

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

SEPTEMBER AND AUGUST 2022
VOLUME 30, NO. 1
THIS EDITION CONTAINS CASES
FROM SEPTEMBER AND AUGUST 2022

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:

<https://opinions.arcourts.gov/ark/en/nav.do>

CIVIL

Arkansas County Bank v. Pin Oak Hunting Club, 2022 Ark. App. 314 [**prescriptive easement**] Appellants first argued that the circuit court erred when it found that appellee had established a prescriptive easement. Generally, one asserting an easement by prescription must show by a preponderance of the evidence that his use has been adverse to the true owner and under a claim of right for a statutory period of seven years. Overt activity is necessary to make it clear to the owner that an adverse use and claim of right are being exerted. Permissive use of an easement cannot ripen into an adverse claim without clear action, which places the owner on notice. The plaintiff bears the burden of showing by a preponderance of the evidence that there had been adverse, not permissive, use of the land in question. There is a presumption of permissive use if land is unenclosed and undeveloped; however, this presumption can be rebutted if the user shows hostility of conduct in the usage of the land. Here, the appellate court held that the appellee did not rebut the presumption that the use of the levee was anything but permissive. There was no overt activity on the part of appellee to clearly indicate to the appellants that they were using the property adversely or exerted a claim of right to the property other than a permissive use of a levee to access their property. Therefore, the trial court erred in finding that appellee was entitled to a prescriptive easement. [**adverse possession**] On cross-appeal, appellee argued that the circuit court erred in finding that appellants established adverse possession of the portions of a levee system on appellee's property. The elements of adverse possession require a claimant to show he has been in

possession of the property in question continuously for more than seven years, and his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. In 1995, a statutory requirement for proof of adverse possession was added that the claimant prove color of title and payment of ad valorem taxes on the subject property or contiguous property for a period of seven years. If a claimant's rights to the disputed property vested prior to 1995, he need not comply with the statutory change. Here, the levee at issue was built by appellants' relative sometime in the early 1940s. The appellants treated the levee as their own property, as they were the only entities maintaining the levee. Because there was no testimony that appellee ever maintained the levee—only the appellants—since at least the early 1960s, the seven-year period for adverse possession ran long before 1995; therefore, the appellants were not required to prove color of title and payment of taxes. **[easement by necessity]** Appellees also argued that the circuit court erred in failing to grant it an easement by necessity. To establish an easement by necessity, a party must prove (1) that, at one time, one person held title to the tracts in question; (2) that unity of title was severed by conveyance of one of the tracts; and (3) that the easement is necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time the easement is exercised. The possibility that alternate routes to the property exist that might be more inconvenient does preclude the finding of an easement by necessity. Here, appellee failed to prove that the easement was necessary for appellee to use its land. A member of appellee's club admitted that appellee may be able to build a slightly elevated path that would permit the members to access all of their hunting holes by four-wheelers during low-water periods—if a permit could be obtained from the U.S. Army Corp of Engineers—but argued it would not be feasible. Because there were possibly other routes to part of appellee's property that had not investigated, the circuit court did not err in denying their request for an easement by necessity. (Henry, D.; 01DCV-18-31; 9-7-22; Barrett, S.)

Marley v. Ghan, 2022 Ark. App. 321 **[third-party beneficiary]** The circuit court entered judgment in favor of appellee following a bench trial. On appeal, appellants argued that the circuit court erred by finding that appellee could enforce a lease because no valid contract existed between appellee and their father, and thus the contract could not be assigned to appellants. Specifically, they claimed that the evidence did not establish the essential elements of a contract—precise terms, consideration, or mutuality of contract—between appellee and their father. If a contract is made for the benefit of a third party, then it is actionable by such third party if there is substantial evidence of a clear intention to benefit that third party. It is not necessary that consideration move to the obligor from the third-party beneficiary. If there is consideration between the parties, then a standard contract is created. There must be consideration between the obligor and the obligee, but the absence of consideration or contract between the obligor and the third-party beneficiary is the fundamental characteristic of a third-party beneficiary contract. In this case, the lease explicitly required the landlord to pay appellee a commission if the company appellee was working for as a broker purchased the property. Thus, the lease was intended to benefit appellee. Further, as a third-party beneficiary, appellee did not need to establish the elements of a contract between it and the appellants' father. Therefore, the circuit court did not err by finding that the appellee could enforce the lease. **[property description]** Appellants additionally argued that the circuit court erred by

finding that the lease was valid because the lease did not contain a legal property description. A real property contract must include a definite description of the subject property to comply with the statute of frauds. If a writing furnishes a means by which the realty can be identified, it need not describe the property with the particularity required for deeds. A contract's designation of the premises by street address satisfies the statute of frauds. Here, the lease agreement included the street address of the property. Therefore, the circuit court did not err in finding the lease was valid. (Threet, J.; 72CV-18-179; 9-14-22; Abramson, R.)

Johnson v. Universal Health Services, 2022 Ark. App. 324 [**summary judgment; pleading**] The circuit court granted summary judgment to appellees. On appeal, appellant argued the circuit court erred. Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. A wrongful-death action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person. For the purposes of the wrongful-death statute, the term "heirs at law" as used in Ark. Code Ann. § 16-62-102(b) means "beneficiaries" as used in Ark. Code Ann. § 16-62-102(d). Where there is no personal representative at the time of filing, all statutory beneficiaries must be joined as plaintiffs to the action. A wrongful-death action alleging medical malpractice must be brought within the two-year statute of limitations for such claims. Here, appellant's complaint was filed "Individually, and as the Personal Representative of the Estate of Samuel Goodman, Deceased." In it, appellant identified herself as the personal representative of the estate and its only heir. Appellant conceded that the deceased had two other statutory beneficiaries, a daughter, and a sister, who were not named as plaintiffs in her action as required by the wrongful-death statute. However, she argues that the purpose of the wrongful-death-pleading requirements were satisfied because the beneficiaries were made known to appellees through discovery. The appellate court held that whether appellees knew the identity of the deceased's beneficiaries through discovery was irrelevant to whether appellant had standing pursuant to the statute. [**Medical Malpractice Act**] Appellant next argued that the summary judgment should only apply to her cause of action for wrongful death, because the rest of the claims in her complaint were covered by the Medical Malpractice Act and were not subject to the pleading requirements of the wrongful-death statute. Causes of action for medical malpractice and wrongful death are not separate and distinct when the cause of death is alleged to have resulted from a medical injury. The supreme court has held that the Medical Malpractice Act's two-year limitations period conflicts with the three-year limitations period under the Wrongful Death Act and is therefore controlling when death ensues from medical injuries. However, the Medical Malpractice Act contains no provision inconsistent with the provision of the wrongful-death statute stating that every action shall be brought by and in the name of the personal representative of the decedent, and if there is no personal representative, then by the heirs at law. Accordingly, as in *Brewer v. Poole*, 362 Ark. 1 (2005) and *Rice v. Tanner*, 363 Ark. 79 (2005), where plaintiffs filed suit alleging wrongful death due to medical malpractice, appellant's claims had to have been brought by the proper plaintiffs pursuant

to the wrongful-death statute within the two-year limitations period for medical-malpractice claims. (Griffen, W.; 60CV-20-2447; 9-14-22; Klappenbach, N.)

Levitt v. Today's Bank, 2022 Ark. App. 343 **[summary judgment]** The circuit court entered an order granting summary judgment in favor of appellee in a foreclosure action. On appeal, appellants argued that there were genuine issues of material fact as to their defenses of duress and prevention of performance sufficient to defeat summary judgment and that the circuit court erred in finding that their affirmative defenses to the foreclosure action had been purchased by a third party in bankruptcy. A circuit court will grant summary judgment only when it is apparent that no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law. **[duress]** To establish duress that will justify voiding a contract, a party must show that they involuntarily accepted the terms of the opposing party, that the circumstances permitted no other alternative, and that the circumstances resulted from coercive acts by the opposing party. Duress consisting of threats exciting a fear of such a grievous wrong as death, great bodily injury, or unlawful imprisonment would probably justify a cancellation of a contract if the party, acting under such threats, moved to cancel it promptly. A contract executed under duress may be ratified after the duress is removed. Such ratification results if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled. Here, one of the appellants filed an affidavit attached to the response to the motion for summary judgment. In it, he averred that an employee of the appellee threatened them with civil and criminal penalties and threatened to foreclose on their home if they did not agree to the loan modifications. Thus, appellants raised an issue of fact concerning duress. While the Bank denied these allegations in its response to their counterclaims, it presented no evidence responding to or disputing these assertions of duress in its reply brief. The appellate court held that the evidence to support appellants' claim of duress was sufficient to raise material issues of fact to survive summary judgment. Additionally, the appellate court found that summary judgment was not appropriate because there was a genuine issue of material fact as to whether appellants ratified the loan agreement. Appellee argued the appellants ratified the contract by remaining silent regarding the alleged duress until after the appellee initiated foreclosure proceedings. Viewing the facts of this case in the light most favorable to appellants, they still faced the possibility that criminal charges or forfeiture proceedings could be instituted against them, even after execution of the loan documents. Thus, what constituted a "considerable length of time" to avoid the contracts was an issue of fact for the jury to decide. **[affirmative defense sold in bankruptcy]** Appellants next argued that the circuit court erred in finding that their affirmative defenses were sold in a bankruptcy proceeding and that they were thus precluded from asserting said defenses as to the foreclosures. Here, only the claims by the parties were sold in the bankruptcy proceeding according to the report of sale, not their defenses. Therefore, the circuit court erred in finding their defenses were sold. **[prevention of performance]** Finally, appellants argued that there were genuine issues of material fact regarding whether the appellees assumed a duty to obtain title to the trailers that were pledged as security for the loan and whether the appellee's failure to do so caused the appellant's inability to perform their obligations under the loan agreements. The

Arkansas Supreme Court has held that he who prevents the doing of a thing shall not avail himself of the nonperformance he has occasioned. A party has an implied obligation not to do anything that would prevent, hinder, or delay performance. Here, the appellate court held that genuine issues of material fact existed to whether the actions of the appellee prevented the appellants from performing under the contracts. Therefore, the trial court erred in granting summary judgment. (Threet, J.; 72CV-18-3120; 9-21-22; Whiteaker, P.)

Stone v. Read, 2022 Ark. App. 349 [**breach of contract; meeting of the minds**] The circuit court entered a final judgment after a bench trial wherein appellee was awarded damages for her breach-of-construction-contract claim and dismissed appellant's counterclaim. On appeal, appellant argued that the circuit court erred in finding that he had breached the parties' construction contract and awarding appellee damages because his obligations to perform were released after appellee first breached the contract. On a breach-of-contract claim, when performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. For one party's obligation to perform to be discharged, the other party's breach must be material. A material breach is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. Where a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written terms. Parol evidence may be admitted, however, to prove an independent, collateral fact about which the written contract was silent. Here, the parties entered into a written construction contract in which appellant agreed to remove appellee's home that was destroyed by fire and construct a new residence. The written contract did not contain a payment schedule. Appellant argued that the parties had a verbal agreement regarding the payment schedule that was reached before the commencement of the written contract. Appellant's payment schedule was generally one-third, up front; one-third, upon one-third completion; one-third less 10 percent retainage, upon two-thirds completion; and the balance on completion. The appellee made the first two payments, and she did not dispute the amount for the third payment, only that she could not make the payment because the bank had the money. The appellate court held that the record contained evidence that the parties did have a meeting of the minds, and appellee agreed to the terms of appellant's verbal payment schedule agreement based upon the appellee's conduct. Therefore, because appellee materially breached the contract first when she failed to pay appellant the third installment payment, appellant was released from his obligation of completing construction. The trial court erred in finding that appellant had breached the parties' contract. (Griffen, W.; 60CV-17-1085; 9-21-22; Hixson, K.)

Harris v. Crawford County Board of Election Commissioners, 2022 Ark. 160 [**election certification; improper venue**] The circuit court dismissed appellant's complaint challenging the certification of the House District 25 (HD 25) Republican primary race by appellee, Crawford County Board of Election Commissioners. On appeal, appellant argued that the circuit court abused its discretion by (1) dismissing her complaint based on lack of jurisdiction and improper venue and (2) denying her motion to transfer the case to Crawford County. Statutory language is

ambiguous if it is open to two or more constructions, or if it is of such obscure and doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. When a statute is ambiguous, the court must interpret it according to legislative intent, and review becomes an examination of the whole act. In addition, courts must look at the legislative history, the language, and the subject matter involved. According to the “last-antecedent canon,” the clause “wherein any of the wrongful acts occurred” typically refers to the word or phrase that is nearest to it— “the circuit or district” in this case. However, the “surplusage canon” states that every word and provision in a statute are to be given effect if possible and that no statutory provision should be given an interpretation that causes it to be redundant or to have no consequence. Here, the appellant filed a complaint in the Franklin County Circuit Court contesting the Crawford County Board of Election Commissioner’s certification. The dispute in this case centered on the proper interpretation of the language in Ark. Code Ann. § 7-5-801(b) stating that “[t]he action shall be brought in the circuit court ... within any county in the circuit or district wherein any of the wrongful acts occurred ...[.]” Appellant argued that the clause “wherein any of the wrongful acts occurred” referred to “the circuit or district,” while appellees contend that it referred to “any county.” Appellees asserted, the construction of Ark. Code Ann. § 7-5-801(b) urged by appellant would render the clause “wherein any of the wrongful acts occurred” superfluous and insignificant. If this language was removed, subsection (b) would still have the same meaning. Specifically, if an election contest could be brought in any county in the district regardless of whether wrongful acts occurred in that county, there would be no reason for the General Assembly to insert the words “wherein any of the wrongful acts occurred.” The Supreme Court held that appellant incorrectly filed her postelection contest in Franklin County rather than Crawford County, wherein the alleged wrongful acts occurred. Therefore, the circuit court correctly dismissed appellant’s complaint. **[venue transfer]** Appellant next argued that even if the circuit court correctly determined that Franklin County was not the proper venue for her suit, the court abused its discretion by denying her motion to transfer the case to Crawford County. Rule 12(h)(3) of the Arkansas Rules of Civil Procedure provides that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Upon a determination that venue is improper, the court shall dismiss the action or direct that it be transferred to a county where venue would be proper, with the plaintiff having an election if the action could be maintained in more than one county. While election contests are special proceedings, the Supreme Court has held that the rules of civil procedure still apply to those proceedings in the absence of a different procedure set forth in the election statute. Here, the circuit court had the authority to decide whether to dismiss appellant’s suit upon its determination that venue was improper or transfer it to Crawford County. Arkansas Code Annotated § 7-5-801(b) governs the proper forum for a postelection contest; however, it contains no language supplanting Rule 12(h)(3) of the Arkansas Rules of Civil Procedure, which gives the circuit court the discretion to transfer the action to a county where venue would be proper. Therefore, the circuit court erroneously concluded that it lacked the authority to transfer this matter. (Sutterfield, D.; 24OCV-22-60; 9-22-22; Hudson, C.)

Branscum v. Nelson, 2022 Ark. App. 354 **[prescriptive easement; relocation]** The court entered an order recognizing a prescriptive easement on behalf of appellant and the “citizens of Perry

County, Arkansas.” Additionally, the order allowed the appellees to relocate the road where the prescriptive easement was held to exist and did not order appellees to remove a gate installed on the road. On appeal, appellant argued that the circuit court did not have authority to allow appellees to relocate the road. The grantee of an easement or right of way has the right to determine the exact location of such easement if the grantor fails to do so, and it cannot thereafter be redesignated at a different location without another grant. Allowing the owner of a servient estate to relocate a right of way after its location has become fixed by use is clear error. This standard does not directly apply because a prescriptive easement is created by adverse use, not by grant. In the case of an easement by prescription both its creation and extent are ascertained from the adverse use of the property over a long period of time. The appellate court held that a less stringent standard should not apply to attempts to relocate a prescriptive easement, and therefore the circuit court erred in its attempt to allow appellees to move the road. In *Massee v. Schiller*, 243 Ark. 572 (1967), the Arkansas Supreme Court held that a landowner could install cattle guards in an abandoned roadway over which a neighbor had a prescriptive easement, though none were present when the easement was created, because the guards did not unreasonably interfere with the prescriptive use. Here, unlike the circumstances in *Massee*, there was a public easement. Appellees installed a gate because he “wanted to restrict the access of the general public,” contravening the only right that easement conveys. Therefore, the gate, and any other obstructions on the road, must be removed. (Smith, V.; 53CV-19-46; 9-28-22; Harrison, B.)

Faigin v. Diamante Members Club, Inc., 2022 Ark. App. 361 [**res judicata; claim preclusion**]
The circuit court entered a final judgment and decree of foreclosure granting summary judgment in favor of appellees, the former and current owners of a private golf club associated with the developed subdivision the appellants own property within. On appeal, appellants argued that res judicata was not applicable. The concept of res judicata has two facets, one being claim preclusion and the other issue preclusion. Claim preclusion bars relitigation of a claim in a subsequent suit when five factors are present: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. Here, the appellate court held that appellants’ claims were barred by claim preclusion. First, all pending motions in an earlier class action lawsuit were decided by summary judgment, and summary judgment is a final adjudication on the merits. Second, the circuit court had jurisdiction to hear the motions. Third, appellants fully contested entry of summary judgment in favor of appellees. Fourth, appellants were unnamed parties in the class action lawsuit, and while they make the argument that one of the appellees was not a party, the parties need not be precisely the same for a judgment in one action to bar another. As long as there is substantial identity or privity of parties, this element of claim preclusion is met. Privity of parties within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right. Privity existed between the appellees because the former owner of the private golf club assigned its rights related to the subdivision to the current owner of the private golf club. Finally, appellants’ attempt to nominate their cause of action as one for “deceit, fraud, or misrepresentation” did not change that appellants’ claim involved the same set of facts alleged in

the previous class action lawsuit. Therefore, the circuit court correctly applied res judicata in granting summary judgment in favor of appellees. (Phillips, G.; 63CV-10-959; 9-28-22; Gladwin, R.)

Brown v. Crossett Health Foundation, 2022 Ark. App. 363 [**declaratory judgment**] The trial court entered summary judgment in favor of appellee, finding that there was no actual controversy after appellant, a physician, filed a complaint seeking declaratory judgment that a covenant not to compete was invalid and void as against public policy. A party seeking a declaratory judgment must still demonstrate a justiciable controversy. A case is nonjusticiable when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events; the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote. Here, there was an existing geographically broad, three-year covenant not to compete. Appellant tried to gain employment in one of the prohibited counties, shortly after his contract was not renewed with appellee, and appellee's CEO directly thwarted appellant's effort to gain employment in a neighboring county. Appellant sought to be relieved from those restrictions which will not expire until January 2023. The appellate court held this presented an actual controversy between the parties. [**mootness**] Appellee also argued that this matter was moot for the same reasons. A case is moot when a judgment on the matter would have no practical effect on an existing legal controversy. Appellant's affidavit stated that he wanted to remain in his Arkansas residence and work within a reasonable driving distance of his home. That the appellant accepted employment in another state to support himself and his wife did not nullify the fact that he will still be subject to the covenant not to compete until it expires in January 2023, so this matter was not moot. Therefore, the trial court erred in entering summary judgment. (Gibson, R. 02CV-20-33; 9-28-22; Klappenbach, N.)

CRIMINAL

McKay v. State, 2022 Ark. App. 318 [**probation revocation; sufficiency of the evidence**] The trial court appellee's suspended sentences in two failure-to-comply cases. On appeal, appellant argued that the evidence was not sufficient to support the trial court's finding that he violated a condition of his suspended imposition of sentence contract. Arkansas Code Annotated § 5-14-128(a) prohibits Level 3 sex offenders from knowingly residing within two thousand feet of a school. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence. Criminal intent can be inferred from one's behavior under the circumstances, and it is presumed that one intends the natural and probable consequences of one's acts. The factfinder may draw upon common knowledge and experience to infer the defendant's intent from the circumstances. An element may be inferred by circumstantial evidence when there is no other reasonable explanation for the accused's conduct. A person acts knowingly when he is aware that his conduct is of that nature or that the attendant circumstances exist. Someone may also act

knowingly when he is aware that it is practically certain his conduct will cause the result. Here, appellant was a registered Level 3 sex offender. Appellant's employer had been paying for appellant to stay at a motel for a week, after he had discovered that appellant was homeless and living out of his car. The State did not introduce evidence that appellant had been staying at the motel for longer than a week or that he kept any personal effects at the motel. Additionally, the appellate court held that even if he were residing at the motel, there was no evidence that he knew, more likely than not, that he was within two thousand feet of a school. The State did not introduce any map of the area, nor did any witness discuss signs or sightlines, or testify that the distance had even been measured. The only evidence regarding the proximity element was a detective's statement that the motel was within two thousand feet of the high school. The appellate court held that conclusory statements that the defendant was residing near a school was not sufficient to establish culpability, even with the lower burden of proof necessary for an SIS revocation. Therefore, the trial court erred in revoking the appellant's suspended sentence. (Karren, B.; 04CR-10-1589; 9-7-22; Murphy, M.)

Miller v. State, 2022 Ark. App. 352 [**suspended sentences; habitual offender**] The circuit court revoked appellant's suspended sentences and probation. On appeal, appellant argued that the circuit court lacked jurisdiction to revoke his suspended sentences because the underlying suspended sentences were illegal. In Arkansas, sentencing is entirely a matter of statute and must be in accordance with the statute in effect at the time the crime was committed. When a defendant is charged and sentenced as a habitual offender with two or more prior felony convictions, that defendant may not be sentenced to probation or a suspended sentence. Upon revocation of a suspended sentence or probation, the circuit court may impose any sentence that could have been originally imposed on the defendant for the offense. If an original sentence is illegal, it may be corrected at any time, even if it has been partially executed. Here, a sentencing order was entered in which appellant was sentenced as a habitual offender to 120 months' suspended sentences. Because appellant was sentenced as a habitual offender to suspended sentences only, the sentences were not in accordance with statute. Because the initial suspended sentences were illegal, these cases must be corrected at a resentencing with credit given for any time already served. (Medlock, M.; 17CR-17-509; 9-21-22; Brown, W.)

Robinson v. State, 2022 Ark. 163 [**Eighth Amendment; motion to reduce sentence**] The circuit court denied appellant's postconviction motion to reduce his sentence, arguing that Arkansas courts should expand their interpretation of the Eighth Amendment as it relates to sentencing young adults. In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held that a mandatory sentence of life imprisonment without parole for those under eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. The Arkansas Supreme Court has previously declined to extend *Miller* to persons who were eighteen or over when the crime was committed. Generally, once a trial court enters a judgment and commitment order, jurisdiction is transferred to the executive branch of government. Here, appellant pleaded guilty to first-degree murder and was sentenced to life imprisonment for a

murder he committed when he was nineteen-years-old. Although some statutes, rules, and writs allow the trial court to exercise jurisdiction in certain instances, appellant's motion did not allege any that were applicable. Additionally, no Arkansas statute allowed for reconsideration of appellant's sentence here. Therefore, the circuit court correctly concluded it lacked jurisdiction to reduce appellant's sentence. (Houston, B.; 63CR-93-334; 9-22-22, Wood, R.)

Stapp v. State, 2022 Ark. App. 357 [**rape-shield statute; prior act**] A jury convicted appellant of three counts of rape and following the jury's sentencing recommendations the circuit court imposed forty-year sentences on each count to run consecutively. On appeal, appellant argued that the circuit court erred in its denial of his pretrial rape-shield motion. Under the rape-shield statute, the prior sexual conduct of a victim is not admissible by the defendant to attack the credibility of the witness, to prove consent or any other defense, or for any other purpose. The circuit court is required to hold an in-camera hearing to determine whether such evidence would be relevant to a fact at issue and whether the probative value outweighs its inflammatory or prejudicial nature. There is a five-factor test to consider whether the prior sexual conduct of a child is admissible to prove an alternate source of the child's sexual knowledge pursuant to *State v. Townsend*, 366 Ark. 152 (2006). The *Townsend* factors are: (1) that the prior act clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. A failure to meet any one factor means the evidence proffered by the defendant does not fall within the rape-shield exception. Here, appellant failed to prove the first factor. The evidence indicated that appellant had raped the child on at least three occasions over a period of several years. The alleged "prior act" the appellant sought to introduce between the child and her cousin, a minor, allegedly occurred after appellant had already raped the child twice. Consequently, the alleged prior act between the child and her cousin was not a prior act as contemplated by the first *Townsend* factor. Because appellant failed to meet the test set out in *Townsend*, the circuit court did not abuse its discretion in excluding the evidence of the alleged prior act. (Braswell, T.; 23CR-20-313; 9-28-22; Abramson, R.)

Harness v. State, 2022 Ark. App. 360 [**motion for mistrial**] Appellant was convicted of rape in the circuit court. On appeal, appellant argued that the circuit court erred by denying his motions for mistrial. A mistrial is a drastic remedy and should be declared only when there is error so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. [**discovery**] With respect to motions for mistrial based on Arkansas Rule of Criminal Procedure 17.1, a mistrial is an extreme sanction for a prosecutorial discovery violation and is to be avoided unless the fundamental fairness of the trial itself is at stake. Arkansas Rule of Criminal Procedure 17.1(d) provides that the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor. Arkansas Rule of Criminal Procedure 19.2 contains a continuing duty to disclose, and Rule 19.4 provides that upon a showing of cause,

the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof. Here, the only information not known to defense counsel was that the victim witness coordinator asked the victim about two matters the victim had already testified about in direct and cross-examination while the court was adjourned. Prejudice does not exist when the defendant already has access to the information that the State did not disclose. Therefore, there was not a violation of Rule 17.1 or Rule 19.2 of the Arkansas Rules of Criminal Procedure. **[victim seating]** The trial judge may control the seating arrangement in the courtroom. Unless appellant suffered some prejudice as a result of being seated with counsel, he has no ground for complaint. At trial, the victim was seated at the prosecutor's counsel table as the jury entered the courtroom after a break during the victim's testimony. After appellant objected, the circuit court offered to give a limiting instruction. The appellate court held that appellant's refusal to accept the circuit court's offered admonition negated his mistrial motion. Appellant's counsel agreed that the encounter was short and not something that "jumped out" at the jury, and he refused the admonition. Therefore, the circuit court did not err in its denial of the appellant's motions for mistrial. (Putman, J.; 05CR-19-305; 9-28-22; Gladwin, R.)

PROBATE

Fenwick v. Clark, 2022 Ark. App. 300 **[probate; subject matter jurisdiction]** The circuit court denied appellant's motion to dismiss a motion for declaratory judgment filed by appellee, as executrix of an estate. On appeal, appellant argued that the circuit court erred when it held that the probate division was the proper division for jurisdiction of the issues in this case because the dispute between the appellee and him concerned their respective interests in certain property that passed outside of the estate. The probate jurisdiction of the circuit court includes: (1) the administration, settlement, and distribution of estates of decedents; (2) the probate of wills; (3) the persons and estates of minors; (4) persons of unsound mind and their estates; (5) the determination of heirship or of adoption; (6) the restoration of lost wills and the construction of wills when incident to the administration of an estate; and (7) all such other matters as are provided by law. Amendment 80 of the Arkansas Constitution provides that the jurisdiction conferred on circuit courts established by the amendment includes all matters previously cognizable by circuit, chancery, probate and juvenile courts and that circuit courts shall assume the jurisdiction of circuit, chancery, probate, and juvenile courts. Arkansas Supreme Court Administrative Order No. 14 (a) further provides that the designation of divisions is for the purpose of judicial administration and is not for the purpose of subject-matter jurisdiction. The Arkansas Supreme Court has held that the creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court. Appellant filed the initial probate action and specifically asserted that the property was a portion of the marital estate and that he claimed his spousal rights in same. Appellant's claim of a spousal life estate was an inchoate interest that ripened into a vested right only upon the deceased's death. He made his claim in the probate court through his

own pleadings, stating that he was the surviving spouse and heir. The probate division of the circuit court has the power to determine whether real property is included in an estate. Further, the personal representative is obligated to determine whether the court should find it necessary for real property to become an asset in the hands of the personal representative to be sold, leased, mortgaged, or exchanged. The circuit court correctly concluded that it had jurisdiction to determine the specific issues pending before it at the time of its order. (Blatt, S.; 66FPR-19-503; 8-31-22; Gladwin, R.)

Gawenis v. Zelda Walls Living Trust, 2022 Ark. App. 302 [**subject matter jurisdiction; Arkansas Trust Code; guardianship**] The circuit court entered an order striking appellant's answer and entered default judgment against him and in favor of appellee, as trustee of a trust. On appeal, appellant argued that the circuit court abused its discretion by presiding over appellee's complaint for declaratory judgment because litigation involving the same parties, issues of fact, and issues of law were pending before a different division of the circuit court. The Arkansas Trust Code provides that (a) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law; (b) A trust is not subject to continuing judicial supervision unless ordered by the court; (c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights. When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the rules of civil procedure, the court may enter a default judgment against him. Here, appellee was nominated as successor trustee in the event of the original trust settlor's death or incapacity. Appellant had filed a petition for guardianship over the original trust settlor, seeking to be appointed guardian. An order was entered that same day naming appellant emergency, temporary, and permanent guardian and declaring the original trust settlor incapacitated. Appellant moved to revoke the Trust within the guardianship action. He did not serve the Trust or the trustee with process or provide notice of either the guardianship or the motion to revoke the trust. Appellee then filed a complaint against appellant for a declaration as to the rights of the trustee and beneficiaries pursuant to the Arkansas Trust Code, authorizing an action for declaratory judgment. The circuit court had subject-matter jurisdiction based upon the Arkansas Trust Code. Additionally, the appellate court also disagreed with appellant's argument that his guardianship proceeding involved identical parties, issues of fact, and issues of law. Neither the Trust nor the trustee was ever served with process or made a party to the guardianship proceeding. Appellant failed to file a timely answer to appellee's complaint asserting these or any other defenses, failed to respond to appellee's motion to strike his answer and enter default judgment, and failed to attend the hearing on the matter. Therefore, the circuit court did not abuse its discretion in entering a default judgment under these circumstances. (Weaver, S.; 71CV-20-119; 8-31-22; Gruber, R.)

A.P.G. v. Tice, 2022 Ark. App. 325 [**guardianship**] The trial court awarded permanent guardianship of appellant's daughter to the child's paternal grandmother. On appeal, appellant argued that there was no showing that a guardianship was necessary or in the child's best interest,

and the guardianship violated her constitutional right to raise her child. Arkansas Code Annotated § 28-65-210 provides: Before appointing a guardian, the court must be satisfied that: (1) The person for whom a guardian is prayed is either a minor or otherwise incapacitated; (2) A guardianship is desirable to protect the interests of the incapacitated person; and (3) The person to be appointed guardian is qualified and suitable to act as such. Arkansas Code Annotated § 28-65-204 provides that the parents of an unmarried minor, or either of them, if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person. The issue of whether a natural parent is “fit” or “unfit,” as those terms are used in child-custody cases, is not an element in an initial guardianship case. The sole considerations in determining the parental preference in a guardianship of a child are whether the natural parent is qualified and suitable and what is in the child’s best interest. The appellate court recognized while the supreme court’s recent cases holding that parental fitness is at the heart of termination-of-guardianship cases involving parents of minor wards, the supreme court has not overruled its cases holding that fitness is not a consideration in initial guardianship cases. Here, the trial court’s order did not state whether appellant was “qualified and suitable” under Ark. Code Ann. § 28-65-204; whether a guardianship was “desirable to protect” the child’s interests; and, if a guardianship was desirable, that appellee was “qualified and suitable” to act as the child’s guardian. Additionally, the trial court did not make a finding regarding the child’s best interest. Therefore, the trial court erred in making the necessary findings. (McCain, G.; 58PR-20-205; 9-14-22; Gruber, R.)

Fulk v. Fulk, 2022 Ark. App. 338 [**incapacity or undue influence**] Following a bench trial, the circuit court admitted the deceased’s will to probate and appointed appellant as executor but set aside a transfer of duck club stock to appellant, finding that it was the result of incapacity and undue influence. On appeal, appellant argued the circuit court erred in setting aside the transfer. Ordinarily, the party challenging the validity of an instrument is required to prove incapacity or undue influence by a preponderance of the evidence. However, when the assignee procured the assignment and had a confidential relationship with the assignor, this gives rise to a rebuttable presumption of incapacity and undue influence. To rebut this presumption, the party defending the assignment bears the burden of proving beyond a reasonable doubt that the testator enjoyed both required mental capacity and freedom of will. Undue influence on a testator may be inferred from the facts and circumstances. A court may consider whether a signatory was hospitalized or in a weakened state. A court may also consider whether the person who stood to benefit from the instrument’s execution was “the driving force behind the changes” or present when the changes were discussed with the signatory and executed. Further, when the party defending the instrument relies almost exclusively on the testimony of individuals whose self-interest aligns with his own, then the circuit court is entitled to take that into account when making its credibility determinations. Here, the deceased was diagnosed with Alzheimer’s-type dementia in 2017 and lived in a senior living community. The circuit court found that a confidential relationship existed between the deceased and appellant because, in addition to the close familial relationship between them as father and son, appellant held the power of attorney and thereby was attorney-in-fact for the deceased at the time of the transfer. The circuit court held that as a result of the establishment of both procurement and a confidential relationship between the deceased and appellant, a

rebuttable presumption of lack of capacity and undue influence arose. The appellate court held that the circuit court did not err in finding that appellant had not rebutted the presumption. **[appointment of executor]** On cross-appeal, appellees argued the circuit court erred in appointing appellant as executor. Arkansas law calls for the executor named in a decedent's will to be the first person appointed by the court. Arkansas law allows probate courts to choose another personal representative if the person named in the decedent's will is not qualified to serve. Along with minors, those of unsound mind, convicted felons, and unauthorized corporations, not qualified to serve can mean a person whom the court finds unsuitable. The statutory word "unsuitable" gives wide discretion to a probate judge. Past maladministration of a comparable trust, bad character, misconduct, neglect of duty, or physical or mental incapacity, warrants a finding that an executor or administrator is unsuitable. Circuit courts are given wide discretion in determining whether an individual is unsuitable to serve. Here, the deceased's will appointed the appellant as executor. The circuit court noted that personal animosity did not render appellant unsuitable to administer the estate. Appellant is a licensed attorney who practiced law in the private sector in Arkansas for three and a half years and practiced military law for over twenty-six years. At trial, appellant testified that if named executor of his father's estate, he would retain counsel, gather the assets of the estate, and distribute the assets according to the plan of distribution approved by the court. The appellate court held that the evidence presented at trial demonstrated that appellant was qualified, able, and fit to serve as executor of the deceased's estate. Therefore, the circuit court did not err in appointing appellant as executor. (Reif, M.; 60PR-19-703; 9-21-22; Abramson, R.)

DOMESTIC RELATIONS

Richards v. Richards, 2022 Ark. App. 309 **[division of marital property]** On appeal, appellant argued that the circuit court erred in treating a 401(k) as marital property. Arkansas Code Annotated § 9-12-315 governs the distribution of marital property. As a general rule, the court should distribute all marital property one-half to each party unless the court finds such a division to be inequitable. When making an equitable division the court must consider factors enumerated in Ark. Code Ann. § 9-12-315(a)(1) including: the length of the marriage, the occupation of the parties, the amount and sources of income, and employability. All nonmarital property shall 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 factors enumerated in Ark. Code Ann. § 9-12-315(a)(1), in which event 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. Here, the appellate court held the trial court's statement, "The Court finds that this division of property and marital debt to be equitable, although it might not be equal," was not adequate to explain the court's basis and reasoning for not awarding appellant his nonmarital contributions to his 401(k) and the increase in value of those contributions. (Taylor, J.; 72DR-19-1737; 9-7-22; Harrison, B.)

Grynwald v. Grynwald, 2022 Ark. App. 310 [**spousal support; retroactive child support**] On appeal, appellant argued that the circuit court erred in awarding spousal support and that the circuit court erred by awarding retroactive child support to the date of the filing of the complaint. A circuit court can make an award of alimony that is reasonable under the circumstances. The purpose of alimony is to rectify economic imbalances in earning power and standard of living in light of the particular facts in each case. The primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. Other factors to be considered include the financial circumstances of both parties; the couple's past standard of living; the value of jointly owned property; the amount and nature of the parties' income, both current and anticipated; the extent and nature of the resources and assets of each of the parties; the amount of income of each that is spendable; the earning ability and capacity of each party; the property awarded or given to one of the parties, either by the court or the other party; the disposition made of the homestead or jointly owned property; the condition of health and medical needs of both parties; the duration of the marriage; and the amount of child support. Here, the circuit court reviewed the financial circumstances of both parties, the amount and nature of the current and anticipated income of both parties, the earning ability and capacity of both parties, the assets divided in this case, the length of the parties' marriage, the sacrifices and contribution by appellee to appellant's earning capacity, and the extent and nature of the resources and assets of each of the parties. The appellate court held that an award of alimony to appellee was reasonable under the circumstances, considering the substantial disparity in the parties' incomes. Therefore, the circuit court did not err in granting spousal support. The commencement date of an award of child support is a matter within the discretion of the trial court. Thus, in various instances it has been held proper for the court to fix the effective date of an order of child support from the date of filing of the petition or complaint, or from the date of trial, or from the date of the parties' separation. Here, appellant argued that appellee never requested temporary support and that he provided for the children's support during the pendency of the divorce case. However, appellant provided no evidence of any support paid to appellee. Therefore, the circuit court did not abuse its discretion. (Johnson, A.; 60DR-19-197; 9-7-22; Abramson, R.)

Frazier v. Frazier, 2022 Ark. App. 323 [**modification of child-support; dismissal**] The trial court dismissed appellant's petition for modification of child support. On appeal, appellant argued the trial court erred because (1) the petition for modification sufficiently pleaded a cause of action and had been prematurely dismissed, and (2) the dismissal of the petition improperly circumvented the revised family-support chart. Arkansas Code Annotated § 9-14-107(c)(2)(C) prohibits the modification of child support based solely on a revision to the child-support chart. An inconsistency between the existing child support award and the amount of child support that results from the application of the child-support chart shall constitute a material change in circumstances unless the inconsistency is due solely to a revision of the family support chart. Here, appellant alleged in his petition for modification of child support that his monthly income had increased and/or decreased by more than \$100.00 per month. There was no discovery completed between the filing of the petition and the trial court's order of dismissal. The appellate court held that because appellant's petition for modification was not based solely on a change in the child-support

chart, it should have been fully adjudicated rather than summarily dismissed on appellee's allegation that it might reduce appellant's child-support obligation. Therefore, the trial court erred in dismissing the appellant's petition for modification of child support. (Beaumont, C.; 9-14-22; 72DR-13-1408; Gladwin, R.)

Reesnes v. Reesnes, 2022 Ark. App. 372 **[marital property division]** The parties were divorced pursuant to a divorce decree entered in 2009. Part of the marital property was omitted in the parties' property settlement agreement (PSA) and not divided upon their divorce. The trial court in this postdivorce proceeding found that appellant had committed constructive fraud in failing to disclose the property upon divorce and endeavored to awarded appellee her equal share of the marital property. On appeal, appellant argued that the trial court erred in awarding prejudgment interest. **[prejudgment interest]** Prejudgment interest is intended to be compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. However, prejudgment interest is allowable only when the amount of damages is definitely ascertainable by mathematical computation or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. Here, the trial court determined that the value of the property at the time of the divorce was \$360,000 and awarded appellee \$180,000 for her marital interest. The court awarded prejudgment interest at 4 percent per annum as a remedy for appellee's loss of use of those funds for 10 plus years. However, prejudgment interest on this amount was not allowable because the amount of damages were not definitely ascertainable by mathematical computation without reliance on opinion or discretion. The damages amount was based on the opinion of appellant's valuation expert. Appellee argued that it should not be considered prejudgment interest but rather a permissible sanction for appellant being held in contempt. While the appellant was held in contempt for failing to provide related to a different entity, the trial court made no finding of contempt regarding the property at issue. Thus, there was no legal basis to support the award of prejudgment interest, and the award of prejudgment interest was in error. **[distribution of ownership]** On cross-appeal, appellee argued that under the circumstances of this case, the methodology implemented by the trial court in arriving at her share of the property as of the time of divorce resulted in an inequitable division of marital property. Arkansas Code Annotated § 9-12-315(a)(4) provides that when stocks, bonds, or other securities issued by a corporation, association, or government entity make up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair market value of the securities, may order and adjudge that the securities be distributed to one party on condition that one-half the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities. This statute allows two alternate means for dividing securities and business interest: (1) designation of the specific property in securities that each party is entitled to by dividing and distributing the property, or (2) determining the fair market value and ordering that the property be distributed to one party on the condition that half of the fair market value in money or property be set aside and distributed to the other party in lieu of division and distribution. Here, the parties' marital interest in property should have been divided between the parties when they were divorced in August 2009. However, the property was not divided at that time because of

appellant's constructive fraud in failing to disclose the property. This resulted in appellee being deprived of her interest in the property for a period of more than ten years. In an attempt to make appellee whole, the trial court awarded appellee half the value of the property as of the time of divorce and also awarded appellee 4 percent prejudgment interest as a remedy for her loss of the use of those funds for ten plus years. However, the trial court erred in awarding the prejudgment interest. Therefore, the appellate court held that to affirm the trial court's methodology in dividing the property by awarding appellee one-half of its value upon divorce, it would effectively deprive appellee of her equal share in the property at the time of the divorce as a result of appellant's constructive fraud, and that would result in an inequitable division of marital property. (Hannah, C.; 73DR-09-437; 9-28-22; Hixson, K.)

JUVENILE

Carla Johnson v. Ark. Dep't of Human Servs., 2022 Ark. App. 301 [**TPR; best interest**] The appellate court found no error in the circuit court's finding that there was potential harm in returning the children to Appellant's care due to neglect, potential drug exposure, and possible homelessness. Despite the case being open for more than twenty months, Appellant had not completed counseling or parenting classes, had not attended NA, and had not maintained stable housing or income. If Appellant could not handle the requirements of the case when the children were not with her, the court found it was doubtful that she could handle nine children with various special needs and treatments if they were to be returned. Considering Appellant's failure to comply with the case plan or show stability in her life, the circuit court's findings were not clearly erroneous. (Byrd, T.; 60JV-20-41; 8-31-22; Klappenbach, N.)

Chasity Dollins v. Ark. Dep't of Human Servs., 2022 Ark. App. 306 [**TPR; sibling bond**] Appellant alleged the circuit court erred by not adequately considering the negative impact termination would have on the children if they were to be adopted separately. Even if Appellant had preserved the argument for appeal, it would not prevail. While keeping siblings together remains an important consideration, it is not outcome determinative because the best interest of each child is the polestar consideration. Furthermore, evidence of a genuine sibling bond is required to reverse a best interest finding based on the severance of a sibling relationship. In this case, there was no evidence presented at the termination hearing of a sibling bond. Rather, one was taken into DHS custody when at nine months old and had been placed separately from siblings since that time, except during irregular visitation with Appellant. Without some evidence of the existence of a sibling bond, the circuit court did not clearly err in finding termination was in the children's best interest. Lastly, the appellate court found that the circuit court fulfilled its statutory obligation by finding termination was in the best interest of Appellant's children based on the testimony that the children were adoptable and were subject to potential harm if returned to

Appellant due to continued drug use and criminal activity. (Broadway, M.; 28JV-20-101; 8-31-22; Vaught, L.)

Bradley Uren v. Ark. Dep't of Human Servs., 2022 Ark. App. 317 [TPR] Appellant appealed from an order terminating his parental rights alleging the circuit court erred in denying his motion to seal the termination proceedings or, in the alternative, to continue the termination hearing until the resolution of related criminal charges against him. [TPR; sealing record] The Appellant moved to seal the record at the termination hearing so that his anticipated testimony would be kept confidential from the prosecutor in his pending criminal case; the trial court found that the confidentiality statute in the Juvenile Code applied to the proceedings, which had already been closed and sealed. No error was found as the circuit court afforded Appellant all the relief that could be afforded in this regard. [TPR; abuse of discretion; motion for continuance] There was no error in the trial court's denial of a continuance until the conclusion of the criminal proceedings. At the time of the termination hearing, the children had been out of Appellant's custody for nineteen months; had been in the custody of relatives for fifteen months; were adoptable; and the relatives were interested in adoption. The protection of children and achieving permanency remains of paramount concern; a child's need for permanency and stability may override a parent's request for additional time to improve the parent's circumstances. There was no abuse of discretion in the circuit court denying the continuance request until the resolution of Appellant's criminal charges. Further, Appellant's children were adjudicated dependent-neglected based on its finding of sexual abuse perpetrated by Appellant; no appeal was taken from that adjudication order; he was thusly precluded from asserting error on appeal with respect to those findings which conclusively established a statutory ground for the termination of Appellant's parental rights. Appellant never asserted any Fifth Amendment constitutional right prior to those findings being made in the adjudication order. Because those findings were already established prior to the termination hearing, there was no prejudice to Appellant by the denial of a continuance; no evidence that the trial court acted improvidently or without due consideration when doing so. (Layton, D.; 03JV-20-1; 9-7-22; Hixson, K.)

Judrika Houston and Chrystal Martin v. Ark. Dep't of Human Servs., 2022 Ark. App. 326 [TPR; best interest; familial bond] Appellants argued the circuit court erred in finding termination of parental rights was in the children's best interest when a less restrictive alternative to termination, relative placement, was available for permanency without destroying familial bonds. Here, the proposed relative was not a blood relative to the children, was not caring for the children, did not have a familial bond with the children (having not seen one since birth and only spoken to another on the phone a single time), had not made a long-term commitment to the children, and was denied placement by home study. Despite relative's willingness to provide a home for the children and even adopt if the Appellants' parental rights were terminated, the absence of a familial bond and placement relative's felony history were sufficient evidence such that best interest finding was not clearly erroneous. Furthermore, the circuit court made its findings after learning the relative's home study had been denied. Therefore, the circuit court was not required to mention said denied relative in its best-interest findings. (Zuerker, L.; 66FJV-19-331; 9-14-22; Potter Barrett, S.)

Angel Morpew v. Ark. Dep't of Human Servs., 2022 Ark. App. 330 [**TPR; best interest; potential harm**] Appellant challenged the potential-harm prong of the circuit court's best-interest finding in terminating parental rights, believing recent progress resolved any potential danger to the children or at least warranted more time for reunification. The circuit court found potential harm in Appellant's instability and failure to comply with the case plan. The appellate court found Appellant's recurrent incarceration throughout the case supported the best-interest finding: Appellant had been incarcerated multiple times since the case opened; additionally, at the time of the termination hearing, was incarcerated on a second drug-court sanction. Once released from incarceration, Appellant would have to restart the eighteen-month drug-court program, yet Appellant had been in the program for that long but was still only in phase I of IV. If noncompliance continued, Appellant would be terminated from drug court and face a sentence of ten years' incarceration. This evidence demonstrated that Appellant's behavior over the course of the twenty-eight-month long case did not show enough stability to render the circuit court's potential-harm finding clearly erroneous. (Sullivan, T.; 64JV-19-9; 9-14-22; Murphy, M.)

Michelle Debiasse and Mark Debiasse v. Ark. Dep't of Human Servs., 2022 Ark. App. 331 [**TPR; aggravated circumstances; little likelihood**] The appellate court found no error in finding aggravated circumstances due to little likelihood that further services would result in successful reunification when Appellant mother criminally charged for her role in the abuse that led to the dependency-neglect case, the criminal charges were unresolved, a no contact order in the criminal case barred her from contacting the children and by extension prevented placement of the children in her care; mother had not acknowledged the trauma she caused the children; and there was no other service that could be provided to the parents that had not already been provided or offered. A caseworker's testimony that there were no further services to offer the parent that would result in reunification remains sufficient to support an aggravated circumstances finding. The appellate court also found no error in finding aggravated circumstances due to little likelihood that services would result in reunification as to Appellant father when, at the time of the termination hearing and for a large portion of the case, he was incarcerated in another state on charges related to child pornography, had never met the youngest child, and had not visited the other children in several years. Lastly, the appellate court found no error in the circuit court's finding that termination of Appellant father's parental rights was in the best interest of the children despite his claim that Appellee's failure to contact him or provide him due process resulted in a complete failure to inquire about any relatives of his for potential relative placement, contending that Appellee's perceived failure to consider familial relationships was against the public policy of the state to preserve and strengthen family ties. (Williams, L.; 26JV-19-239; 9-14-22; Brown, W.)

Ashlee Christensen v. Ark. Dep't of Human Servs., 2022 Ark. App. 339 [**TPR; best interest; children's adoptability**] Appellant challenged the circuit court's best-interest finding, arguing that the Appellee failed to introduce sufficient evidence of the children's adoptability. DHS worker testified to specific issues concerning each child and that no factor, including the children's various behavioral and mental-health issues, barred the children from being adopted. The trial court weighed the evidence and concluded that the children would likely be adopted. [**sibling bond**] As

to Appellant’s argument concerning the court’s failure to consider the sibling relationship, the children had been placed in separate homes since the beginning of the case, and that evidence was before the circuit court. Further, the Juvenile Code does not require that siblings be adopted together. Given those circumstances, there was no error when finding the children adoptable. (Medlock, M.; 17JV-20-36; 9-21-22; Abramson, R.)

Jodi Bobbitt v. Ark. Dep’t of Human Servs., 2022 Ark. App. 355 [**TPR; best interest**] Appellant’s sole argument was that it was not in her children’s best interest to terminate her parental rights as the case was progressing toward permanent placement with their fathers. To make a best interest finding, the trial court is to consider two factors: (1) the likelihood of adoption for the juvenile and (2) the potential harm to the juvenile if returned to the parent’s custody. When a child will achieve permanency with one parent, adoptability is not a controlling consideration; instead, factors like whether the parent physically harmed or posed a risk to the child and whether the parent would be able to provide future support should control. The potential-harm analysis is conducted in broad terms; a specific potential harm does not have to be identified or proved by clear and convincing evidence. In this case, there was no error when the trial court found that Appellant’s untreated addiction and continued personal relationships with dangerous men “would expose the juveniles to a risk of harm through her actions, instability, and substance abuse if she [were to be] released from her incarceration.” (Sullivan, T.; 42BJV-20-12; 9-28-22; Harrison, B.)

Sheila King v. Ark. Dep’t of Human Servs., 2022 Ark. App. 356 [**TPR; ICWA**] Appellant appealed the termination of her parental rights to her three children. Out of an abundance of caution on an unclear record regarding which, if any, of the children were “Indian children,” the circuit court applied a higher burden of proof for termination of parental rights pursuant to the Indian Child Welfare Act (ICWA). Appellant first asserted that Appellee’s expert witness did not provide the testimony required by ICWA to support a finding beyond a reasonable doubt that continued custody with Appellant was likely to result in serious emotional or physical damage to the children. The court found the record had ample evidence to support such a finding: Appellant failed to complete any part of the case plan, she continued to use illegal drugs, she did not consistently visit the children, and at the time of the termination hearing, she was still living with her adult son, who was a sex offender, and with a new husband, who had been charged with domestic abuse toward Appellant. There remains no requirement that the expert ICWA witness specifically address each individual child in testimony or make specific statements about how each child would be harmed if returned to the home. [**witness; ICWA**] Appellant next asserted that it was a conflict of interest for Appellee to offer one of its own employees as the ICWA expert. To the extent that Appellant called into question the ICWA expert’s credibility due to her employment with Appellee, the circuit court remains the arbiter of the credibility of witnesses. To the extent that Appellant framed this issue as an evidentiary challenge to the witness’s qualification as an expert, the argument was not preserved for review as she failed to raise it below; additionally, Appellant stipulated to the Appellee employee’s status as an ICWA expert. (Zuerker, L.; 66FJV-20-160; 9-28-22; Harrison, B.)

Shavonna Ford v. Ark. Dep't of Human Servs., 2022 Ark. App. 367 [**TPR of one parent while reunification with other parent**] Appellant contends that the evidence was insufficient to prove that termination was in the children's best interest when the court had continued the goal of reunification as to the father. When a child could achieve permanency with one parent, adoptability is not a controlling consideration; instead, factors like whether the parent physically harmed or posed a risk to the child and whether the parent would be able to provide future support should control. Here, the circuit court identified how the return of the children to Appellant would place them at risk for potential harm, including Appellant's failure to participate in services to address substance-abuse issues, which was an ongoing problem throughout the entire case and which played a factor in her two motor vehicle accidents that occurred while the children were in the car; one child's failure to thrive; another child's developmental delays; Appellant's ongoing housing and employment instability; her mental-health issues, and her failure to comply with court orders. No clear error; decision affirmed. (Weaver, S.; 71JV-19-29; 9-28-22; Gruber, R.)