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CIVIL

Arkansas Capitol Corporation v. Salamone, 2022 Ark. App. 447 **[summary judgment; ambiguous loan assumption agreement]** The circuit court granted summary judgment in favor of appellee on the issue of whether appellee remained liable on a personal guaranty of a Small Business Administration (SBA) loan appellant issued in 2014 after a "Loan Assumption and Restructure Agreement" (the Assumption Agreement) that the parties executed in 2016. The Assumption Agreement concerned the sale of business assets. In the circuit court, both parties argued the relevant documents were unambiguous. The circuit court agreed, ruling for appellee, which thereby released him from a personal guaranty. Ambiguity requires only more than one reasonable construction. Although both parties asserted that the relevant instruments were unambiguous and dispositive, the appellate court concluded that the four corners of the documents left at least one reasonable interpretation under which appellee remained liable as a guarantor, and at least one reasonable interpretation under which he was discharged in 2016. Therefore, the circuit court erred when it determined that no ambiguity was presented and entered judgment for appellee. (Griffen, W.; 60CV-19-3560; 11-9-22; Harrison, B.)

Bradbury v. Harvey, 2022 Ark. App. 448 **[collateral estoppel]** The circuit court granted summary judgment in favor of appellees. On appeal, appellant argued that the circuit court erred in finding that his claims against the appellees were barred by collateral estoppel. The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of issues of law or fact actually litigated by parties in the first suit. The party against whom collateral estoppel is asserted must have been a party to the earlier action and must have had a full and fair opportunity to litigate the issue in that first proceeding. Unlike res judicata, which acts to bar issues that merely could have been litigated in the first action, collateral estoppel requires actual litigation in the first instance. When determining whether an issue has been actually litigated, the courts must look to see if the issue was properly raised and whether there was a full and fair opportunity to be heard. In the present case, a trucking company withheld federal payroll taxes from wages paid to its employees but did not pay them to the federal government. Appellant served as president of the trucking company's sister entity, and the federal government held him responsible and assessed penalties against him. Appellant then sued the federal government seeking a refund and abatement of the assessments. In his complaint before the United States District Court, appellant argued that he was not liable for the tax penalty and that the appellees exercised financial control of the company he was president of during the tax periods at issue. The government counterclaimed against appellant and both parties moved for summary judgment. The United States District Court held that appellant was a "responsible person" as a matter of federal tax law and "mostly" granted the government's motion. Appellant's complaint in circuit court alleged multiple claims against appellees, including breach of contract, breach of fiduciary duty, constructive fraud, and unjust enrichment. For most of these claims, appellant alleged damages including, but not limited to, the amount of the taxes, penalties, and interest the IRS assessed against him. The appellate court held that legal responsibility under a federal tax statute does not wipe away a person's state-law rights and duties nor the remedies available for tort liability when it is sufficiently proven. The determination of appellant's state claims for breach of contract, breach of a fiduciary duty, constructive fraud, deceit, civil conspiracy, promissory estoppel, unjust enrichment, contribution, and indemnification were not essential to the federal court's judgment. The claims presented in his complaint involved state-law remedies and were not litigated in the federal-court proceeding. Therefore, the circuit court erred in finding that appellant's claims in the present case were barred by collateral estoppel. (James, P.; 60CV-11-5472; 11-9-22; Harrison, B.)

Altice USA, Inc. v. City of Gurdon, 2022 Ark. 199 **[class-action certification]** The circuit court granted certification of the appellee's class-action lawsuit, which alleged that appellant unlawfully charged appellee and other Arkansas cities three fees for the use of their services. On appeal, appellant argued that the circuit court erred in its certification of the class. There are six requirements for class-action certification: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy, (5) predominance, and (6) superiority. Appellant challenged all requirements except numerosity. **[commonality]** Commonality is satisfied when the defendant's acts—independent of any action by the class members—establish a common question relating to the entire class. Here, appellee identified a cause of action in its complaint, seeking declaratory judgment relief under Ark. Code Ann. § 16-111-108, which allows a circuit court to award further relief based on a

declaratory judgment. To satisfy the commonality requirement, appellee only needed to establish that there were questions of law or fact common to the class, which it did. **[predominance]** A plaintiff can satisfy the predominance requirement if the preliminary, common issues may be resolved before any individual issues. Here, no individual issues existed. Appellee and the putative class contended that appellant unlawfully assessed three identical fees as part of its service charges. Thus, the existence of one common claim among the class predominated. **[typicality]** A plaintiff's claim is typical if it arises from the same course of conduct that gives rise to the claims of other class members and is based on the same legal theory. When the complaint alleges that the defendant's unlawful conduct affected both the plaintiff and the putative class, the typicality requirement is usually met irrespective of varying fact patterns that may underlie individual claims. Here, there was no variation between the class representative's claims and the claims of the rest of the class. Both the class representative and the putative class alleged that appellee unlawfully collected three identical fees when charging the cities for its services. **[adequacy]** Adequacy has been interpreted to mean (1) the representative counsel must be qualified, experienced, and generally able to conduct the litigation; (2) there must be no evidence of collusion or conflicting interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision-making as to the conduct of the litigation. Here, the record showed that appellee's attorneys were qualified and able to lead the class action because of their extensive experience, and there was no evidence of collusion or conflicting interests between the class representative and the class. Additionally, the record showed that appellee's mayor was familiar with the class's claims, establishing there was more than a minimum level of interest in the litigation. **[superiority]** To maintain a class action, it must be superior to other available methods for the fair and efficient adjudication of the controversy. The cities that made up the putative class were from across the state and resolving the claims in one action as opposed to multiple, widely dispersed trials would be fair to all parties. The circuit court did not abuse its discretion by concluding that a class action is the superior method for adjudicating the cities' claims against appellant. Therefore, the circuit court did not err in certifying the class. (Batson, B.; 10CV-21-29; 11-10-22; Womack, S.)

Crowder Land Company, LLC v. Payne, 2022 Ark. App. 467 **[prescriptive easement; hunting-lessee restriction]** The circuit court granted a prescriptive easement to appellants to traverse two logging roads that run across the lands of appellees. On appeal, appellants argued the circuit court erred by restricting the entry and use of the road easements by any of appellants' hunting lessees without permission of appellees. Both the creation and extent of an easement by prescription are determined by the adverse use of the property over a long period of time. As the extent of the easement becomes more difficult to discover, the relations between the owner and the possessor of the servient estate become increasingly subject to the governing principle that neither shall unreasonably interfere with the rights of the other. Here, all of the properties involved were primarily used for timber investment and recreational hunting. One of appellants' hunting lessees testified that he and "gobs of people" had used the roads for decades to hunt under their hunting leases. The hunting lessee had been leasing hunt property for thirty-one years and had always used those roads. Generally, the right to use the easement passes with the transfer of a leasehold interest,

such as a hunting lease, whether mentioned in the instrument of transfer or not and may not be interfered with by the servient estate. The right to hunt and fish, technically known as a profit à prendre, or a qualified ownership, in the land for the limited purpose of hunting and fishing, is a valuable and well-recognized right and may be transferred between individuals separately from the land itself. The appellate court held that the hunting-lessee restriction was too burdensome on the prescriptive easement granted to appellants. Therefore, the circuit court erred to the extent that the order required appellants' third-party hunting lessees to obtain permission from the appellees to use the easements. (Singleton, S.; 52CV-19-146; 11-16-22; Klappenbach, N.)

CRIMINAL

State v. Van Voast, 2022 Ark. 195 **[appeal from district court to circuit court]** The circuit court denied the state's motion to dismiss appellee's appeal from district court. On appeal, the state argued that the circuit court lacked jurisdiction over appellee's appeal. Rule 36 of the Arkansas Rules of Criminal Procedure governs appeals from district court to circuit court. Here, the state argued that appellee failed to comply with the requirements of Rule 36(c) of the Arkansas Rules of Criminal Procedure to file a written request with the district court clerk to prepare and certify the record and file a certificate of service of that written request on the prosecuting attorney. Under Rule 36(c) of the Arkansas Rules of Criminal Procedure, the triggering event for the circuit court to acquire jurisdiction is the filing of the certified record in the office of the circuit clerk. The written notice requirement in Rule 36(c) has no jurisdictional significance and simply identifies when a district clerk is tasked with preparing the record. Similarly, the certificate of service requirement is not necessary to give the circuit court jurisdiction, and in the present case, it is also undisputed that the prosecuting attorney received notice of appellee's intention to appeal to circuit court, both by email and by the facsimile that was intended for the district court clerk. Accordingly, the circuit court acquired jurisdiction of appellee's appeal upon the timely filing of the certified district court record. (Lindsay, M.; 72CR-21-1529-6; 11-3-22; Hudson, C.)

Hughes v. State, 2022 Ark. App. 453 **[motion for continuance; hearsay violation]** A jury convicted appellant of first-degree murder and aggravated residential burglary and found that the felony offense of first-degree murder was committed in the presence of a child. On appeal, appellant argued that the circuit court abused its discretion in denying a motion for continuance based on an alleged discovery violation by the State and by permitting alleged hearsay testimony in violation of the Arkansas Rules of Evidence. **[discovery violation]** Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure provides that subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney: any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant. Rule 17.1(d) states that subject to the provisions of Rule 19.4, 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. Here, on the morning of the first day of trial, appellant became aware that the State had reached a conditional plea agreement with one of the appellant's codefendants. Appellant moved for a continuance and his counsel stated that had he known about the deal the day before, he would have prepared that night, which prejudiced his ability to prepare. The State indicated that the codefendant's oral statement made at the time of the plea agreement did not deviate from the written statement previously provided to the defense. The circuit court found that appellant was not prejudiced by the plea agreement being disclosed on the day of trial and instructed the State not to deviate from the codefendant's original written statement in its opening to the jury, as requested by the defense. The State agreed to wait and call the codefendant on the second day of trial; thus, defense counsel had the night to prepare for cross-examination as he originally stated he would have done. In light of these circumstances, the appellate court held that the circuit court did not abuse its discretion in denying appellant's motion for continuance. **[hearsay]** As a general rule, hearsay is not admissible evidence. There are, however, certain out-of-court statements that are not considered hearsay. Rule 801(d)(1) of the Arkansas Rules of Evidence sets out the following: the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving him. Here, the appellant argued the circuit court abused its discretion when it permitted the testimony of an officer about statements made to him by a witness at the crime scene regarding the identity of the shooter. Appellant tried to imply that the witness fabricated her identification. The witness testified at trial and was subject to cross-examination concerning the statement made to the officer. Considering these facts, the officer's testimony about the statement the witness made at the scene was not hearsay under Ark. R. Evid. 801(d)(1)(ii). The witness's statement was consistent with her testimony that appellant was the shooter and was offered to rebut the implication of fabrication; therefore, the admission of the officer's testimony about the witness's statement was not in error. (Bailey, A.; 05DR-21-283; 11-9-22; Gladwin, R.)

PROBATE

Selman v. Hurley (In re Selman), 2022 Ark. App. 469 **[guardianship; nonresident]** The circuit court appointed the ward's son, appellee, as guardian of the person and estate of appellant's wife. On appeal, appellant argued the circuit court erred as a matter of law when it ruled that a nonresident of Arkansas may be appointed guardian of an adult. In *Martin v. Decker*, 96 Ark. App. 45 the appellate court affirmed the circuit court's decision to award guardianship to a Nebraska resident and cited Ark. Code Ann. § 28-65-203(e) for allowing a nonresident natural person meeting all other qualifications for appointment of guardian other than residence to be qualified to

be guardian if a resident agent is appointed and the appointment has been filed with the court. Here, the circuit court properly considered, and ultimately awarded, the son who resided in California guardianship of the ward. (Talley, D.; 14PR-2020-31; 11-16-22; Barrett, S.)

DOMESTIC RELATIONS

Dixon v. Dixon, 2022 Ark. App. 439 **[order of protection]** The circuit court entered two final orders of protection in favor of appellees, the appellant's wife, and daughter. On appeal, appellant argued that the circuit court erred in granting a final order of protection in favor of his daughter, granting an order of protection in favor of his daughter for ten years; and granting an order of protection in favor of his wife for ten years. **[domestic abuse finding]** An order of protection may be entered 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, appellant's daughter testified that she had witnessed physical and emotional abuse in their home during the approximately ten-year period she lived with her mother and appellant. She said that she saw appellant strike, choke, punch, and kick her mother and that there was a lot of screaming and throwing things. Specifically, appellant's daughter testified that she was scared when appellant approached her and her mother at their apartment. She was not merely in fear for her mother's safety but for her own as well. The circuit court was not required to view appellant's behavior toward his daughter in isolation from his behavior toward his wife. Therefore, it was not erroneous for the circuit court to conclude that appellant's physically and emotionally abusive behavior could reasonably inflict fear of imminent physical harm, bodily injury, or assault in his daughter**. [ten-year order of protection for daughter]** Arkansas Code Annotated § 9-15-205(b) authorizes a court to enter an order of protection for a duration between ninety days and ten years in the discretion of the court. Here, appellee daughter testified that appellant was physically abusive to her mother for years, and when she turned eighteen, she left her family home to escape appellant. Additionally, appellant began appearing at the Walgreens near the daughter's home when she came home from school. Appellant's wife testified that appellant had a concealed weapon and knew what he was capable of doing. The circuit court did not abuse its discretion in granting the order of protection for ten years, which is allowed by the statute. **[ten-year order of protection for wife]** The testimony established that appellant hit, punched, choked, and kicked appellee wife; that he had a pattern of rage and violence throughout the marriage; that he had a concealed weapon and had made statements to appellee suggesting he meant her harm if she defied him; and that he continued to inflict in appellee wife the fear of physical harm, bodily injury, or assault after she moved away from appellant. Based upon the record, the circuit court did not abuse its discretion in entering a ten-year order of protection for the appellee wife. (Foster, H.; 23DR-20-938; 11-2-22; Gruber, R.)

Baird v. Baird, 2022 Ark. App 442 **[petition to relocate; custody modification]** The circuit court granted appellee's petition to relocate with the parties' children. On appeal, appellant argued that

the trial court erroneously applied the presumption in favor of relocation as set out in *Hollandsworth v. Knyzewski*, 353 Ark. 470 (2003) and that the trial court instead should have applied the analysis set forth in *Singletary v. Singletary*, 2013 Ark. 506 (2013). In determining whether a parent may relocate with a minor child, the trial court must generally look to the principles set forth in the Arkansas Supreme Court's decision in *Hollandsworth* and *Singletary*. In *Hollandsworth* the Arkansas 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. Later in *Singletary*, the Arkansas Supreme Court explained that the *Hollandsworth* presumption does not apply when the parents share joint custody of a child. The analysis in a change-in-custody request due to the relocation of one parent in a joint-custody situation is the same as that when relocation is not involved; the court must first determine whether a material change in circumstances has transpired since the divorce decree or last order of custody and then whether the change in custody is in the best interest of the child. In *Cooper v. Kalkwarf*, 2017 Ark. 331 (2017) the Supreme Court clarified that the *Hollandsworth* presumption should apply only when the parent seeking to relocate is not just labeled the "primary" custodian in the divorce decree but also spends significantly more time with the child than the other parent. Here, in the most recent custody order before appellee filed her motion to relocate, the parties agreed to reduce appellant's child-support obligation due to consideration of the fact that appellant would have the children 5 of every 14 days during the school months. The agreed order further provided that the parties would share equal time with the children during holidays and the summer. The parties' custody arrangement was not an every-other-weekend scenario but rather resulted in an approximate 60/40 split. The record also reflected that appellant was significantly involved in the children's lives, shared co-parenting responsibilities, and had a significant and meaningful relationship with the children. The Supreme Court in *Cooper* stated that application of the *Hollandsworth* presumption is only appropriate in cases where it preserves the rights of a primary custodian when he or she has shouldered the vast majority of the responsibility of caring for and making decisions on behalf of the child. This was not the case here, with the record showing that appellant spent significant time with the children and shared a significant responsibility for the children's care and custody. The appellate court held the circuit court erred in applying the *Hollandsworth* presumption under the facts and the *Singletary* analysis should have governed appellee's relocation petition. (Hannah, C.; 73DR-14-294; 11-2-22; Hixson, K.)

Chrissonberry v. Chrissonberry, 2022 Ark. App. 450 **[modification of custody; material change in circumstances]** The circuit court entered an order modifying the parties' custody arrangement. On appeal, appellant argued that the circuit court erred by finding that appellee established a material change in circumstances warranting a modification of custody. To change custody, the circuit court must first determine that a material change in circumstances has occurred since the last order of custody; the party seeking modification has the burden of showing a material change in circumstances. If that threshold requirement is met, the circuit court must then determine who should have custody, with the sole consideration being the best interest of the children. Here, the evidence showed appellant had multiple relationships since the divorce and that there was conflict in her relationships. The circuit court found that appellant cohabitated with a convicted felon a

short time after her divorce to her second husband, and the conflict that the child witnessed between appellant and each of her partners created significant stress for the child. Even though DHS ultimately found abuse allegations against appellant unsubstantiated, the conclusion did not negate a change-in-circumstances finding in this proceeding. The child was fearful of being in appellant's home, and the ad litem reported that the child no longer wanted to live with her. The appellate court held that the circuit court did not err by finding that appellee established a material change in circumstances. Therefore, the circuit court did not err in modifying custody. (Johnson, A.; 60DR-12-3699; 11-9-22; Abramson, R.)

Hocut v. Hocut, 2022 Ark. App. 452 **[order of protection]** The circuit court entered an order of protection in favor of appellee. On appeal, appellant argued that the circuit court erred in granting appellee's order of protection because there was insufficient evidence that a present and immediate threat of domestic abuse existed. To obtain an order of protection, the petitioner must produce sufficient evidence to show that the victims are in imminent and present danger of domestic abuse. "Domestic abuse" is defined as "physical harm, bodily injury, assault, or the infliction of imminent physical harm, bodily injury, or assault between family or household members." The legislative definition of domestic abuse does not include the terms harassing or controlling. Arkansas Code Annotated § 9-15-205(b) states that an order of protection "may be renewed at a subsequent hearing upon proof and a finding by the court that the threat of domestic abuse still exists." A protective order may be renewed and there is no requirement that any renewal be brought while the original order is in effect. The standard for renewal is whether the original condition "still exists." Giving the words their ordinary meaning, "condition" and "still" refer to the prior order of protection. Here, appellant committed acts of domestic violence against appellee that included hitting her numerous times, holding a loaded gun to her head, and not allowing her to leave the residence with the parties' children for over two hours. In December 2019, appellee was granted a one-year order of protection against appellant. Although appellee did not seek an extension of this order of protection prior to its expiration because appellant's pending criminal trial was originally set for May 2020, both counsel agreed that a new order would be issued at that time if the circuit court found it necessary. Due to COVID issues, the trial was moved several times. Appellee later filed a new petition for an order of protection against appellant. At the hearing, appellee alleged that appellant parked in a Walmart parking lot near her friends in an attempt to videotape her. She also testified that appellant was so violent and aggressive that the circuit court had ordered supervised visitation with their children pending his criminal trial. The previous order of protection specifically directed appellant not to be around appellee and explicitly indicated that appellee feared him. New evidence does not bar the inclusion of previous acts of violence, particularly where the perpetrator is estopped by prior findings from denying those encounters. Based upon their review of the transcripts, the appellate court held that appellee presented sufficient proof that a threat of a continuing pattern of domestic abuse still existed. (Bailey, A.; 05DR-21-283; 11-9-22; Gladwin, R.)

Bassett v. Emery, 2022 Ark. App. 470 **[petition to establish visitation; adoption]** The circuit court denied appellant's motion to modify custody and visitation of her child. On appeal, appellant argued the circuit court erred in its denial of her petition to establish visitation. Specifically, appellant alleged that in analyzing her request for visitation, the circuit court improperly considered the petition to adopt the child which appellees filed in a separate court. Arkansas Code Annotated § 9-13-101 provides that a parent who is not granted sole, primary, or joint custody of his or her child is entitled to reasonable parenting time with the child unless the court finds after a hearing that parenting time between the parent and the child would seriously endanger the physical, mental, or emotional health of the child. The statute further states that at the request of a party, a court shall issue a written order that: (1) is specific as to the frequency, timing, duration, condition, and method of scheduling parenting time with a parent who is not granted sole, primary, or joint custody of his or her child; and (2) takes into consideration the developmental age of the child. Here, a month after appellant filed her petition for modification, the appellees filed, in a different court, a petition to adopt the child. The appellees urged the circuit court to find that, because there was a likelihood that the adoption would be granted, it would not be in the child's best interest to change custody or establish a visitation schedule. The circuit court agreed and cited the legal standards governing petitions to adopt a child without the consent of the biological parent in its analysis of appellant's petition to change custody or establish visitation. Appellant was not given statutory visitation rights, and the circuit court did not make a finding that visitation would endanger the child. By statute, the threshold necessary for denying a biological parent the right to visit his or her child is a finding by the circuit court that visitation between the parent and child would seriously endanger the physical, mental, or emotional health of the child. In this case, the circuit court erred by not applying that framework when evaluating appellant's request for visitation. (Alexander, T.; 28DR-21-70; 11-16-22; Vaught, L.)

Booker v. Booker, 2022 Ark. App. 473 **[division of property]** The circuit court entered an order divorcing the parties. On appeal, appellant argued that the court erred in granting appellee an unequal division of certain martial property and debts. Alternatively, she argued the circuit court erred in denying her credit for one-half of appellee's military retirement benefits. **[unequal division of marital property]** Arkansas Code Annotated § 9-12-315(A)(1)(a)(viii) states that the contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker, is a factor the court may take into consideration when making a division of property on some other basis than an equal distribution. In *West v. West*, 103 Ark. App. 269 (2008) the appellate court ruled that simply reciting the source of the funds cannot equate to a proper consideration of the contribution of each party in the acquisition, preservation, or appreciation of marital property. Here, the circuit court did more than recite appellee's contribution. It cited the statute to support its decision, provided specific dates, and found that appellee was the sole contributor during that time. The court found that appellant did not contribute to the marriage from 2003 through 2015. She was living in Texas during this time, having essentially abandoned the marriage and marital assets. It was not erroneous for the court to find that because appellant did not contribute to the marital assets during a particular time, she should not get the benefit of those assets at the time of divorce. **[unequal division of marital debts]** Next,

appellant argued that the circuit court erred when it did not give her any credit for the debt she incurred making improvements to the house. Here, given that the debt was incurred due to expenses associated with the marital home, and upon the home's sale, she would receive half of the proceeds less what appellee paid toward the mortgage while she was not contributing to the marriage, the appellate court held it was not erroneous for the circuit court to allocate the debt the way it did. **[retirement benefits]** Finally, appellee asserted that if the appellate court did not reverse the asset division, she should get credit for half of the military retirement benefits she did not receive from 2003 through 2015. Arkansas law does not require parties to a divorce to account for every sum spent during a marriage. The income was marital; thus, appellee had the right to use and transfer that money, as long as he was doing so nonfraudulently. Appellant was not entitled to reimbursement or credit for the money appellee received absent proof of an intent to defraud, which appellant did not allege. Thus, the circuit court did not err in denying her credit for those funds. (Williams, L.; 26DR-19-35; 11-16-22; Murphy, M.)

Saenz v. Gray, 2022 Ark. App. 475 **[attorney's fees]** The circuit court entered an order dismissing without prejudice the appellant's motion to modify child support and visitation for failure to perfect service upon appellee. On appeal, she argued the circuit court erred in its award of attorney's fees to appellee. The circuit court has the inherent power to award attorney's fees in domestic-relations proceedings. Attorney's fees in domestic-relations proceedings are not awarded as a matter of right but rest with the circuit court's discretion. Factors to consider in a motion for attorney's fees include (1) the experience and ability of the attorney, (2) the time and labor required to perform the legal service properly, (3) the amount involved in the case and the results obtained, (4) the novelty and difficulty of the issues involved, (5) the fee customarily charged in the locality for similar legal services, (6) whether the fee is fixed or contingent, (7) the time limitations imposed upon the client or by the circumstances, and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer. Here, appellee submitted an itemized statement to the circuit court when seeking the award of attorney's fees. The appellate court held that given the evidence before them, the circuit court did not abuse its discretion by awarding appellee attorney's fees. (Scott, J.; 04DR-18-1821; 11-16-22; Brown, W.)

Kinder v. Kinder, 2022 Ark. App. 476 **[visitation; child support; alimony; debt allocation]** The circuit court entered an amended divorce decree. On appeal, appellant argued the trial court erred by ordering only restricted visitation with the child, and in its award of child support and alimony and in its unequal division of the parties' debt. **[restricted visitation]** The primary consideration regarding visitation is the best interest of the child, and fixing visitation rights is a matter that lies within the sound discretion of the circuit court. Here, the attorney ad litem recommended gradually stair stepping appellant's visitation with the child was not based on any suspicion that he might be a danger to her. The restricted visitation was imposed because the appellant and child had been separated for twenty months, having had only two brief visits during that time span. The child had told her therapist that she was not yet ready to be alone or in a public place with appellant. Based

on the ad litem's recommendation, the circuit court anticipated that it would not take long until appellant worked his way into having regular, unrestricted visitation. Focusing solely on the child's best interest, the appellate court held that the circuit court did not err in ordering appellant's visitation with the child to be phased in gradually, incrementally, and therapeutically. **[child support]** Arkansas Supreme Court Administrative Order No. 10 requires child-support orders to contain the trial court's determination of the payor's income and recite the amount of support required under the guidelines. Here, the circuit court used appellant's most recent W-2 to determine his income and then applied his net monthly income to the support chart. Appellant, however, testified that this income included overtime pay that is no longer available to him. But the W-2 was the best information available to the court at the divorce hearing, and the circuit court was not required to find that an eight-week window of income presented by appellant represented a reliable method of predicting his future income for child-support purposes. On this record, the appellate court held the circuit court did not err in its child-support award. **[alimony]** The purpose of alimony is to rectify the economic imbalances in earning power and standard of living given 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. If alimony is awarded, it should be set at an amount that is reasonable under the circumstances. Here, the evidence supported a finding that appellant could pay alimony and appellee had a current need for it. Additionally, the evidence showed that their most recent respective annual incomes were $118,000 and $44,000. The appellate court held the alimony awarded by the circuit court, although high was not unreasonable, and did not rise to an abuse of discretion given the circumstances the court was faced with when it made the award. Therefore, the circuit court did not err in its award of alimony. **[division of debt]** An allocation of the parties' debt is an essential item to be resolved in a divorce dispute, and it must be considered in the context of the distribution of all the parties' property. It is not erroneous to determine that debts should be allocated between the parties because of their relative ability to pay. Here, both parties received a substantial portion of the marital assets, appellant had a greater ability to pay the marital debt than appellee. The appellate court held that the circuit court did not err in the parties' debt allocation. (Compton, C.; 60DR-17-2887; 11-30-22; Harrison, B.)

Piker v. Piker, 2022 Ark. App. 480 **[modification of custody]** The circuit court entered an order denying appellant's petition for a modification in custody of the parties' children. On appeal, appellant argued the circuit court erred in denying his request to share joint custody with appellee. Specifically, appellant contended that the circuit court erred in finding there had been no material change in circumstances. In order to modify a custody decree, the trial court must apply a two-step process: first, the court must determine whether a material change in circumstances has occurred since the divorce decree was entered; second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. Factors that are appropriate to consider when determining if there has been a material change of circumstances include, but are not limited to, one parent's relocation, the passage of time, the remarriage of one or both parents, a strained

relationship between the parent and child, and the preference of the children. A change in the circumstances of the noncustodial parent alone is not sufficient to justify a change of custody. Here, appellant petitioned for a modification of custody in July 2020 because he alleged that he no longer traveled for work and worked from home, appellee's work schedule resulted in the children staying at home alone and he was remarried. In its ruling from the bench, the circuit court urged appellant to stop allowing his wife to interfere in the parties' coparenting of their children and warned appellant that he could be held in contempt or sanctioned for her behavior. To the extent that the circuit court ruled on the materiality of appellant's remarriage, that factor appeared to have worked against appellant in his bid for joint custody. The appellate court agreed with the circuit court's ultimate conclusion that appellant failed to prove a material change of circumstances sufficient to warrant a modification in custody, considering all the relevant factors along with the attorney ad litem's report. Additionally, considering the attorney ad litem's detailed report and the children's stated preferences, the appellate court held that the circuit court did not err in holding that a modification of custody would not have been in the best interest of the children. Therefore, the circuit court did not err in denying appellant's petition for a modification in custody. (Herzfeld, R.; 63DR-17-373; 11-30-22; Virden, B.)

Pilcher v. McWilliams, 2022 Ark. App. 487 **[custody determination; sole custody]** The circuit court entered an order finding that appellee was the proper person to have sole custody of the parties' child, subject to appellant having increasing visitation as the child grew older. On appeal, appellant argued the circuit court erred (1) by considering proffered excluded evidence in making its custody determination; and (2) by awarding appellee primary custody of the child. **[inadmissible evidence]** Specifically, appellant contended that the circuit court erroneously considered appellee's proffered evidence in making its custody determination, despite its ruling that it would not do so, and such consideration prejudiced him. In *Fuhrman v. Fuhrman*, 254 N.W.2d 97 (N.D. 1977) hearsay statements were admitted over objection as substantive evidence in a custody determination. While acknowledging that the introduction of allegedly inadmissible evidence in a nonjury case would rarely constitute reversible error, the North Dakota Supreme Court held in *Fuhrman* that the inadmissible evidence appeared to have been used to induce the lower court to make an essential finding that would otherwise not have been made. Here, the appellate court found that the reasoning of the *Fuhrman* court was persuasive in this situation. Although the circuit court refused to allow a witness's testimony, it did allow appellee to proffer it. In making a custody determination, the appellate court held that it was evident from the finding in the circuit court's order that it considered evidence it had ruled to be inadmissible to conclude that it was not in the child's best interest for the parties to have joint custody. Therefore, the circuit court erred in considering the proffered evidence. **[rebuttable presumption; domestic abuse]** In an original child-custody determination in a divorce, there is a rebuttable presumption that joint custody is in the child's best interest. One way to rebut an award of joint custody is if the circuit court finds by clear and convincing evidence that joint custody is not in the child's best interest. Additionally, Ark. Code Ann. § 9-13-101(c)(2) provides that there is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern

of domestic abuse. Here, the circuit court found that in light of the testimony presented, appellee had proved by clear and convincing evidence that joint custody was not in the child's best interest, noting her testimony regarding the domestic violence that occurred while she was pregnant, as well as witness testimony of domestic violence that was ruled, was inadmissible. The appellate court held that the circuit court stopped short in its analysis under the statutory subsection. There is a rebuttable presumption that it is not in the child's best interest to be placed in the custody of an abusive parent where there is a finding by a preponderance of the evidence that the parent had engaged in a pattern of domestic abuse. The circuit court did not make a finding of a pattern of domestic abuse in this case, and the only evidence properly before it regarding domestic abuse was one incident concerning appellee while she was pregnant. Because there was not a pattern of domestic abuse shown by admissible evidence, there was no presumption to be rebutted, and the circuit court erred in making that finding. (Reif, M.; 60DR-21-316; 11-30-22; Barrett, S.)

Horn v. Caldwell, 2022 Ark. App. 488 **[grandparent visitation]** The circuit court denied appellant grandparent visitation with her maternal granddaughter, who was thirteen years old when appellant's petition for grandparent visitation was filed. The child's parents were never married, and the child's mother died several months before appellant's petition was filed. On appeal, appellant argued that the circuit court erred in finding that she failed in her burden to prove that grandparent visitation was in the child's best interest. The grandparent-visitation statute provides that there is a rebuttable presumption that a custodian's decision to deny or limit the petitioner's visitation is in the best interest of the child. The petitioner must show that she has established a "significant and viable relationship" with the child and that visitation with the petitioner is in the child's best interest. To establish that visitation with the petitioner is in the best interest of the child, Arkansas Code Annotated section 9-13-103(e) provides that to establish that visitation with the petitioner is in the best interest of the child, the petitioner shall prove by a preponderance of the evidence the following: (1) The petitioner has the capacity to give the child love, affection, emotional support, and guidance; (2) The loss of the relationship between the petitioner and the child is likely to: (A) Harm the child, (B) Cause emotional distress to the child, (C) Result in the emotional abuse of the child, or (D) Result in the emotional neglect of the child; (3) The petitioner is willing to cooperate with the custodian if visitation with the child is allowed; and (4) Awarding grandparent visitation would not interfere with the parent-child relationship. Here, the appellant demonstrated a pattern of not cooperating with appellee, the child's father, and schemed against him in an apparent attempt to create division between appellee and the child. Appellant also sent inappropriate texts to the child involving the legal proceedings she was initiating and coached the child to probe for and record evidence that would place appellee in a negative light. Appellant also filed a DHS report, wherein she alleged that the child was being abused and not being properly fed, which was later found to be unsubstantiated. Based upon the evidence presented, the appellate court held the circuit court did not err in finding that appellant failed to establish that grandparent visitation was in the child's best interest because appellant failed to prove that she was willing to cooperate with appellee and failed to prove that grandparent visitation would not interfere with appellee's relationship with the child. (Shirron, S.; 30DR-08-255; 11-30-22; Hixson, K.)

Parsons v. Parsons, 2022 Ark. App. 493 **[final order of protection]** The circuit court entered an order granting appellee's petition for a final order of protection against appellant. On appeal, appellant argued there was insufficient evidence to support a domestic-abuse finding and the issuance of the order of protection. 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 at the hearing to multiple incidents resulting in physical injury. She stated that appellant hit her and caused her to have a black eye and busted ear. Appellee also described an incident in the closet when Jeffery repeatedly hit her, causing knots on her head. She further detailed appellant's threats to kill her and her parents if she refused to have an abortion. The credibility of witnesses is within the province of the fact-finder, and the appellate court held that the circuit court did not err in its findings in light of the testimony presented at the hearing. Therefore, the circuit court did not err in granting appellee's petition for a final order of protection. (Brantley, E.; 63DR-20-942; 11-30-22; Brown, W.)

JUVENILE

Anita Farfan v. Ark. Dep't of Human Servs., 2022 Ark. App. 438 **[UCC-JEA; Emergency jurisdiction]** The appellate court found the circuit court did not abuse its discretion in finding subject-matter jurisdiction after the trial court initially exercising emergency jurisdiction over a non-resident child under the UCCJEA; and emergency jurisdiction continued to the termination hearing because there was no evidence of any custody order from any other state demonstrating jurisdiction. **[Hearings; appearing remotely]** There was no error in denying Appellant's request to appear via Zoom at termination hearing because of her repeated inability to follow the court's instructions while using the platform. **[TPR; best interest; relatives]** Appellant argued that termination was unnecessary when placement with a relative was available, as a least restrictive option is a relevant consideration for the best-interest determination for termination of parental rights. Despite relative's approved ICPC home study, there was no error in denying placement there as the trial court previously had specifically found the relative inappropriate for placement because of her testimony regarding her background and her relationship with Appellant. (Weaver, S., CV-22-129, November 2, 2022, Gladwin, R.)

Jessica Lloyd and Bobby Lloyd v. Ark. Dep't of Human Servs., 2022 Ark. App. 461 **[TPR; potential harm]** The appellate court found no clear error in the circuit court's determination that Appellant mother subjected the children to aggravated circumstances since she continued to test positive for illegal drugs well into the case, and also failed to maintain stable housing, employment, and transportation; these factors also supported the finding of risk of potential harm. There remains no time requirement for a finding of potential harm; lack of time to complete appropriate services is irrelevant to the circuit court's determination of best interest. Appellee is not required to provide services under the analysis of potential harm. **[TPR; services prior to aggravated circumstances**

finding] Appellant father argues that although some services were offered in the case involving Appellant mother's older child, Appellee did not provide those services to Appellant father because he was not a parent to that child and was not a party to the case. Appellant father contended there was no evidence of meaningful services offered to him pertaining to his children in the six months prior to the termination hearing. A finding of aggravated circumstances does not require that meaningful services were provided-- especially considering Appellant father had consistently failed to follow court's orders and to comply with the case plan. A caseworker's testimony that there were no further services that Appellee could provide to reunify a parent with his or her children supports a finding of aggravated circumstances. (Sullivan, T., CV-22-267, November 9, 2022, Brown, W.)

Marla Farris and Jeremey Lewis v. Ark. Dep't of Human Servs., 2022 Ark. App. 474 **[TPR; sexual abuse by one parent]** Appellant mother challenged termination of her parental rights because she was not found to be the one who sexually abused her child. However, the focus of an adjudication hearing is not the parent, but on the child and whether the child is dependent-neglected, without reference to which parent committed the acts or omissions leading to the adjudication; the juvenile is simply dependent-neglected. A dependency-neglect adjudication based on sexual abuse constitutes grounds for immediate termination of the parental rights of one or both parents. Because this child's adjudication was based on sexual abuse, this ground for termination applies, regardless of who committed it. **[TPR; potential harm]** There was no clear error in the circuit court's best-interest finding regarding potential harm as the circuit court found that the child "would be subjected to potential harm because of the mother's inability to understand or believe her daughter and the suspicion she would not be able to protect the juvenile in the future." A circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm; potential harm must be viewed in broad terms, and "potential" necessarily means that the court is required to look to future possibilities. Further, the evidence presented indicated that despite services, Appellant mother had not become a stable, safe parent capable of caring for the juvenile, whose therapist stated that returning the child to Appellant mother's custody would be detrimental to the juvenile's emotional well-being, and the caseworker opined that Appellant mother's behavior demonstrated she did not believe the juvenile's trauma had occurred. **[TPR; right to counsel]** Appellant father's interjection that he was firing his court-appointed attorney did not equate to a request for a new attorney to be appointed or for a continuance of the termination hearing; those issues were not addressed at the trial court level and would not be taken up by the appellate court. Additionally, the right to appointed counsel does not create a right to appointed counsel of choice. (Batson, B., CV-22-212, November 16, 2022, Murphy, M.)

Stanley Thompson v. Ark. Dep't of Human Servs., 2022 Ark. App. 478 **[TPR; aggravated circumstances; best interest]** The appellate court found no error in the circuit court finding aggravated circumstances due to little likelihood that services to the family would result in successful reunification when, though Appellant had identified a specialized parenting class for his special needs child, those special services would not be beneficial in Appellant's case because

Appellant had not benefited from the basic case-plan services. Nor does the withholding of that specialized service render the court's potential harm finding clearly erroneous. (Herzfeld, R., CV-22-247, November 30, 2022, Abramson, R.

Patrick Kugler and Tepring Loveland v. Ark. Dep't of Human Servs., 2022 Ark. App. 485 **[TPR; subsequent factors]** The appellate court found no error in the circuit court terminating parental rights of Appellant mother for subsequent factors when she permitted a violent boyfriend to return to the family home, permitted relatives who continued to abuse drugs to live in the home, and continued to smoke cigarettes while using cannular oxygen despite the danger it posed to her and to the juveniles. **[TPR; potential harm]** No error in finding potential harm as past behavior can be a predictor of future harm, especially here when the aforementioned factors remained and weren't rectified. **[TPR; parental rights]** There was error in terminating parental rights of Appellant father when the record and prior orders did not clearly establish him as a parent as defined in the juvenile code. (Warren, D., CV-22-344, November 30, 2022, Gruber, R.)

Charles Gabel v. Ark. Dep't of Human Servs., 2022 Ark. App. 489 **[Adjudication; fitness for custody]** The appellate court found no error in the circuit court failing to make a finding on Appellant's fitness for custody or visitation at adjudication hearing as the presumption of such fitness applies only to parents and not putative parents. **[Disposition; DNA testing]** There was also no error in failing to order DNA testing when Appellant did not request it, despite the burden on proving paternity is placed squarely on the putative parent; the applicable statute permits the ordering of DNA testing, but does not require it. **[Disposition; visitation]** There was no error in failing to order visitation with Appellant as Appellant did not request visitation at the hearing, especially considering the Department was given discretion to place the child with Appellant provided certain conditions were met. (Williams, L., CV-22-282, November 30, 2022, Hixson, K.)