

# APPELLATE UPDATE

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## CIVIL

*Martin v. Higgins*, 2024 Ark. App. 1 [**FOIA; undisclosed investigations**] The circuit court denied appellant's request for material under the Arkansas Freedom of Information Act (FOIA) after concluding that an exemption for undisclosed investigations applied. An exemption to disclosure exists for undisclosed investigations by law enforcement agencies of suspected criminal activity. Whether an investigation is open and ongoing is a question of fact for the trial court. According to J. Watkins, *The Arkansas Freedom of Information Act* 72 (1988), subsection (b)(6) of the FOIA is meant to exempt internal 'work product' materials containing details of an investigation. The trial court must first review the relevant material in camera before determining whether an exemption applies. *Hyman v. Sadler*, 2017 Ark. App. 292 did not establish a bright-line rule on what constitutes an undisclosed, or an ongoing, investigation. Here, a witness was present and could have testified about the contents of the withheld materials and the ongoing nature of any investigation, but the circuit court declined to hear any testimony after concluding that *Hyman* settled the issue as a matter of law. Without any admitted evidence on the subject, it was impossible to know whether appellant's client's arrest reports were sufficiently investigatory in nature to fit within the undisclosed investigations exemption to the FOIA. Thus, the circuit court must conduct an in camera review of the relevant material and perform a meaningful fact-finding inquiry before

making its decision on whether the undisclosed investigations exemption applies to the requested arrest reports. (Fox; T.; 60CV-22-4393; 1-10-24; Virden, B.)

*Underwood v. Underwood*, 2024 Ark. App. 51 [**derivative loan collection claim**] A jury found in favor of appellant in derivative actions for breach of fiduciary duty and conversion. The jury also entered a verdict in appellant's favor, individually, for breach of fiduciary duty. However, the jury denied her derivative claim regarding a shareholder loan that the appellee took from a company. The issue on appeal was whether there was substantial evidence to support the denial of appellant's loan-collection claim. Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. When performance of a duty under a contract is due, any non-performance is a breach. If a loan agreement is silent as to the maturity date, then the loan is payable on demand. This means that the debt is due immediately, so that an action can be brought at any time, without any other demand than the suit. Here, appellee purchased a company while the parties were married, at which point appellee was the sole shareholder, director, and officer of the company. When the parties divorced, each was granted 50 percent of the company. Three years later, appellant brought an individual and derivative action against appellee and the company. Appellant claims that, as a shareholder, she made a demand on appellee to repay the shareholder loans when she filed the lawsuit and that she was entitled to a directed verdict that the loans had to be paid immediately upon that demand. There was no written loan agreement nor were the terms of the loan to shareholder memorialized in any way. The appellee could not articulate at trial any time period within which the loan was intended to be repaid. He never testified to a date, a specific event, or a condition that would require the loans to be repaid. There was no evidence entered at trial that indicated a date or circumstance for repayment of the loan to shareholder. Thus, there was not sufficient evidence for the jury to determine appellee had done what the loan contract required of him. (Weaver, S.; 23CV-18-157; 1-24-24; Murphy, M.)

*Robin Dee Enters. v. Burns*, 2024 Ark. App. 59 [**service; out-of-state corporation**] The circuit court denied appellant's motions to set aside a default judgment and to quash garnishment on the grounds that service of process was invalid and, therefore, the judgment was void. On appeal, appellant argued that service was invalid. A default judgment is void ab initio due to defective process regardless of whether the defendant had actual knowledge of the pending lawsuit. Service outside the state on the registered agent of a corporation by certified mail with return receipt requested is expressly authorized by Arkansas Rule of Civil Procedure 4 when reasonably calculated to apprise the defendant of the action. Rule 4's requirements for service by mail on a registered agent are, by design, less onerous than those for service by mail on a natural person. Like the statutory-service provisions, Rule 4 does not mandate service on a corporation's registered agent at any specific address, location, or geographical area. Here, appellant argued that the mailing the complaint and summons to its registered agent at its Illinois address failed to satisfy Rule 4's requirement that service be reasonably calculated to apprise the defendant of the action. Appellant was acting as its own agent for service of process. Appellee first sent the complaint and

summons to the North Little Rock address on file with the Arkansas Secretary of State listed as appellant's agent address. When that certified mail was returned undelivered, appellee sent the complaint and summons to the only other address on file with the Arkansas Secretary of State—appellant's foreign address in Illinois—where the certified mail was received and signed for by an employee of appellant responsible for picking up appellant's mail. Therefore, the appellate court held the circuit court did not err in finding that service in this manner complied with Rule 4 and was, therefore, valid. (Mitchell, C.; 54CV-19-208; 1-31-24; Gruber, R.)

## CRIMINAL

*Smith v. State*, 2024 Ark. 1 [**motion for mistrial; witness statement**] Appellant was convicted by a jury of first-degree murder. On appeal, appellant argued the circuit court erred by failing to grant his motion for mistrial after a witness testified that he had been in prison. A mistrial is an extreme and drastic remedy that is appropriate only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. In determining whether a circuit court abused its discretion by denying a motion for mistrial, the Supreme Court considers factors such as (1) whether the prosecutor deliberately induced a prejudicial response and (2) whether an admonition to the jury could have cured any resulting prejudice. An admonishment or limiting instruction will usually remove the effect of a prejudicial statement unless the statement is so patently inflammatory that justice could not be served by continuing the trial. Here, the defense—not the prosecution—elicited testimony that appellant had previously been in prison while cross-examining the state's witness. Additionally, although the circuit court offered to give a curative instruction to the jury, appellant failed to ensure that such an instruction was given. A singular reference to a defendant's prior trial or prison sentence is not so prejudicial that it warrants a mistrial. The testimony at issue here did not rise to the level of prejudice involved in cases where a mistrial should have been granted. Thus, the circuit court did not abuse its discretion in denying appellant's motion for a mistrial. (Lindsay, M.; 72CR-19-1446; 1-18-24; Hudson, C.)

*Kimball v. State*, 2024 Ark. 3 [**statute of limitations**] The circuit court denied appellant's motion to dismiss the charges and a jury convicted appellant of two counts of rape. On appeal, he argued that the statute of limitations barred prosecution. Appellant committed the crimes against his granddaughters between the years 1997 and 2004. The statute of limitations in effect when appellant committed his crimes allowed for prosecution up to the victim's twenty-fourth birthday, regardless of the victim's age at the time of the offense, if the offense is not reported to the police or a prosecutor. In 2011, that period was extended to permit prosecution up until the minor victim turned twenty-eight years old. In 2013, the statute was amended to allow the prosecution for rape committed against a minor victim to be commenced at any time. No one has a vested right in a statute of limitations until the bar of the statute has become effective. The General Assembly may validly enlarge the period of limitations and make the new statute apply to a cause of action that has not been barred at the time the new statute becomes effective. However, if the action is already

time-barred when the new statute becomes effective, the General Assembly may not revive a cause of action. Here, the charges against appellant would be time-barred only if appellant's crimes had been reported to law enforcement before the General Assembly amended Ark. Code Ann. § 5-1-109(a) in 2011 and 2013. All of the victims testified unequivocally that they did not speak to law enforcement prior to a detective's involvement in the case in 2020. While there was an investigation into appellant's sexual assault of a third granddaughter, after she had an interview at the Child Advocacy Center, the detectives could not recall that the investigation ever extended to the two granddaughters appellant's convictions come from. Additionally, a detective overhearing the girls' father's rant that the appellant had probably done this to all of them did not constitute a report to law enforcement. Thus, the circuit court did not err in denying appellant's motion to dismiss the charges. (Green, R.; 04CR-20-2282; 1-18-24; Webb, B.)

*Petty v. State*, 2024 Ark. 5 [**motion for mistrial; witness statement**] Appellant was convicted by a jury of first-degree murder. On appeal, appellant argued that the circuit court abused its discretion when it rejected his initial and renewed mistrial motions. A mistrial is a drastic remedy and should be declared only when there is an error so prejudicial that justice cannot be served by continuing the trial and when it cannot be cured by an instruction to the jury. In determining whether a circuit court abuses its discretion by denying a mistrial motion, the Supreme Court looks to several factors, including whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. Here, in a pretrial hearing the circuit court ordered that, before introducing any testimony or presenting evidence related to prior bad acts under Ark. R. Evid. 404(b), the parties must first approach the bench and discuss the subject matter with the court. The victim's girlfriend testified about why the appellant had visited the victim's residence the day of the murder. In her testimony, the witness stated that appellant sought the victim's help to recover his car, which was sold while appellant was in jail. The prosecutor explained she had instructed the witness not to discuss prior criminal activity and that the witness did not intend to violate the court's order. The circuit court determined that, concerning the potential harm arising from the witness's statement, the mention of "jail" carried minimal prejudicial impact, given the absence of an implied conviction or prior bad act. Regarding the extent of the prosecutor's involvement in eliciting the prohibited statement from the witness, the circuit court concluded that the State did not intentionally prompt testimony involving a prior bad act. Further, the circuit court instructed the jury to disregard the witness's statement regarding appellant's jail time, clarifying that the witness had misspoken. Thus, the circuit court did not abuse its discretion in denying the appellant's initial and renewed mistrial motions. (Haltom, B.; 46CR-21-486; 1-25-24; Womack, S.)

*Dickerson v. State*, 2024 Ark. App. 58 [**denial of transfer to juvenile division**] The circuit court entered an order denying appellant's motion to transfer his criminal charges to the juvenile division of the circuit court. On appeal, appellant argued that the circuit court erred in denying his motion. A prosecuting attorney has the discretion to charge a juvenile, sixteen years of age or older, in the juvenile or criminal division of circuit court if the juvenile has allegedly engaged in conduct that,

if committed by an adult, would be a felony. Pursuant to Arkansas Code Annotated § 9-27-318(g), the circuit court shall consider all of the factors listed in the statute in a transfer hearing and make written findings on all of the factors. However, there is no requirement that proof be introduced against the juvenile on each factor, and the circuit court is not obligated to give equal weight to each of these factors in determining whether a case should be transferred. A juvenile may be tried as an adult solely because of the serious and violent nature of the offenses. Here, appellant, the victim, and three other teenagers rode together to conduct a “drill,” which meant shooting at an occupied residence. The victim’s shooting was consistent with “friendly fire,” from one of the other teenagers in the car. The State charged appellant in the criminal division of the circuit court with two felony counts: first degree murder and terroristic act. The circuit court made written findings on all of the statutory factors and concluded that there was not clear and convincing evidence that the case should be transferred. The circuit court found that both crimes were serious, violent crimes committed against people and that the terroristic act was willful and premeditated. Appellant was present in the car leading up to the shooting and present at the scene of the crime. Thus, the appellate court held that the circuit court did not err in denying appellant’s motion to transfer. (Whatley, K.; 60CR-22-2334; 1-31-24; Klappenbach, N.)

## PROBATE

*Jacks v. Brossett*, 2024 Ark. App. 6 [**in terrorem clause**] The circuit court entered summary judgment in favor of the appellees holding that appellant had violated the in terrorem clauses of both the will and the trust of the deceased and, as a result, had forfeited all her beneficiary interest in both documents. The circuit court, however, left the subtrust created for the benefit of appellee’s children, the deceased’s grandchildren, intact. On appeal, appellant argued that the circuit court erred in determining that her actions in filing the various petitions for removal violated the in terrorem clauses of her father’s will and trust. Review of the specific language of an in terrorem clause determines what actions trigger the no contest clause. Here, the in terrorem provisions of the deceased’s will and trust were fairly broad. The provisions made clear that any challenge to the provisions of the deceased’s will or trust, any challenge to the trustee’s discretion under the provisions of the trust, or any action that results in a beneficiary becoming an adverse party in any judicial proceeding involving the will or trust would trigger the implementation of the no-contest clause of the deceased’s will and trust and result in a forfeiture of the beneficiary’s interest thereunder. The appellate court held that appellant triggered the forfeiture clauses (1) by seeking appellee’s removal as trustee of the subtrust without adhering to the removal provisions of the trust; (2) by attempting to divest appellee of authority expressly granted to her by the trust; (3) by requesting appellee’s removal as trustee of the main trust in violation of the trust provisions; and (4) by demanding that appellee, as trustee, provide an accounting, despite trust provisions releasing the trustee of such obligations. The appellate court held that the circuit court appropriately granted summary judgment and found that appellant triggered the in terrorem clauses. Thus, forfeiture of her rights under the deceased’s will and trust were correct. (Griffen, W.; 60DR-17-919; 1-10-24; Thyer, C.)

## DOMESTIC RELATIONS

*Brazil v. Brazil*, 2024 Ark. App. 40 [**order of protection**] The circuit court granted a final order of protection in favor of the appellee. On appeal, appellant challenged the sufficiency of the supporting evidence and argued the circuit court erred in denying his motion for new trial, additional findings, and reconsideration of the order of protection. Arkansas Code Annotated section 9-15-201 requires that a petitioner file an affidavit alleging specific facts and circumstances of domestic abuse in connection with a request for an order of protection under the Domestic Abuse Act. The circuit court may provide relief to the petitioner upon a finding of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. The appellate court has defined imminent to mean likely to occur at any moment or impending at the time of the alleged abuse. Additionally, the appellate court has affirmed prior decisions largely due to the credibility findings of the circuit court. Here, appellee presented evidence of a “I’m warning you” text message; a funeral balloon containing a written statement implying she was dead and in handwriting she testified was appellant’s handwriting left at her home; a dangerous electrical cord admittedly left by appellant in the home; a broken lock to the door; and images of individuals on her property at night wearing masks to conceal their identities. The circuit court analyzed the evidence before it as well as the credibility of the parties and found in favor of appellee. It is not reversible error for the circuit court to weigh the evidence differently” than appellant asks the evidence to be weighed. The credibility of any witness’s testimony is to be assessed by the trier of fact—and the trier of fact may believe all, part, or none of it. Thus, the circuit did not err in granting the order of protection. (Houston, B.; 63DR-22-1096; 1-24-24; Gladwin, R.)

*Glass v. Glass*, 2024 Ark. App. 70 [**order of protection; prior allegations; attorney’s fees**] The circuit court entered a final order extending an order of protection against appellant until 2030. On appeal, appellant argued that the circuit court erred by finding that appellant committed domestic abuse against appellee, excluding evidence of appellee’s prior allegations of sexual assault, and awarding appellee attorney’s fees and costs. When a petition for an order of protection is filed under the Domestic Abuse Act, the circuit court may provide relief to the petitioner upon a finding of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. Here, appellee testified to numerous instances of rape committed against her by appellant, and rape and sexual assault are the types of abused covered under the definition of domestic abuse. The circuit court found the appellee’s testimony credible. Additionally, the circuit court found that appellant’s remarks to “call SWAT, tell them there is military, tell them there is ex-cops, tell them we’ve got weapons in the house,” fell squarely within the definition. The appellate court will not second-guess the circuit court’s credibility determinations. [**prior allegations**] Appellant next argued that the circuit court erred by excluding evidence of appellee’s prior allegations of sexual assault. Here, by the time appellee’s attorney objected to the line of questioning, appellee had already admitted that she told appellant that her other daughter’s father

had raped her. Appellant's counsel agreed to move on and presented no evidence that appellee had somehow lied about being sexually assaulted by an ex-boyfriend or how this fact shows that appellee was being untruthful in her allegations against appellant. Thus, the circuit court did not abuse its discretion when it sustained appellee's attorney's objection. **[attorney's fees]** Finally, appellant argued that the circuit court abused its discretion by awarding appellee attorney's fees. Upon a finding of domestic abuse, a circuit court may allow the prevailing party a reasonable attorney's fee as part of the costs. Thus, the circuit court did not err in its fee award because the appellee was the prevailing party. (Reif, W.; 60DR-22-1143; 1-31-24; Brown, W.)

## JUVENILE

*Moore v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 4 **[TPR-best interest; potential harm]** Appellant mother argued on appeal that the evidence was insufficient as to the potential-harm factor and the overall best-interest decision. The child had lingered in foster care for more than two years, during which time Appellant mother completed many of the services provided by Appellee. However, Appellant mother did not glean the benefits of those services and had not become a stable, safe parent able to care for the child; her past behavior was a good indicator of future behavior. Appellant mother went back to using drugs; had a volatile on-and-off relationship with Appellant father; missed many visits with her daughter; failed to acquire her own stable, appropriate housing; had left her abusive, volatile relationship only a month before the termination hearing; failed to acquire employment sufficient to care for herself and her daughter. Appellant mother acknowledged in her testimony that she was not yet ready to take custody of her daughter, although she wanted to have her back. Thus, there was no clear error in finding that it was in this child's best interest to terminate Appellant mother's parental rights. Appellant father preserved no argument for appellate review, essentially asking the appellate court to reweigh evidence in his favor, which it would not do. (Williams, C.; CV-23-479; 1-10-24; Klappenbach, N.)

*Kirk v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 16 **[TPR-best interest; adoptability]** Appellant argued that the circuit court clearly erred by determining it was in the children's best interest to terminate her parental rights because the court did not consider the effect termination and adoption would have on the siblings' relationships. Specifically, Appellant asserted that there was insufficient evidence that all five siblings could be adopted together, and there was little to no evidence or testimony regarding the effect of the siblings' separation caused by individual adoptions. Her argument was not well taken. Adoptability is not an essential element in a termination case; rather, it is merely a factor that must be considered by the circuit court in determining the best interest of the child. The Juvenile Code does not require certainty, or a "guarantee," that siblings be adoptable as a group. While keeping siblings together is a commendable goal and an important consideration, it is but one factor that must be considered when determining the best interest of the child. In this instant case, the circuit court did not err in its adoptability finding. The adoption specialist testified that the children were adoptable and that some of the foster families were interested in adoption; she explained that there were two data

matches for preadoptive homes for all five children together; thus, there was even evidence of the siblings' adoptability as a group. A caseworker's testimony that the children are adoptable is sufficient to support an adoptability finding. Given the adoption specialist's testimony, there is sufficient evidence to support the court's adoptability finding. No clear error. (Byrd Manning, T.; CV-23-507; 1-17-24; Virden, B.)

*Rugama v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 62 [**TPR-best interest**] There was nothing in the record to support Appellant's assertion that the Appellee "completely ignored" him, or had also "ignored potential relatives and the best interest of his child cannot be said to have been fully considered without any consideration of the impact the termination decision would have on relative relationships." Testimony from the Appellee was that it had considered relatives on both sides of the child's family; further the circuit court indicated it would "certainly take that into account in the future . . . before we do any permanent—permanency or adoption, or anything." Accordingly, the appellate court was unable to agree that the circuit court "completely ignored" Appellant's extended family. (Sullivan, T.; CV-23-546; 1-31-24; Thyer, C.)

*Robinson v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 64 [**TPR – subsequent factors**] Both parents challenged the circuit court's finding that the subsequent-factors ground supported the termination, arguing there was no evidence of continued domestic violence in the family after the children were removed from their custody, they were both fully compliant with the case plan, and the court's credibility findings were not sufficient to support its order. After the case was opened, the caseworker noticed bruising on multiple areas of Appellant mother's body on two different visits that were inconsistent with her explanations, law enforcement was called to the home on at least two separate occasions when the Appellants were arguing, and the Appellants' marriage counselor released them from treatment before they had completed therapy because they could not manage their anger during sessions. The evidence in the record also showed that Appellant father had a long history of abusing women and children, and the record contained evidence that supported the court's finding that the abuse was ongoing. Appellee testified that there were deadbolt locks on the interior doors in the home and that Appellant mother appeared on edge and nervous around Appellant father every time the caseworker visited. Moreover, the circuit court found that the parties had been offered and completed many family services, yet they failed to remedy the subsequent factors or rehabilitate the circumstances that prevented reunification. The court found that Appellants refused to acknowledge that there was a true finding of abuse to the child, which precipitated this case. The mother referred to her son as having "carpet burns" despite the child sustaining significant injuries that were at variance with the history given. The Appellants' marriage counselor opined that despite sixteen months of therapy, he could not do anything more to help them with their issues of aggression, lack of communication, and trust. The court specifically noted in its order that a problem could not be resolved until it was admitted that there was one, and the parties' continued denial of the existence of anger and domestic-violence issues prevented them from remedying the subsequent factors. Rather, the circuit court heard from multiple witnesses about Appellant mother's bruises, the involvement of law enforcement at the



home, Appellant father's history of abuse, and the parties' anger issues, and it ultimately chose to disbelieve Appellants and find that the bruises and police visits were a result of domestic violence. The circuit court's ability to judge the credibility of all witnesses in this case was critical. The court specifically found that both Appellants' testimonies were not credible, while the testimony of the two caseworkers for Appellee and the parties' marriage counselor was credible. Where there were inconsistencies in the testimony presented at a termination hearing, the resolution of those inconsistencies was best left to the circuit court, which heard and observed those witnesses firsthand. For those reasons, the circuit court did not clearly err in finding there was sufficient evidence to support the subsequent-factors ground. **[TPR-best interest; potential harm]** Appellant mother argued that the court's finding was clearly erroneous and made the same arguments as earlier: she was compliant with the case plan, and the circuit court's findings of domestic-violence and anger issues were based on nothing but speculation. Appellant father contended that the court improperly considered his past criminal history to support its finding of potential harm, the court should have considered placing the children with a relative, and the court failed to consider the impact of termination on the sibling relationship. In assessing the potential-harm factor, the circuit court was not required to find that actual harm would ensue if the child were returned to the parent nor to affirmatively identify a potential harm. Contrary to father's argument, past actions of a parent over a meaningful period were good indicators of what the future may hold, and to the extent the circuit court considered Tyrone's history of abuse, its consideration was not erroneous. Regarding father's relative-placement argument, there was no evidence of a relative who was ready, willing, and able to have custody of the children. The parents never even mentioned the name of a relative, and Appellee testified that the foster parent, the sister of Appellant mother, was not interested in long-term custody. Finally, father's contention that the circuit court failed to consider the potential for sibling separation after termination was not raised in the circuit court, which is a requirement for it to be considered on appeal. Accordingly, the circuit court did not clearly err in finding termination of Appellants' parental rights was in the best interest of the children. (Broadaway, M.; CV-23-493; 1-31-24; Wood, W.)