APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

DECEMBER 2022
VOLUME 30, NO. 3
THIS EDITION CONTAINS CASES
FROM DECEMBER 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

Gibson v. Buonauito, 2022 Ark. 206 **[attorneys' fees; illegal exaction]** The circuit court entered an order awarding attorneys' fees to appellees. On appeal, appellants argued that the circuit court erred in awarding the fees. **[statutory authority for attorneys' fees]** Arkansas follows the American rule, which requires every litigant to bear his or her attorneys' fees, absent a state statute to the contrary. Arkansas Code Annotated § 26-35-902(a) authorizes an award of attorneys' fees to prevailing litigants in some illegal-exaction cases. This statute states that attorneys' fees in illegal-exaction actions may only be imposed against "any county, city or town" and only when a refund is ordered to the taxpayers. Here, the present action was brought against the state, and Ark. Code Ann. § 26-35-902 does not permit attorneys' fees on illegal-exaction claims against the State. Additionally, appellees did not request a refund or return to the taxpayers. Instead, a reimbursement transpired within the Department of Finance & Administration (the Department) and was transferred from the Department's general fund to its Amendment 91 fund. Therefore, the circuit court did not abuse its discretion in denying the motion for attorneys' fees on this basis. **[American rule exceptions]** When attorneys' fees are not expressly authorized by Ark. Code Ann. § 26-35-902(a), the Arkansas Supreme Court has held that they may be permissible under the two exceptions to the American rule. Those exceptions are (1) the "common fund" doctrine and (2) the "substantial benefit" rule. **[common-fund exception]** Under the common-fund exception, a

plaintiff has created or augmented a common fund or assets that have been salvaged for the benefit of others as well as himself or herself. A common fund contemplates a new pool of money. Here, no common fund was created, and no new pool of money was created, therefore the record did not support a common-fund exception. **[substantial-benefit exception]** Under the substantial benefit rule a shareholder could recover attorneys' fees against a corporation if the corporation received substantial benefits from the litigation even when the benefits were not pecuniary, and no fund was created. The exception was then extended to cover attorneys' fees against the State of Arkansas in *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481. But the *Lake View* court explicitly limited the extension to the facts presented in that case. In *Walther v. Wilson*, 2019 Ark. 105, the Arkansas Supreme Court subsequently awarded attorneys' fees under the substantial-benefit exception, but that case involved a direct financial benefit to the State because state funds were returned from a private entity. In the present case, the Amendment 91 funds remained in the Department's control, no new funds were created, and the State Treasury had not received any direct financial compensation. As a result, the Arkansas Supreme Court declined to extend the substantial-benefit exception any further to cover a nonpecuniary interest in the proper reallocation of departmental funds. Therefore, the circuit erred in awarding the attorneys' fees and costs to appellee. (Welch, M.; 60CV-18-7758; 12-1-22; Kemp, J.)

Gonzales v. Continental Casualty Company, 2022 Ark. App. 501 **[summary judgment]** The circuit court granted summary judgment in favor of appellees, a liability carrier for a hospital, the hospital, and one of the hospital's doctors. Appellant's complaint asserted medical-malpractice claims for the treatment her son received at the hospital. On appeal, appellant argued the circuit court erred in granting summary judgment to the appellees. **[summary judgment in favor of hospital and liability carrier]** In medical-malpractice actions, unless the asserted negligence could be comprehended by a jury as a matter of common knowledge, a plaintiff has the additional burden of proving three propositions by expert testimony: the applicable standard of care; the medical provider's failure to act in accordance with that standard; and that the failure was the proximate cause of the plaintiff's injuries. Proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be fairly inferred. Here, appellees moved for summary judgment on the third element, proximate cause. Accordingly, the question on appeal was whether appellant presented expert testimony establishing to a reasonable degree of medical certainty that the hospital did something or failed to do something that proximately caused the child's injuries. Appellant's expert witnesses testified that, in his expert opinion, surgical intervention earlier would have prevented the outcome in this case. The fact that he opined as to other factors that contributed to the injury did not negate his testimony. The appellate court held that the evidence presented to the circuit court demonstrated the existence of a material issue of fact regarding causation. Therefore, the circuit court erred in granting summary judgment for the liability carrier and the hospital. **[summary judgment in favor of doctor]** Appellant's expert witness opined that the doctor, as the co-medical director of the pediatric intensive care unit at the hospital, was responsible for implementing a policy addressing the relative duties and responsibilities of surgical attendings whose postop patients are placed in

the unit and who develop surgical related postoperative complications. The expert witness attested that if there had been an appropriate policy addressing the relative duties and responsibilities of surgical attendings, an appropriate attending or fellow would have been immediately available when the child needed reintubation, and he would not have suffered the hypoxic brain injury. In light of both this testimony and the reasons set forth above regarding the alleged negligence of the hospital and liability carrier, the appellate court held that the circuit court erred in granting summary judgment in favor of appellees. (Fox, T.; 60CV-15-2801; 12-7-22; Barrett, S.)

Hendrix v. Municipal Health Benefit Fund, 2022 Ark. 218 **[summary judgment; trust; contracts]** The circuit court granted summary judgment in favor of appellee. On appeal, appellant argued that the circuit court erred in granting summary judgment in favor of the appellee. A trustee's duties to the beneficiaries are normally not contractual. However, a trustee can contractually undertake duties other than those which he undertakes as trustee, and if he does so, he will be liable in an action at law for failure to perform such duties. Here, appellee is a trust created by the Arkansas Municipal League. Appellee provides benefits to employees of its municipal members. The appellee's policy booklet set forth the benefits available and the appellee's rights and obligations with respect to payment of those benefits. Appellee denied payment for portions of appellant's daughter's medical bills based on its interpretation of the uniform, customary, and reasonable charges (UCR) exclusion in its policy booklet. Appellant filed a class-action complaint against appellee challenging the enforcement of the UCR term, alleging that the policy booklet was a contract between the appellee and the class members and that the UCR's term was ambiguous, thus rending it unenforceable. On appeal, appellant claims that while the appellee is a trust, it may enter into contracts, such as the policy booklet at issue. Pursuant to appellee's general manager and benefits counsel's affidavit and the Declaration of Trust, the trustees were expressly permitted to promulgate rules and regulations as may be proper or necessary for the sound and efficient administration of the Trust. The rules and regulations promulgated by the trustees were set forth in the policy booklet. The Declaration of Trust expressly permitted the trustees to promulgate the rules and regulations set forth in the policy booklet; thus, they did not undertake other duties. Stated differently, the trustees' duties were to provide health-benefits coverage, and these duties were governed by rules and regulations contained in the policy booklet. Therefore, the trustee/beneficiary relationship remained intact and did not transform into a contractual relationship. Because appellant claimed breach of contract rather than breach of trust or breach of fiduciary duty against the trustees, the appellate court held that he failed to state a proper claim. The circuit court correctly granted summary judgment in favor of appellee. (Coker, K.; 58CV-17-499; 12-8-22; Baker, K.)

McClerkin v. Rogue Construction, LLC, 2022 Ark. App. 515 **[motion to enforce a settlement agreement]** The circuit court entered an order granting appellee's motion to enforce a settlement agreement between the parties. On appeal, appellant argued that the circuit court's finding that the parties entered into an enforceable settlement was erroneous. A settlement is contractual in nature, and in order to be legally valid, it must possess the essential elements of a contract. The essential

elements of a contract include (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. In determining whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. Here, during both the first and second phases of the parties' settlement negotiations, the terms of a release language as to both parties were consistently discussed and, ultimately, never mutually agreed upon. Appellant's counsel stated in an email that they would have to see the release language before their client signed the settlement agreement. Afterward, appellee's counsel sent a draft of the settlement agreement stating that their client will agree to sign it if appellant would agree to sign it. Appellant's counsel never assented to the initial settlement agreement and in a follow-up email stated they had a couple of questions. Settlement negotiations continued and appellee's counsel sent a revised draft of the agreement, which appellant's counsel did not respond to or communicated any agreement to the settlement language therein. After the proposed settlement had been communicated without response, appellant's newly acquired counsel then asked if the parties should mediate again, which the appellees agreed to schedule and stated in an email that they were working on the terms of the release and that they had basically gotten agreements, although no one had signed anything. The appellate court held that based upon the record that the circuit court erred in finding that the parties reached a mutual agreement as to the release language of a settlement and, therefore, the circuit court erred in granting appellee's motion to enforce the settlement agreement. (Fox, T.; 60CV-18-8522; 12-14-22; Hixson, K.)

Taylor Family Limited Partnership "B" v. XTO Energy, Inc., 2022 Ark. App. 521 **[mineral lessee; restoring well site; summary judgment]** The circuit court entered an order granting summary judgment to the appellee because the circuit court determined that the appellant, failed to demonstrate a genuine issue of material facts as to whether appellee, its oil and gas lessee, fulfilled its implied duty to restore the surface of appellant's land after appellee had abandoned two of its natural-gas wells. On appeal, appellant argued that the circuit court erred when it determined that the scope of appellee's implied duty to restore the property was limited to the measures set forth in administrative regulations or a "reasonably prudent operator" standard. Mineral lessees have a duty to act for the mutual advantage of both themselves and their lessors, which, among other things, means that they must act in a reasonable and prudent manner. Mineral lessees have an implied right to go upon the surface to drill wells to their underlying estates, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and remove its products. The implied right, however, is to be exercised in due regard for the rights of the surface owner, which means that the mineral lessee's use of the surface must be reasonable. In *Bonds v. Sanchez-O'Brien Oil and Gas Co.*, 289 Ark. 582, the Arkansas Supreme Court decided that a mineral lessee's duty to reasonably use the surface warranted implying a duty to restore it after drilling operations have stopped. The appellate court held that the implied duty to restore, as recognized in *Bonds*, obligates mineral lessees to restore the surface of the property to a condition that does not prevent or impair an existing or intended use by the surface owner. **[issues of**

material fact] Appellant next argued summary judgment was inappropriate because genuine issues of material fact remained as to whether appellee acted in a reasonably prudent manner when it restored its well sites. Whether appellee breached the mineral lease by failing to meet its implied duty to restore the surface of appellant's property is usually a question of fact, and questions of fact remained in this case. For example, there existed conflicting testimony concerning several issues. Accordingly, because it appeared that genuine issues of material fact remained as to whether appellee fulfilled its duty to restore, the appellate court held the circuit court erred in granting summary judgment. (Sutterfield, D.; 24OCV-18-174; 12-14-22; Brown, W.)

Inman v. Hornbeck, 2022 Ark. App. 522 **[prescriptive easement]** The circuit court entered an order granting appellee a prescriptive easement across appellants' property. On appeal, appellants argued that the circuit court erred by (1) granting an easement by prescription to appellee because appellee failed to satisfy the elements of a prescriptive easement by a preponderance of the evidence. **[statutory period]** It is generally required that one asserting an easement by prescription show by a preponderance of the evidence that one's use has been adverse to the true owner under a claim of right for the statutory period of seven years. Here, appellant testified that she had been aware of damage caused by appellee for "quite some time," estimating the period to be five to ten years. Appellants put a public notice in the newspaper and flooded the land for duck season, however the use of the track continued. Additionally, appellants' son testified that he had known of appellee's use of the property for the twenty years that he had been farming the land. The testimony presented showed that for decades the appellants were aware of appellee's usage of the track of land, and the damage resulting from the usage, the appellate court held that the circuit court did not err in finding that appellee's use was adverse to appellants' interest as landowners and continued for more than the required seven-year period. **[continuous use]** To acquire an easement by prescription, appellee has the burden of proving continuous use of a definite way for seven years. Mere temporary absences of a claimant from the land adversely possessed by the claimant or periods of vacancy of such land that evince no intention of abandonment do not interrupt the continuity of the adverse possession, provided the absence or vacancy does not extend over an unreasonable period. Appellee testified that for the last thirty years, except the last few years when he moved to northern Arkansas, he used the extension on the track of land to access his land on another track during hunting season and occasionally during the off season, as well. The appellee's son testified that he continued to use the extension frequently, as he had for the past twenty-eight years, traversing the tract approximately eighty to one hundred times a year. This evidence is sufficient to establish by a preponderance of the evidence continuous use of the track of land for at least seven years. Appellee did admit that in order to accommodate appellants' farming practices and crop rotations, the path of the extension varied in recent years. The testimony established that the path had fluctuated only in the last few years, long after the easement had been established. Therefore, the circuit court did not err in granting a prescriptive easement in favor of appellee. (Bell, K.; 01DCV-18-105; 12-14-22; Brown, W.)

CRIMINAL

Arkansas Parole Board v. Johnson, 2022 Ark. 209 **[parole eligibility; Fair Sentencing of Minors Act]** The circuit court entered an order granting appellee's motion for judgment on the pleadings and denied the appellant's motion for summary judgment. On appeal, appellants argued the circuit court erred by entering judgment on the pleadings in favor of appellee and finding that he was parole eligible. A fundamental principle of statutory construction is the maxim expressio unius est exclusio alterius, also known as the negative-implication canon, which means that the express designation of one thing may properly be construed to mean the exclusion of another. Here, appellee pleaded guilty to first-degree murder and aggravated assault, crimes he committed when he was fourteen years old. Appellee was sentenced to serve forty years' imprisonment for first-degree murder and a six-year consecutive prison term for aggravated assault—a total of forty-six years' imprisonment. Ark. Code Ann. § 16-93-621 (a)(2)(A) provides that appellee is eligible for parole after serving twenty-five years for his first-degree-murder conviction. This subdivision does not state that it applies to any additional sentences imposed for separate offenses that were ordered to be served consecutively to the sentence for the murder conviction. In contrast, Ark. Code Ann. § 16-93-621 (a)(1)(A) does contain language stating that a nonhomicide offender is eligible for parole after twenty years, "including an instance in which multiple sentences are to be served concurrently or consecutively. By specifically referencing "multiple sentences . . . to be served consecutively," the nonhomicide provision, Ark. Code Ann. § 16-93-621 (a)(1)(A), prohibits the practice of stacking the time an inmate must serve before becoming parole eligible on each sentence. However, pursuant to subdivision (a)(2)(A), the opposite is true for homicide offenses where the General Assembly chose not to include this language. Therefore, the Supreme Court held that the circuit court erred by finding that appellee was parole eligible after serving twenty-five years' imprisonment. Because Ark. Code Ann. § 16-93-621 (a)(2)(A)'s twenty-five-year eligibility for first-degree murder does not apply to his consecutive sentence of aggravated assault, appellee must serve the parole time for his aggravated-assault conviction before becoming parole eligible. (Gray, A.; 60CV-21-6945; 12-1-22; Baker, K.)

Graham v. State, 2022 Ark. App. 502 **[sufficiency of the evidence; chain of custody]** Appellant was convicted in a jury trial of possession of methamphetamine, possession of drug paraphernalia, and simultaneous possession of drugs and firearms. On appeal, appellant argued that there was an insufficient chain of custody to link her to the item of suspected drug paraphernalia and drug residue tested by the crime lab, and that there was insufficient evidence that she possessed a useable amount of methamphetamine. **[useable amount of drugs]** Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. The intent of the legislation prohibiting possession of a controlled substance is to prevent use of and trafficking in those substances. Possession of a trace amount or residue which cannot be used and which the accused may not even know is on his person or within his control contributes to neither evil. In *Kolb v. State*, 2021 Ark. 58, the Arkansas Supreme Court stated that proof of a detectable amount of a controlled substance in a consumable form is sufficient evidence for a fact-finder to infer that

the accused possessed a useable amount of the controlled substance. Here, an officer and a chemist of the state crime lab described the methamphetamine inside the pipe at issue as "residue" and that in her testing of the substance, the state crime lab chemist did not weigh it. Neither the officer nor the chemist weighed the residue or testified that it was of a sufficient quantity to be useable in the manner in which the substance is ordinarily used. The appellate court held that there was insufficient evidence to sustain appellant's convictions for possession of methamphetamine and simultaneous possession of drugs and firearms because the State failed to establish that appellant was found to be in possession of a useable amount of methamphetamine. Therefore, there was not substantial evidence to support a finding that appellant possessed a useable amount of methamphetamine. **[chain of custody]** The purpose of establishing a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. Proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive. Here, the officer did not attach any identifying number to the envelope containing the pipe, nor did he initial the package. There was no testimony that there were any markings on the package at all. The crime lab chemist testified that she tested a pipe that was packaged in a sealed box that had been placed inside an envelope. However, the chemist did not testify where the envelope came from, and neither the envelope nor the pipe was introduced at trial. The appellate court held that the trial court abused its discretion in admitting the lab report and the chemist's testimony concerning her testing of the meth pipe because the chain of custody of the meth pipe was not adequately established. Therefore, the lab report and related testimony concerning the testing of the meth pipe was erroneously admitted. Independent of the erroneously admitted evidence, there was overwhelming evidence of appellant's guilt on the charge of possession of drug paraphernalia. Therefore, the trial court's evidentiary error was harmless error with respect to that conviction. (Gibson, R.; 02CR-21-147; 12-7-22; Hixson, K.)

Pryor v. State, 2022 Ark. App. 504 **[probation revocation]** The circuit court revoked the probation of appellant and sentenced him to six years' imprisonment. On appeal, appellant argued that the State failed to prove that he had violated the conditions of his probation. A circuit court may revoke a defendant's probation if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the probation. The State's burden of proof in a revocation proceeding is less than what is required to convict in a criminal trial, and evidence that is insufficient for a conviction may be sufficient for revocation. The State first alleged in its petition to revoke that appellant had violated the terms of his probation by nonpayment of fines. No evidence was presented on this claim. Therefore, the revocation of appellant's probation based on his failure to pay fines, fees, and court costs, was not proved by a preponderance of the evidence and cannot stand as a basis for appellant's revocation. The State also alleged that appellant had violated the terms of his probation by additional felony charges. The two witnesses at the hearing, an officer, and a sergeant, both testified about an interaction with appellant, but neither testified that appellant was arrested or that he acquired additional felony charges. Appellant never admitted the contraband items belonged to him, and the sergeant testified

that he could not say the contraband items found belonged to appellant. Given the record, the appellate court held the circuit court erred in finding a violation on this basis. The State's final basis for revocation was that appellant was engaging in or has engaged in behavior that posed a threat to the community. The two witnesses at the probation revocation hearing testified about incidents involving the location and existence of possible methamphetamine and possible drug paraphernalia; however, there was no testimony or reference to prove any threat to the community. Therefore, the circuit court erred in finding that appellant had violated the conditions of his probation as alleged by the State. (Morledge, C.; 19CR-19-169; 12-14-22; Abramson, R.)

PROBATE

Howard v. Baptist Health, 2022 Ark. 214 **[disqualification of attorney; witness attorney]** The circuit court entered an order disqualifying appellant as the attorney representing the estate of the deceased in a case arising from the deceased's medical treatment. On appeal, attorney appellant argued that the circuit court erred in granting the defendants' motion to disqualify her because it erroneously interpreted Rule 3.7 of the Arkansas Rules of Professional Conduct and misapplied the Arkansas Supreme Court's *Weigel* test, promulgated in *Weigel v. Farmers Insurance Co., Inc.*, 356 Ark. 617. Disqualification of an attorney is a "drastic measure" to be imposed only where required by the circumstances. The *Weigel* court stated that attorney disqualification is considered an absolutely necessary measure to protect and preserve the integrity of the attorney-client relationship. The Weigel test takes into consideration the reasons for prohibiting an attorney from being both advocate and necessary witness: (1) an advocate who becomes a witness may be in the unseemly position of arguing his own credibility; (2) the roles of advocate and witness are inconsistent and should not be assumed by one individual; and (3) the attorney should not act as both trial counsel and a material witness because of the appearance of impropriety. Acting in a purely pretrial capacity implicates none of the policy concerns articulated in *Weigel*. Here, appellant argued that the circuit court erred in disqualifying her as the attorney for the estate because she was acting only as a "pre-trial advocate," not the "trial advocate" that is contemplated by Rule 3.7 of the Arkansas Rules of Professional Conduct. Rule 3.7 of the Arkansas Rules of Professional Conduct concerns an attorney who is called to testify at trial. Other pretrial activities, such as drafting discovery motions, drafting pleadings, and even entertaining settlement offers, do not involve an attorney acting as a "witness." Therefore, the circuit court erred in disqualifying appellant as the attorney representing the estate of the deceased. (James, P.; 60CV-21-4589; 12-1-22; Webb, B.)

DOMESTIC RELATIONS

Edmonds v. Miller, 2022 Ark. App. 495 **[change in custody; relocation]** The circuit court entered an order granting appellee's change-of-custody motion and changing the surname of the parties'

child. On appeal, appellant argued that (1) she was entitled to the presumption in favor of relocation, (2) even if the presumption did not apply, it was not in the child's best interest to change custody, and (3) the trial court erred by changing the child's surname. **[relocation]** In determining whether a parent may relocate with a minor child, a circuit court must generally look to the principles set forth in the Arkansas Supreme Court's decision in *Hollandsworth*, 353 Ark. 470, and *Singletary*, 2013 Ark. 506. In *Hollandsworth*, the supreme court announced a presumption in favor of relocation for custodial parents with sole or primary custody, with the noncustodial parent having the burden to rebut this presumption. In *Singletary*, the court explained that the *Hollandsworth* presumption does not apply when the parents share joint custody of a child. In a joint-custody arrangement where both parents spend equal time with the child, there is not one parent-child relationship to take preference over the other, and as such, the *Hollandsworth* rationale does not apply. The *Hollandsworth* presumption should be applied only when the parent seeking to relocate is not just labeled the "primary" custodian in the initial custody order but also spends "significantly more time" with the child than the other parent. Here, the circuit court found that appellee proved the child spent more time with him than appellant between 2018 and January 2021. Accordingly, the circuit court's joint-custody analysis under *Singletary*—rather than *Hollandsworth*—was correct. The circuit court found that appellant's move from El Dorado to Crossett created a material change in circumstances because her relocation thwarted the shared-custody arrangement to which the child had become accustomed; further, the child was removed from a school that had been addressing the child's dyslexia and placed in a school that was not made aware of the issue. Therefore, the circuit court correctly found that appellant was not entitled to a presumption in favor of relocation and that a material change in circumstances was proved. **[best interest]** Appellant next argued that even if the Hollandsworth presumption does not apply, the child's best interest does not necessitate a custody change. Here, the evidence showed that the child had better educational opportunities if he remained at his former school, and appellant testified that she was not even aware that the child had a Section 504 plan for his dyslexia. When the child was placed in virtual school he got thirty-nine assignments behind in schoolwork and did not receive any tutoring for his dyslexia. The appellate court held that the circuit court received ample evidence of a material change in circumstances and that it was in the child's best interest to change custody to appellee. **[surname change]** In *Huffman v. Fisher*, 337 Ark. 58, the Supreme Court held that in determining the child's best interest, which must ultimately be the controlling consideration in any change in status, the trial court should consider at least the following factors: (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect. Relevant evidence, other than the *Huffman* factors, may be considered. Here, there was testimony that the child's current surname came from his maternal grandfather, who had been incarcerated in federal prison for four years after his conviction for money laundering and wire fraud for embezzling money. Additionally, neither of the parents nor the child's half-siblings shared the child's surname. No evidence was presented about the child's preference, and the child

was only nine years old. Based upon this evidence, the circuit court did not err in its decision to grant the name change. (Bridewell, L.; 02DR-12-147; 12-7-22; Gladwin, R.)

Graham v. Sexton, 2022 Ark. App. 500 **[retroactive child support]** The circuit court granted appellant's petition for a change of custody and denied her request for retroactive child support because it found that appellant appeared before the court with unclean hands and that she failed to plead affirmatively for back child support. On appeal, appellant argued the circuit court erred in its refusal to retroactively modify child support. Here, in her petition appellant asked that she be "awarded child support for both children commensurate with the Arkansas Family Support Chart" and in her responsive pleading filed five days before the hearing asked for support from the date she filed her petition. The petition requested a change in custody and, in summation, a modification of child support commensurate therewith. There was no request for back child support. Furthermore, appellant's reply to appellee was a responsive pleading, not an affirmative pleading. The appellate court held that the circuit court did not err in finding that this did not constitute an affirmative pleading for back support. Appellant also cited Ark. Code Ann. § 9-14-107(d), providing that any modification of a child-support order shall be effective as of the date of service on the other party of the file-marked notice of a motion for increase or decrease in child support. The statute is titled "Change in income warranting modification" and concerns petitions for a modification in child support based on a material change in the gross income of the payor or payee parent. Appellant's petition requested a change in custody, and nowhere in her petition did she allege that either party had a change in their gross income warranting a modification of child support. A request for child support "commensurate" with the custody change according to the Arkansas Family Support Chart was not a request under this statute. Therefore, the circuit court did not err in denying appellant's request for retroactive child support. (Williams, C.; 30DR-04-200; 12-7-22; Gruber, R.)

Smith v. Smith, 2022 Ark. App. 514 **[imputing income; child support alimony]** Appellant and appellee were divorced by a decree entered in 2021. On appeal, appellant argued the circuit court erred in imputing income to her for purposes of setting the child support and that the circuit court erred in using a methodology inconsistent with the provisions of Administrative Order No. 10. Appellant also contended that the circuit court erred in imputing to her for purposes of alimony and in denying her alimony request. **[imputing income]** Administrative Order 10 states that if imputation of income is ordered, the court must take into consideration the specific circumstances of both parents, to the extent known, including such factors as the parents' assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case. The court may consider the fact that a supporting spouse voluntarily changes employment so as to lessen earning capacity and, in turn, the ability to pay alimony and child support. The courts must not unduly interfere with the personal lives and career choices of individuals merely because they have been involved in a

divorce. Here, the circuit court imputed appellant's income imputing for calculation of child support based on her admission that she could significantly increase her income by teaching in public schools, rather than her current private school teaching position. The evidence presented established that appellant did not voluntarily change employment so as to lessen her earning capacity for purposes of supporting her children. The decision that appellant would teach at a private—where the children attend school—was a mutual decision reached by the parties more than three years before their separation and the institution of the divorce proceedings. The appellate court held that the circuit court abused its discretion in imputing income to appellant for purposes of calculating child support and should have used appellant's actual earnings in its calculation of child support. **[child support chart deviation]** Administrative Order No. 10 provides the framework for calculating child support under the Income Shares Model. In making a deviation, the court must explain its reasons in writing and should consider certain factors. Here, in deviating from the child support chart the circuit court applied its figures to the shared parenting worksheet from the South Carolina Department of Social Services. Pursuant to the provisions in the South Carolina worksheet, the trial court multiplied the parties' basic combined child-support obligation by 1.5, thus increasing the basic combined obligation. The appellate court held that the circuit court erred when it deviated from the chart amount by utilizing a method from South Carolina. Use of the formulas prescribed by the South Carolina worksheet is not authorized by Administrative Order No. 10. A deviation or adjustment, if ordered, must be consistent with the considerations set forth in section II, paragraph 2 of Administrative Order No. 10, which sets forth the deviation factors; and section V, paragraph 2, which addresses joint- or shared-custody arrangements. **[alimony]** 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. The trial court may also consider other factors, including the couple's past standard of living, the earning capacity of each spouse, the resources and assets of each party, and the duration of the marriage. Here, there was a significant disparity in the parties' incomes, being that appellant made only $28,680 a year compared to appellee's annual salary of $170,168. The circuit court imputed a $50,000 annual salary to appellant in deciding to deny alimony. The appellate court held the circuit court abused its discretion in imputing income to her for purposes of alimony for the same reasons the circuit court erred in imputing income to her for purposes of child support. (Johnson, A.; 60DR-19-4098; 12-14-22; Hixson, K.)

Holmes v. Jones, 2022 Ark. App. 517 **[res judicata; child-custody; paternity]** The circuit court reformed an earlier divorce decree between the appellant and appellee to contemplate the care and custody of their biological child during the marriage. On appeal, appellant argued that res judicata barred the relitigation of paternity. Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. The doctrine of res judicata is not strictly applicable in child-custody matters. The Arkansas Supreme Court has held that in proceedings concerning custody and support, the rules of civil procedure do apply, but they must be balanced with public policy. Res judicata bars relitigation of paternity when it was established under a divorce decree. A circuit court may modify a divorce decree after ninety days has passed from its entry pursuant to Arkansas Rule of Civil Procedure 60 when that decree

contains a general reservation of jurisdiction with respect to issues considered in the original action. Arkansas Code Annotated § 9-12-312(a)(1) provides that when a decree is entered, the court shall make an order concerning the care of the children. Divorces have no effect on the legitimacy of children born before the entry of the decree. Courts are encouraged to take a more flexible approach to res judicata in settings involving children so that they may be able to best assess what is in the best interest of the child. Here, appellee gave birth to a daughter, and appellant was told the child was not his, and he was not named on the birth certificate. Then the parties, acting pro se, used an online legal form to create their petition for divorce and the form decree. That form, corresponding pleadings, and decree provided there were no children born of the marriage. Four years after the divorce decree, appellee petitioned the court to reform the decree to reflect a child born of the marriage and award the corresponding custody and support. A subsequent paternity test established appellant as the father of the child. In the present case, a strict application of res judicata would have effectively delegitimized a child born of a marriage. The appellate court held that this did not track with the spirit of the law. Res judicata is a viable defense to a challenge to an established paternity finding, but only insofar as it is not wielded to the affected child's detriment. A child was born of the marriage, and the circuit court was required to make an order concerning her care and custody. The appellate court held that it was not erroneous for the court to deny appellant's motion to dismiss. (Casady, K.; 63DR-16-410; 12-14-22; Murphy, M.)

JUVENILE

Heidi Chassels and Jeremy Collins v. Ark. Dep't of Human Servs., 2022 Ark. App. 503 **[TPR; best interest]** There was no clear error in changing the goal of the case to adoption or in finding that the children's best interest would be served by terminating the parental rights of both parents. Of particular importance was the length of time—approximately two years— that this case had been open. In its order, the circuit court concluded, "Over the lifespan of this case and the lifespan of these children, the parents' numerous relapses and instability have caused the children to be in foster care on numerous occasions. Given that past behavior is the greatest predictor of future behavior, the Court believes that the parents are incapable of effecting permanent change that will serve the best interest of the children." **[ADJ-ICWA]** Any perceived issues with the incorrect burden of proof referenced in an adjudication order regarding Indian children is waived when no appeal is taken from the adjudication; here, a preponderance-of-the-evidence standard instead of the ICWA-required clear-and-convincing-evidence standard. Thusly, it was unpersuasive for Appellants to argue that an insufficient dependency-neglect finding could not support a failure to remedy ground for termination, which requires that the children be adjudicated dependent-neglected. **[TPR; appeal can affirm on entire record]** There was no issue with a circuit court not explicitly including certain findings, as the appellate court can review the entire record and affirm a circuit court's order when it reached the right result, although it may have announced a different reason. In this case, the appellate court affirmed the circuit court's termination as the aggravated-circumstances ground was alleged in the termination petition and later was proved at the termination hearing beyond a reasonable doubt: the children had spent several years in foster care

among a few different cases; the children could not be returned to either parent that day, and there was no indication if or when reunification would be possible. Noting the parents' "numerous relapses and instability," the circuit court found that "the parents are incapable of effecting permanent change that will serve the best interest of the children" which sounds as if there were little likelihood that continued services or additional time would result in a successful reunification without using those specific words. (Warren, D., CV-22-411, 12-14-22, Harrison, B.)

Royal Martin v. Ark. Dep't of Human Servs., 2022 Ark. App. 508 **[TPR; potential harm]** While neither the oral ruling from the bench nor the written termination order explicitly found potential harm in returning minor child to the Appellant, the statute does not require a specific finding. Further, the appellate court's de novo review of the record revealed sufficient evidence to affirm the best interest finding: Appellant's lack of relationship with the child along with his lack of stable housing and employment due to his 110-year sentence to the Department of Correction. **[TPR; best interest]** Appellant's argument that termination was not in the child's best interest because a less-restrictive alternative was available through placement with a relative was, in essence, asking the court to review an earlier, unappealed decision changing the goal to adoption, which the court was unwilling to do since the appeal brought up the intermediary orders but not the transcript of the hearing where the goal was changed. Even so, the permanency planning statute prefers termination over guardianship unless the child was already being cared for by a relative, the relative had made a long-term commitment, and it is not in a child's best interest to terminate parental rights. Here, the necessary third part was missing: it being in the child's best interest, as outlined earlier. (Talley, D.; CV-22-334; 12-14-22; Gladwin, R.)

Nina Johnson v. Ark. Dep't of Human Servs., 2022 Ark. App. 513 **[TPR; little likelihood]** It was not speculative to presume that, even after making substantial positive improvements and maintaining them for seven to eight months, there was little likelihood that further services to Appellant would result in reunification. Progress toward, or even completion of the case plan, is not a bar to termination of parental rights. What matters is whether completion of the case plan achieved the intended result of making a parent capable of caring for a child; mere compliance with the directives of the court and DHS is not sufficient if the root cause of the problem was not adequately addressed. Here, Appellant never completed inpatient drug treatment and left two (2) different inpatient treatment programs; had relapsed again after twenty-two months in drug court; and had participated in all the same services in an earlier DN case when siblings to this juvenile entered foster care. No clear error in finding a lack of stable housing and employment when Appellant acquired housing only a week prior to the termination hearing, and had been working for approximately two months. **[TPR; potential harm]** No clear error in finding potential harm when the circuit court had concerns about Appellant's housing and employment stability, ability to maintain newly found sobriety, and history of poor decisions regarding illegal drug use and romantic partners. (Zimmerman, S.; CV-22-255; 12-14-22; Potter Barrett, S.)

Nina Johnson v. Ark. Dep't of Human Servs., 2022 Ark. App. 520 **[TPR; aggravated circumstances]** No error in finding little likelihood that further services to Appellant would result in reunification when this was the second time Appellant's children had been in foster care due to Appellants drug use; this was the second time Appellant had participated in drug court (the first drug-court program for over twenty-two months); Appellant only began testing negative on drug screens halfway through the case and not until after picking up additional drug charges, and Appellant faced housing insecurity until a week before the termination hearing. **[TPR; best interest]** No clear error in finding the children would be at risk of potential harm if returned to Appellant when Appellant failed to maintain stable housing throughout the case, had a pattern of drug abuse and relapse, and even acknowledged in the appellate brief that past actions may be viewed as an indication of future conduct. This was the second time the children had been in foster care, and Appellant continued to test positive on drug screens until five months before the termination hearing. (Zimmerman, S.; CV-22-289; 12-14-22; Murphy, M.)