she was not safe in Appellant's home because she kept asking to go home with him. The trial court could reasonably conclude that, if the father recognized or sensed that his child was not safe in the home, then Appellant—who spent considerably more time with the child and who should have been hypervigilant with respect to signs of sexual abuse given her past failure to protect her own children—should have known that the child was being sexually abused. Under these circumstances, the appellate court could not say that the trial court's adjudication of the child as dependent-neglected was clearly against the preponderance of the evidence. (Zuerker, L.; CV-24-187; 10-9-24; Virden, B.)

Minor Child v. State, 2024 Ark. App. 477 [**delinquency; jurisdiction**] Appellant allegedly committed delinquent acts while a minor but was not charged with delinquency until after reaching the age of 18. He filed a motion to dismiss arguing that the juvenile court did not have jurisdiction; he appealed the denial of his motion to dismiss. Since the denial of a motion to dismiss is not a final order, there was no mechanism by which Appellant could bring his challenge and his appeal was dismissed. (Hannah, C.; CR-23-609; 10-9-24; Abramson, R.)

Brookins v. Ark. Dep't of Human Servs., 2024 Ark. App. 508 [**non-suit; rule 41**] Where Appellee filed a motion to terminate parental rights, 90 days later filed another motion to terminate parental rights, then 30 days later moved to dismiss the petition, when the court conducted a termination hearing, because an amended complaint, unless it adopts and incorporates the original complaint,

supersedes the original complaint, then there was technically no termination petition pending before the court at the time of the termination hearing, so it was error to terminate Appellee's parental rights. (Johnson, S.; CV-24-333; 10-23-24; Barrett, S.)

Harris v. Ark. Dep't of Human Servs., 2024 Ark. App. 514 [**due process; notice and an opportunity to participate**] Appellant father argues that Appellee completely failed to provide him with any meaningful participation in this case to the point that it deprived him of basic due process specifically that Appellee failed to secure his participation in the hearings, provide court orders, or enable him to participate in the case after release from prison. However, father was named a party throughout the duration of the case; he was provided DNA testing while incarcerated; he was appointed counsel almost a full year before the termination hearing took place; and he was appointed new counsel for the termination hearing at the fifteen-month review. Court was not convinced father was denied the "fundamentally fair procedures". Moreover, the evidence from the termination hearing demonstrated that he was offered services but that he rejected them. The court stated from the bench that it "find[s] the caseworker's testimony to be credible that [Appellant] doesn't want any services." [**TPR; subsequent factors**] Subsequent to the original petition for dependency neglect, Appellant mother was sentenced to fifty-three months' imprisonment. The children were prevented from returning to her custody while she was in prison, and there were no services identified below or to the appellate court that were available to Appellant to change that fact. While she had substantially complied with services offered by the Appellee, she was upset about her impending sentencing hearing and used methamphetamine the morning of her sentencing hearing, such that she was so intoxicated in court that her plea could not be taken that day, showing that her use of illegal narcotics manifested a complete indifference to remedy her issues and to rehabilitate herself and her circumstances to resolve her criminal issues, all of which prevented the placement of the juveniles back in her custody. As such, the subsequent-factors ground was supported by substantial evidence. [**TPR; best interest/potential harm**] In considering potential harm caused by returning children to parents, the circuit court was not required to find that actual harm would result or affirmatively identify a potential harm. Potential harm must be viewed in a forward-looking manner and in broad terms, including the harm the child suffers when he or she lacks the stability of a permanent home. A parent's inability to demonstrate appropriate parenting and decision-making skills can support a potential-harm finding; drug use in and of itself is sufficient to support the circuit court's finding of potential harm. Appellant mother was not able to address her legal issues during this case. Despite an offer of probation on the table at one point, she acquired an additional charge for failure to appear and then showed up at her sentencing hearing high. She was incarcerated when the termination hearing took place. All support a finding of potential harm. No clear error. (Sullivan, T.; CV-24-82; 10-23-24; Murphy, M.)

Cox v. Ark. Dep't of Human Servs., 2024 Ark. App. 525 [**TPR; best interest/potential harm**] The circuit court found one ground for termination was that the issues causing removal had not been remedied; both Appellants were still testing positive for illegal substances at the time of the

termination hearing. A parent's drug use and failure to comply with court orders supports a potential-harm finding. A parent's past behavior is often a good indicator of future behavior and may be viewed as a predictor of likely potential harm should the children be returned to the parents' care and custody. (Johnson, S.; CV-24-184; 10-30-24; Barrett, S.)

Nesbitt v. Ark. Dep't of Human Servs.; 2024 Ark. App. 530 [TPR; ICWA] It was error to terminate parental rights to Indian children by clear and convincing evidence when the statute requires proof beyond a reasonable doubt. (Weaver, S.; CV-24-486; 10-30-24; Hixson, K.)