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CIVIL

Arkansas Blue Cross and Blue Shield v. Freeway Surgery Center, 2024 Ark. App. 540 [**statutory construction; insurance contracts**] The circuit court entered an order reversing and remanding a declaratory order issued by the Arkansas Insurance Commissioner (“Commissioner”) regarding the meaning of Ark. Code Ann. § 23-79-115. On appeal, appellant argued that the Commissioner properly concluded that the statute did not apply to network participation agreements between insurance companies and licensed outpatient/ambulatory surgery centers. Legislative history, the language of the statute, and the subject matter involved all inform legislative intent. Arkansas Code Annotated § 23-79-115 was enacted nearly a decade before network participation agreements were allowed. After network participation agreements were allowed, the General Assembly passed additional laws specifically regulating those contracts. The appellate court held that the record supported the Commissioner’s ruling that Ark. Code Ann. § 23-79-115 did not apply to the network participation agreements based on the statutory language and the intent of the General Assembly when it was enacted. Therefore, the circuit court erred in entering the order reversing the Commissioner’s declaratory order. (Griffen, W.; 60CV-21-2725; 11-6-24; Gladwin, R.)

Baker v. Adams, 2024 Ark. App. 577 [**motion to dismiss**] The issue before the court was whether a plaintiff’s right to dismiss a case pursuant to Arkansas Rule of Civil Procedure 41(a) is absolute. It is axiomatic that a plaintiff has an “absolute right” to a voluntary nonsuit before a case is submitted. The Arkansas Supreme Court has given preference to the absolute right to nonsuit over a defendant’s motion to dismiss. Here, all plaintiffs (the appellants) except one self-represented plaintiff moved to dismiss their amended complaint without prejudice under Arkansas Rule of Civil Procedure 41(a). The defendants (the appellees) responded to that motion, arguing that dismissal was improper at that time because certain evidence that the circuit court had ordered to be produced had not yet been given to the defendants. The response alleged that the motion to dismiss came after “more lies and misconduct” were exposed at the deposition of the plaintiffs’ expert. At a hearing, the circuit court orally denied the plaintiffs’ Rule 41(a) motion but never entered a written order. The plaintiffs later renewed the motion to dismiss without prejudice under Rule 41(a). Months later, the defendants filed a renewed motion to dismiss the amended complaint with prejudice due to alleged misconduct and fraud by one of the plaintiffs and various plaintiffs’ attorneys. The circuit court held a hearing on both motions to dismiss, then entered an order granting the defendants’ motion and dismissed the case with prejudice. In the present case, when the appellants filed their Rule 41 motion, the case was not submitted. It had not been submitted to a jury. It had not been subject to a bench trial. It was not subject to pending dispositive motions that had been fully briefed. It was not after the close of a hearing on dispositive motions. The parties note that a motion to compel was pending, but that is not a dispositive motion. Neither Rule 41 of the Arkansas Rules of Civil Procedure nor any cases interpreting that rule indicate that there are exceptions to the absolute right to one voluntary nonsuit. Thus, the circuit court erred in dismissing the appellants’ lawsuit with prejudice. (Guynn, A.; 35CV-18-1077; 11-20-24; Klappenbach, N.)

Bloodman v. Bill Fitts Auto Sales Inc., 2024 Ark. App. 585 [**service; dismissal; motion to vacate**] The circuit court entered an order dismissing appellant’s appeal from district court and denied her motion to vacate certain writs of garnishment obtained by appellee against appellant. On appeal, appellant argued that she was not served with the summons and complaint from district court under Rule 4 of the Arkansas Rules of Civil Procedure. [**dismissal**] District Court Rule 9 governs appeals from district court to circuit court and gives thirty days for a party to appeal to the circuit court by filing a certified copy of the district court docket sheet with the circuit court. Here, the circuit court dismissed appellant’s appeal, stating it was untimely. Appellant filed her notice of appeal, which included a certified copy of the district court docket sheet, in the circuit court within thirty days after the district court entered its order denying her motions to vacate. Thus, the circuit erred in dismissing the appeal. [**motion to vacate**] Under Rule 4(i)(1) of the Arkansas Rules of Civil Procedure, service of process must be made within 120 days of filing the complaint or the action shall be dismissed. Rule 4(i)(2) allows the time period for service to be extended upon a showing of good cause. If service is not obtained within that time and no timely motion to extend is made, dismissal of the action is mandatory. Rule 4(g)(3) governs service by warning order and does not extend the 120-day service period when a party chooses to attempt service in this manner. A writ of garnishment is ineffective when the issuing court does not have jurisdiction. Here, appellee

never filed a proof of service. The certified docket sheet did not show a motion for an extension until almost a year after the service period under Rule 4 had expired. Appellee did attempt to serve appellant by publishing a warning order, however, it was done far more than 120 days after appellee had filed its complaint. Because the district court never had jurisdiction over appellant, the judgment was void. Thus, the circuit court erred in denying the appellant's request to vacate the writs of garnishment. (Farmer, J.; 63CV-22-1190; 11-20-24; Murphy, M.)

CRIMINAL

Finley v. State, 2024 Ark. App. 567 [**sealing convictions**] The circuit court denied appellant's petitions to seal his felony convictions in two cases. On appeal, appellant argued that the circuit court erred in finding that because appellant had failed to complete his sentence and had two prior felony convictions, neither of the convictions could be sealed. The decision to seal a criminal conviction is a two-step process. The petitioner must first prove his convictions are eligible for sealing. Arkansas Code Annotated § 16-90-1406 requires that the petitioner must have completed his sentence and that the petitioner can have no more than one previous felony conviction. Then, the petition may be granted if the court finds by clear and convincing evidence that doing so would further the interests of justice. Arkansas Code Annotated § 16-90-1406(c)(1)(B) provides that for the sole purpose of calculating the number of previous felony convictions under this section, all felony offenses that were committed as part of the same criminal episode and for which the person was convicted are a single conviction. Here, appellant was involved in two criminal episodes. In case 1 appellant was arrested for two felony drug offenses. In case 2, appellant was arrested for three felony drug offenses. For the purpose of sealing convictions, the three convictions in case 1 are deemed one conviction, and the two convictions in case 2 are deemed one conviction. In reviewing the petition to seal the conviction in case 1, appellant did not have any prior convictions; therefore, the conviction in case 1 would be eligible for sealing if appellant completed his sentence. In reviewing the petition to seal the conviction in case 2, appellant had one prior conviction (case 1); therefore, the conviction in case 2 would be eligible for sealing if appellant completed his sentence because Ark. Code Ann. § 19-90-1406(c)(1)(A) allows a conviction to be sealed if the petitioner has no more than one previous felony conviction. If appellant completed his respective sentences, the conviction in case 1 would be eligible for sealing and the conviction in case 2 would be eligible for sealing. The circuit court found that appellant did not complete his sentence because he failed to prove by clear and convincing evidence that he paid the fines and costs associated with the sentence. Appellant testified that neither conviction required him to pay fines or costs. The combined sentencing order did not order appellant to pay either fines or costs and stated in the space for court costs, "WAIVED/INDIGENT." Based upon this, the appellate court held that the circuit court erred in finding that appellant did not prove that he completed his sentences. Therefore, appellant's sentences were eligible for sealing under Ark. Code Ann. § 16-90-1406. (Singleton, S.; 70CR-95-208; 70CR-95-317; 11-13-24; Hixson, K.)

Turner v. State, 2024 Ark. 171 [**best-evidence rule**] The appellant was convicted of two counts of felony capital murder. On appeal, appellant argued the circuit court erred in admitting Snapchat evidence via testimony from a State’s witness. Specifically, appellant contended that admitting this testimony violated the best-evidence rule because the message itself was not produced. The best-evidence rule applies only if an “original” exists. Rule 1004 of the Arkansas Rules of Evidence permits other evidence of the message’s contents when the original is lost or destroyed without bad faith. Here, the State’s witness testified that after she informed appellant of police questioning, he sent a Snapchat message instructing her to withhold information about a gun. The witness’s testimony established that the Snapchat communication, as was customary, was automatically deleted because the messages were self-destructing messages. The Arkansas Supreme Court found that because Rule 1004 applied here, the circuit court acted within its discretion in admitting the witness’s testimony under this exception. The State was not required to attempt retrieval of the Snapchat message, because Rule 1004 of the Arkansas Rules of Evidence provisions are disjunctive, it is enough that the message was lost without bad faith. Thus, the circuit court did not err in admitting the witness’s testimony. (Compton, C.; 60CR-21-2638; 11-21-24; Womack, S.)

PROBATE

Garner v. Bunn (Matter of Adoption of MC), 2024 Ark. App. 579 [**consent to adoption; best interest**] The circuit court terminated appellant’s parental rights to his daughter and granted a stepparent adoption to appellee, with the consent of the mother. On appeal, appellant argued that the circuit court erred in ruling that his daughter could be adopted without his consent and that it was in the child’s best interest to be adopted. Consent to adoption is not required of a parent whose child is in the custody of another if the parent for a period of at least one year has failed significantly without justifiable cause to communicate with the child. A person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence. Under Ark. Code Ann. § 9-9-207(a)(2), a failure to communicate without justifiable cause is one that is voluntary, willful, arbitrary, and without adequate excuse. Also, the one-year period may be any one-year period, not merely the one-year period preceding the filing of the petition for adoption. Failure to communicate without justifiable cause means a failure that is voluntary, willful, arbitrary, and without adequate excuse. Here, the record revealed that except for one visit with his family on Christmas when the child was a newborn, appellant had no more than five contacts with the child in nine years. Appellant admitted that his failure to visit was nobody’s fault but his own. The appellant gave no explanation as to why he could not have visited the child by agreement with the mother or pursued his visitation rights in court if she were uncooperative in providing him with visitation. The record was clear that appellant, by his own admission, was not thwarted in his efforts to visit the child but that his failure to have visitation was voluntary, willful, and arbitrary and without adequate excuse on his part. Thus, the circuit court did not err in finding there was no justification for the failure to communicate. [**best-interest**] Before an adoption petition can be granted, the circuit court must find clear and convincing evidence that the adoption is in the best interest of the child. Here, the circuit court found that appellant’s relationship with the child was virtually nonexistent. The court found that some of his

family members have done more than he has, but even those contacts were sporadic. The circuit court made a specific finding that it was in the best interest of the child to be adopted by appellee based on total abdication by appellant of his parental responsibilities, and the sporadic visitation by the aunt and grandmother did not override the best-interest determination. When reviewing the entire evidence, the appellate court found that the circuit-court's best-interest finding was supported by clear convincing evidence. (Brantley, E.; 73PR-22-165; 11-20-24; Barrett, S.)

DOMESTIC RELATIONS

Davis v. Morton, 2024 Ark. App. 545 [**property-settlement agreement**] The circuit court denied appellant's motion to clarify the property-settlement agreement he and appellee had previously entered into upon their divorce. On appeal, the appellant argued that the circuit court erred in denying his motion. A court has no authority to modify an independent contract that is made part of a divorce decree. While the agreement is still subject to judicial interpretation, courts must apply the rules of contract construction in interpreting the agreement. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. [**ambiguous**] Appellant first argued the circuit court erred in finding that the agreement was unambiguous. Specifically, appellant argued that because his active-duty benefits were not vested at the time of the divorce, they would not have been divisible by the court. Here, the parties' property-settlement agreement stated that appellee "is entitled to 50% of [appellant's] monthly retired military pay, once [appellant] begins receiving such payments." This language was unambiguous and was not qualified by terms such as "vested," "active duty," or "reserve." Even if appellant's active-duty retirement would not have been divisible by the court, the parties were free to contemplate his future retirement and enter into a binding contract to award appellee a portion of those benefits. Regardless of the source of appellant's monthly retirement pay, the agreement entitled appellee to 50 percent. When a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written terms. (Weaver, S.; 23DR-15-27; 11-6-24; Klappenbach, N.)

Ferguson v. Ferguson, 2024 Ark. App. 551 [**custody**] The circuit court entered an order awarding appellee legal and physical custody of the parties' two children and awarding appellant supervised visitation. On appeal, appellant argued that the circuit court erred in not awarding joint custody. There is a presumption that an award of joint custody is in the best interest of the child, which may be rebutted if the circuit court finds by clear and convincing evidence that joint custody is not in the best interest of the child. A child custody determination is fact-specific, and each case ultimately must rest on its own facts. The record in this case was clear that the circuit court carefully considered all the evidence in its detailed and thorough findings. The circuit court concluded that appellant appeared in court to be irrational and delusional at times and not an appropriate caregiver for the children. Additionally, the circuit court specifically found it was not in the children's best interest to award joint custody due to appellant's delusions, physical violence,

threats to the home and church, running naked in the street, drug use, emotional and verbal abuse, and suicidal statements. The circuit court authorized a transition to unsupervised regular visitation based on appellant's continued attention and improvement to his mental health. The circuit court made findings based on the best interest of the children. Based on its review of the record, the appellate court held that the circuit court did not err in its order awarding custody. (Threet, J.; 72DR-22-406; 11-6-24; Wood, W.)

Redman v. Redman, 2024 Ark. App. 562 [**modification of custody**] The circuit court entered an order granting custody of the parties' two children to appellee. On appeal, appellant argued that the circuit court erred by changing custody because the court failed to rule from the bench that it was in the children's best interest to change custody, then included the ruling in the written order, and that there was no evidence supporting a best interest finding. Failure of communication, increasing parental alienation by a custodial parent, and inability to cooperate can all constitute a material change in circumstances sufficient to warrant modification of custody. The combined, cumulative effect of particular facts may together constitute a material change. Here, the circuit court considered and listed many reasons supporting its decision to change custody, only one of which was appellant's habit of having overnight guests in violation of the court's order. In ruling from the bench and in its written order, the circuit court extensively recounted the evidence supporting a change of custody, including appellant's disregard of the circuit court's order by interfering with visitation, failing to inform appellee about emergency-room visits, changing the children's school without consulting appellee, having romantic relationships that negatively affected the children, and manipulatively forcing the children to be the go-between, which drove a wedge between appellee and his children. Recognizing the superior position of the circuit court to evaluate the witnesses and their testimony, the appellate court was not left with a definite and firm conviction that the circuit court made a mistake in determining that changing primary physical custody to appellee was in the best interest of the children. Although the circuit court's bench ruling did not specifically contain the words "best interest," there is a presumption that a circuit court makes the findings necessary to support a judgment changing custody. Thus, the circuit court did not err in its modification of custody. (Weaver, S.; 71DR-18-107; 11-13-24; Virden, B.)

Howard v. Howard, 2024 Ark. App. 566 [**alimony; child support**] The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court erred in its award of rehabilitative alimony and its computation of child support. [**alimony**] A decision regarding alimony is a matter that lies within the circuit court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. Arkansas Code Annotated § 9-12-312(a) states that the circuit court may enter an order concerning alimony that is reasonable from the circumstances of the parties and the nature of the 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. Courts should consider secondary factors: (1) the financial circumstances of both parties; (2) the amount and nature of the income, both current and anticipated, of both parties; (3) the extent and nature of the resources and assets of each of the parties; and (4) the earning ability and capacity of both parties. Here, the

circuit court awarded appellee alimony for seven years and did not mention in its order that the alimony was rehabilitative. In making their findings, the circuit court specifically recognized the disparity between the parties' incomes, the twenty-three-year duration of their marriage, and appellant's standard of living during their four-year separation. The circuit court noted that appellee was a teacher with limited potential to earn more income and that appellant had significant income and potential income through his multiple business ventures. Based upon the appellate court's standard of review, the discretionary nature of alimony awards, and the evidence before the circuit court, the appellate court held that the circuit court did not abuse its discretion in awarding alimony. **[child support]** The definition of income included in Administrative Order No. 10 is intentionally broad and designed to encompass the widest range of sources for the support of minor children. Income includes perquisites or goods and services received in-kind and can include meals, housing, personal use of vehicle, and travel. In general, the court should carefully review income and expenses from a parent's self-employment or operation of a business to determine actual levels of gross income available to the parent. Here, the circuit court heard testimony from both parties concerning the funds appellant spent out of his business bank account for personal use, and it made detailed findings about the expenses. The appellate court held that the circuit court did not abuse its discretion in its calculation of appellant's income. (Reif, W.; 60DR-20-2158; 10-13-24; Wood, W.)

Styles v. Styles, 2024 Ark. App. 583 **[electronic filing; default judgment]** The circuit court entered a default judgment ordering appellant to pay boarding school expenses for one of the parties' children. On appeal, appellant argued that because of technical issues with her law firm's internet provider, which prevented her from receiving notice of appellant's petition for relief, the trial court erred in granting the default judgment. Administrative Order No. 21(12(d) provides, "A party whose filing is made untimely as the result of a technical failure of the electronic filing system or other technical problems may seek appropriate relief from the court. Sample language is attached to this order as Form A. Technical failures of the electronic filing system under subdivision (a) of this Section 12 are excused. For technical problems that are considered to be user-related under subdivision (b) of this section, the court for good cause shown may excuse an untimely filing." Here, appellant's counsel did not complete and verify Form A with the details of the alleged technical problems experienced by his law firm, nor did appellant's counsel present any other proof of the alleged technical problems with his law firm's internet provider that prevented him from receiving notice of the petition for reimbursement filed by appellee. At the hearing on the motion, the circuit court noted that appellee had presented proof of electronic service, but that appellant was without any proof of the technical problems. For technical problems that are considered to be user-related the court for good cause shown may excuse an untimely filing. Under these circumstances, the appellate court could not say that the trial court acted thoughtlessly, improvidently, or without due consideration in finding that appellant failed to show good cause for her untimely response and in granting appellee's motion for default judgment on his petition for reimbursement. (McCain, G.; 58DR-18-53; 10-20-24; Hixson, K.)

JUVENILE

Cooper v. Ark. Dep't of Human Servs., 2024 Ark. App. 553 [**ADJ; abuse; discipline**] Appellants' children were adjudicated dependent-neglected based on a finding they were at substantial risk of serious harm as the result of abuse. One child testified that Appellant mother had whipped her repeatedly with a purse strap with metal ends that causes welts throughout her body and that the mother struck her three times in her face, which caused immediate bleeding and a bruise. When the child came to school with a bandage on her face, her teacher saw that it was bleeding and applied antibiotic cream and replaced it with a bigger bandage. There was also testimony that mother made the child stay in her room for thirty-three days straight and was allowed to come out only to use the bathroom. The second child testified that on three occasions, Appellant mother disciplined her by dragging her across the floor by her hair, after which she would administer a whipping. The child testified further that during one such episode, mother put her foot on the child's chest such that it restricted her breathing. The child also testified that Appellant father whipped her with a bamboo stick, which resulted in a bruise on her stomach that "shocked" the school nurse when the child showed it to her. As a result of the repeated whippings, both children stated that they were afraid to go home, and if they had to return home, they would kill themselves. Appellants argued that they did not abuse the children because their physical discipline was reasonable and moderate and inflicted for the purpose of correcting the children; this argument was unsuccessful. As an initial matter, both children testified that often, the whippings were for little or no reason at all, and therefore, the whippings were not administered for the purpose of "correcting the child" as required by the statute. Moreover, there was evidence that the physical discipline went beyond "reasonable and moderate." There was testimony that the mother admitted whipping her children in the same spot every time to maximize the child's pain; she also admitted she would whip the children and tire herself out and that she would have to stop and take a break and then start again. This is consistent with the severity of the whippings as testified to by the children. In sum, there was evidence from which the trial court could conclude that the children were abused due to extreme or repeated cruelty, emotional injury, suffering nonaccidental physical injuries, being struck in the face with physical injury and without justifiable cause, and interference with a child's breathing. As such, the finding of abuse was not clearly erroneous. (Keaton, E.; CV-24-75; 11-6-24; Hixson, K.)

Hardaway v. Ark. Dep't of Human Servs., 2024 Ark. App. 565 [**TPR; best interest; interested family**] Appellant had been incarcerated for much of the case; and had another four years' incarceration ahead of him at the time of the termination hearing; had had little contact with the child since her birth; had already had his parental rights to her sibling involuntarily terminated; and had not worked any services even when he was not incarcerated. There simply was no hope for a timely successful reunification with him and no need to delay permanency for the child. Moreover, due in part to his failure to appear or participate in the case for a year, potential reunification with him was unnecessarily delayed, resulting in the child ultimately staying in the custody of the Appellee for over two years. His relative's ICPC home study was not approved until 18 months into the case, and by that time, the child had spent all but one week of that time living

with a foster family and her biological brother. Any relationship the child had with that relative was limited and occurred through Appellee-supervised visitation. Removing the child from her current stable home with her brother and a family with whom she had bonded for two years and sending her out of state to live with someone she barely knew was not in the child's best interest. As for another relative, the circuit court was concerned with placing the child in her care. It noted that the other relative and Appellant's testimonies at the hearing were different than their testimonies at previous hearings and, given their family conflict and the lack of closeness between them, determined that it was not in the child's best interest to be placed with that relative, either. It was clear that stability and a reasonable hope for reunification with Appellant were not present; thus, there was no reason to further delay permanency through termination and adoption. No clear error. (Hess, K.; CV-24-330; 11-13-24; Thyer, C.)