

# APPELLATE UPDATE

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

## CIVIL

*Corbitt v. Arkansas State University*, 2024 Ark. 44 [**firearms; alcohol permits**] The Arkansas Supreme Court held the circuit court did not err in finding that Arkansas State University can prohibit firearms in its on-campus arena, because the facility is covered by an alcohol permit. (Richardson, M.; 16JCV-22-1659; 4-4-24; Webb, B.)

*Nolan v. 2600 Holdings, LLC*, 2024 Ark. 50 [**joinder; indispensable party**] The circuit court denied appellant's motions seeking joinder under Rule 19 of the Arkansas Rules of Civil Procedure. On appeal, appellant argued that the circuit court erred when it denied his motion. Rule 19 governs the mandatory joinder of parties to a civil suit, where they are needed for a just adjudication of the controversy before the court. The purpose underlying the rule is to ensure that all persons who will be necessarily and materially affected by its result shall be made parties to an action. Rule 19, like its counterpart in the Federal Rules of Civil Procedure, does not condition the authority to join an indispensable party on a motion by a party but instead appears to authorize the joinder of indispensable parties by the courts sua sponte. Here, appellee was an unsuccessful applicant for a medical marijuana cultivation license and petitioned the circuit court for relief mainly to require the Arkansas Medical Marijuana Commission (the Commission) to strip

appellant of his cultivation license. The State and appellant claimed that the appellant was an indispensable party under Rule 19(a) of the Arkansas Rules of Civil Procedure. The circuit court found that Rule 19(a) “requires mandatory joinder of a non-party litigant if relief cannot be accorded without him, and if a disposition in his absence may impair his ability to protect that interest or leave a party with inconsistent obligations by reason of his claimed interest.” The circuit court misinterpreted the rule by reading it to mean that both conditions were required. Thus, the circuit court focused on whether it had the ability to enter a writ of mandamus without making appellant a party rather than whether entering the writ would impair appellant’s ability to protect his interests. Additionally, the Arkansas Supreme Court found that the relief sought by appellee would impair appellant’s ability to protect his interests. The circuit court’s granting of summary judgment and the State’s decision to not appeal resulted in essentially a court order for the Commission to revoke appellant’s license. Therefore, the circuit court erred in not joining the appellant as an indispensable party to the litigation. (Wright, H.; 60CV-21-582; 4-11-24; Wood, R.)

*Yarbery v. Edwards*, 2024 Ark. App. 263 [**prescriptive easement; scope**] The circuit court granted the appellants a prescriptive easement to use a road that runs across the appellee’s property. On appeal, the appellant argued that the circuit court erred by limiting the scope of the easement it granted them across the appellee’s land. On cross appeal, appellee argued that the circuit court erred in granting an easement at all. [**granting prescriptive easement**] A prescriptive easement, once attached, is permanent and irrevocable. Immediate landowners need not establish their use was adverse; they may be able to establish that their predecessors-in-titles’ use was adverse. Even permissive use can ripen into adverse use when the use continues openly for seven years after the landowner or his predecessors know the use is adverse or if they, under the circumstances, are presumed to know the use is adverse. Here, the appellate court held that it was not erroneous for the circuit court to rely on the length of time of use, maintenance performed, improvements made, and even the existence of a gate and locks in concluding the appellants’ use was as a matter of right. Thus, the circuit court did not err in granting the prescriptive easement. [**scope of use**] When an easement is acquired by prescription, the nature of the use cannot be changed to render it more burdensome to the servient estate than it was during the prescriptive period. A determination of the scope of a prescriptive easement should focus on what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run. Here, significant testimony established that the appellants and their predecessors used their properties for farming, ranching, hunting, fishing, and other types of recreation. The circuit court was careful to limit the scope of the use of the easement to the historical use of the dominant tenements. Thus, the appellate court held that the circuit court did not err in limiting the easement. (Magness, G.; 66GCV-21-171; 4-17-24; Murphy, M.)

*Corbitt v. Pulaski County Circuit Court*, 2024 Ark. 65 [**statutory interpretation**] The Arkansas Supreme Court held that attorneys, as officers of the court, are authorized by statute to possess

handguns in courthouses under Ark. Code Ann. § 5-73-122. (Welch, M.; 60CV-22-6976; 4-18-24; Womack, S.)

## CRIMINAL

*Davis v. State*, 2024 Ark. 49 [**motion for a new trial; juror misconduct**] A jury convicted appellant of capital murder. On appeal, appellant argued that the circuit court erred in denying appellant's motion for a new trial based on juror misconduct. The party moving for a new trial bears the burden of proving, first, that juror misconduct occurred, and second, that there was a reasonable probability of resulting prejudice. Here, the issue was whether a juror engaged in juror misconduct by failing to disclose that her sister was employed by appellant's defense attorney, and if so, whether there was a reasonable probability of resulting prejudice. During voir dire, the juror was questioned about her familiarity with the attorneys involved in appellant's case, but a review of the record demonstrates that she was not at any point asked whether any of her relatives were employed by the attorneys. The juror indicated that she was not familiar with the attorneys involved in appellant's case, including the defendant's attorney. There was no evidence that the juror and appellant's attorney knew each other, and appellant failed to provide any evidence that the juror was dishonest in the jury selection process or engaged in any misconduct. The appellant's attorney also testified that he did not know the juror. Further, the juror did not inform her sister of her service as a juror in appellant's trial until after the trial had concluded, and the extent of their conversation was limited to the fact that she had served on the jury. Based on the record, appellant failed to demonstrate that the juror engaged in juror misconduct. Thus, the circuit court did not abuse its discretion by denying appellant's motion for a new trial. (Wyatt, R.; 35CR-20-351; 4-11-24; Baker, K.)

*Kilcrease v. State*, 2024 Ark. App. 252 [**hearsay**] Following a jury trial, appellant was convicted of several charges including criminal mischief in the first degree. On appeal, appellant appealed only one of the criminal mischief convictions, arguing that the circuit court abused its discretion in admitting hearsay evidence. A person commits criminal mischief in the first degree if he or she purposely and without legal justification destroys or causes damage to any property of another person. This offense is a Class C felony if the amount of actual damage is more than \$5,000 but less than \$25,000. A repair estimate offered to prove the truth of the matter asserted therein, namely, the remediation costs, is hearsay. A document is admissible under the business-records exception if it is (1) a record or other compilation; (2) of acts or events; (3) made at or near the time the act or event occurred; (4) by a person with knowledge or from information transmitted by a person with knowledge; (5) kept in the course of a regularly conducted business; (6) that has a regular practice of recording such information; (7) all as shown by the testimony of the custodian or other qualified witness. Here, the charges arose after appellant stole a truck from a repair shop and rammed it into two other vehicles on the highway. The criminal mischief charge at issue on appeal alleged that appellant caused damage to the vehicle of one of the victims. The victim testified that appellant hit his vehicle three times, and the estimate to repair his vehicle was about

\$9,400. The victim also testified that the State’s exhibit 1 was a document he received from the body shop and the insurance company. Appellant objected to the document as hearsay. The circuit court overruled the objection and admitted the exhibit. The State argued that the document here was an invoice prepared by the repair shop and that the victim dealt directly with the repair shop and testified that the invoice reflected the actual cost of repairs. However, the twelve-page document stated that it was a “Supplement of Record 1 with Summary,” and included the word “estimate” at least eight times. Furthermore, the document appeared to have been prepared by the victim’s insurance company rather than the repair shop. It directed the victim to “[p]lease present a copy of this estimate to a repair facility of your choice,” and stated that “[t]his is not an authorization to repair. Failing to present this estimate to the repairing garage before repair may result in additional expenses to you.” The appellate court held that the victim was not a qualified witness to support its admission under the business records exception. Thus, the victim’s testimony regarding the amount of actual damage was inadmissible hearsay. (Puryear, C.; 02CR-22-202; 4-17-24; Klappenbach, N.)

*Chambers v. State*, 2024 Ark. App. 257 [**trafficking fentanyl; choice of evils defense**] A jury convicted appellant of one count of trafficking fentanyl. On appeal, appellant argued the circuit court erred in refusing to give the jury her proffered instruction regarding the “choice of evils” defense. When the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense. There is no error, however, in refusing to give a jury instruction if there is no basis in the evidence to support the giving of the instruction. In *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004), the appellate court listed illustrations of situations that might permit recourse to this defense, including (1) the destruction of buildings or other structures to keep fire from spreading; (2) breaking levees to prevent flooding a city, while in the process causing flooding of an individual’s property; and (3) temporary appropriation of another’s vehicle to remove a seriously injured person to a hospital. Where reasonable, legal alternatives to the charged conduct can be pursued or the necessity has ended, the “choice of evils” defense is not available. Here, appellant claimed that there was evidence that she received multiple threats from her friend’s boyfriend prior to selling the fentanyl pills and that she sold the fentanyl to avoid any further threats from him. The State noted that there was no evidence that the friend’s boyfriend was nearby when appellant sold the fentanyl, and she did not mention being afraid of him during her post-arrest interview. Even accepting the appellant’s claims as true, it still failed to support the existence of a “choice of evils” defense. The last threat conveyed to appellant by her friend’s boyfriend occurred an indeterminate period of time before she sold the fentanyl. There was no imminent public or private injury to be avoided by selling the fentanyl. Because there was no basis in the evidence for giving the instruction, the circuit court did not err in refusing to instruct the jury on appellant’s “choice of evils” defense. (Medlock, M.; 17CR-22-840; 4-17-24; Thyer, C.)

*Echols v. State*, 2024 Ark. 61 [**Act 1780**] The circuit court denied appellant’s Act 1780 of 2001 petition for lack of jurisdiction on the basis that appellant was not in State custody. On appeal,

appellant argued that the circuit court erred by misinterpreting Act 1780, which identifies who is jurisdictionally entitled to make a motion for relief under that Act. Act 1780 provides that a writ of habeas corpus may be issued on the basis of new scientific evidence proving a person is actually innocent of the offense for which he was convicted. When reviewing issues of statutory interpretation, the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. When the language is plain and unambiguous, there is no need to resort to rules of statutory construction, and the analysis does not need to go any further. The Arkansas Supreme Court held that the plain language sections of Ark. Code Ann. § 16-112-201 and -202 unambiguously permit “a person convicted of a crime” to petition for additional DNA testing to demonstrate the person’s actual innocence pursuant to Act 1780. The language imposes no requirement that a petitioner must be in State custody to seek relief pursuant to Act 1780. The circuit court and the State employed reasoning that hinged on the legislative history and purpose underlying Act 1780 and common-law interpretations of traditional habeas relief; however, resorting to those tools of statutory construction was unnecessary in the present case given the clear language of Act 1780. Appellant had been convicted of a crime, and as a result, he was entitled to seek relief pursuant to Act 1780. Thus, the circuit court misinterpreted the plain language of Act 1780 and, as a result, erred when it dismissed appellant’s Act 1780 petition on the grounds that he was not in State custody at the time it was filed. (Alexander, T.; 18CR-93-516; 4-18-24; Baker, K.)

*Taylor v. State*, 2024 Ark. 68 [rules of professional conduct; government attorney] The circuit court disqualified the defense counsel’s entire firm because one of its attorneys had worked as a deputy prosecutor on a matter involving the alleged victim and the defendant. The defendant filed an interlocutory appeal from the disqualification. Under the Arkansas Rules of Professional Conduct, a lawyer cannot represent a client in a matter if the lawyer already participated in the matter personally and substantially as a government employee. The government can, however, waive this disqualification by giving written consent. This disqualification is imputed to the attorney’s entire firm unless the attorney has been timely screened and prompt notice given to the government agency. The term “personal and substantial participation” came from the Ethics in Government Act of 1978, 18 U.S.C. § 207, which defines it “as participation ‘through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action. Here, the appellant’s attorney and their law firm entered an appearance on appellant’s behalf in a case in Pulaski County. Almost a year and a half later, a new attorney joined the firm and began assisting with appellant’s defense. The state moved to disqualify the new attorney and the law firm. The new attorney in their capacity as deputy prosecutor in Lonoke County interviewed the victim about similar allegations she had against the defendant in Lonoke County. The circuit court in Pulaski County concluded the attorney’s participation had been on the same matter and substantial and the firm had not timely screened the attorney or given prompt notice. The “matter” can continue in another form, and it is relevant whether the matter involves the same or related parties. The Arkansas Supreme Court held that the circuit court did not abuse its discretion when it concluded the Lonoke County investigation and the Pulaski County prosecution were the same

“matter” because the conduct involved the same defendant, the same victim, and the same general conduct. (Johnson, L.; 60CR-21-4157; 4-25-24; Wood, R.)

## PROBATE

*Fernandez v. Serrano*, 2024 Ark. App. 280 [**adoption; best interest**] The circuit court denied appellant’s petition to adopt his thirteen-year-old stepdaughter. On appeal, appellants, the child’s stepfather, and biological mother, argued that the circuit court erred in finding that adoption was not in the best interest of the child. Arkansas Code Annotated section 9-9-207(a)(2)(i) & (ii) provides that consent to adoption is not required of a parent of a child 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 or to provide for the care and support of the child as required by law or judicial decree. However, the mere fact that a parent has forfeited the right to have his consent to an adoption required does not mean that the adoption must be granted—the court must further find by clear and convincing evidence that the adoption is in the best interest of the child. Here, the appellee is the child’s biological father and contested the adoption. The circuit court found that appellee’s consent to the adoption was not required because he had failed without justifiable cause to communicate with the child for over a year. However, the circuit court found that the adoption was not in the child’s best interest. While the findings of the circuit court may have been limited to its conclusion that it did not find the mother’s rape allegations against appellee credible, disclosing those allegations to the child negatively affected the child’s opinion of appellee, and that denial of the adoption would not change the stepfather’s relationship with the child. When opening the entire case for review, the appellate court held that there was ample evidence presented that could have additionally supported the finding that denial of the adoption was in the child’s best interest. The record demonstrated that the mother thwarted appellee’s relationship with the child from the outset; the mother did not even tell appellee about the child for the first two years of the child’s life. The appellee regularly paid child support and carried insurance on the child. Appellee’s testimony established that he was willing to accept any form of a relationship with the child that might be tenable. Based on the record, the appellate court held that the circuit court did not err in finding that the adoption was not in the child’s best interest. (Scott, J.; 04DR-21-1847; 4-24-24; Murphy, M.)

*Smith v. Smith (In re Est. of Smith)*, 2024 Ark. App. 275 [**law-of-the-case doctrine**] The circuit court granted summary judgment in favor of appellees, concluding that relitigation of an issue was barred by the doctrines of law of the case and res judicata. On appeal, appellants argued that the circuit court erred by granting summary judgment. Neither new proof nor new defenses may be raised after remand when they are inconsistent with the appellate court’s first opinion and mandate. To allow such to occur undermines the finality of the appellate court’s decision and denies closure on matters litigated. The “mandate rule” is a “sub-species” of the law-of-the-case doctrine, under which the appellate court’s decision establishes the law of the case for the trial court upon remand and for the appellate court itself upon subsequent review and is conclusive of every question of

law and fact previously decided in the former appeal, and also of those that could have been raised and decided in the first appeal but were not presented. Law of the case also prevents consideration of arguments that could have been made at trial but were not presented. Additionally, when there is no cross-appeal, the order from which a cross-appeal is not taken becomes the law of the case. The remedy of a constructive trust comes into play only after a person has acquired legal title to a property, albeit under circumstances that result in a finding that the beneficial interest should not go with the legal title. Here, in the first appeal of this case, the appellate court affirmed the circuit court's order setting aside a will but reversed and remanded its order imposing a constructive trust. On remand, appellants, for the first time, contested the legal effect of a deed and survivorship agreement as to title in the property. Appellants did not challenge the validity of the title in the appellees. Instead, they challenged the manner in which that title had been acquired by electing to pursue the remedy of a constructive trust. Appellants could have challenged the validity of the title as an alternative theory at the same time they sought a constructive trust. In electing to pursue only the remedy of constructive trust, appellants assumed that the deed and survivorship agreement at issue vested legal title solely in the appellees upon their mother's death, leaving the estate with no interest in the property. The circuit court found that appellees held legal title as joint tenants with survivorship rights, and appellants did not challenge that finding. Accordingly, the appellate court held that the circuit court did not err by ruling that the belated deed challenge was barred under the law-of-the-case doctrine. Therefore, the circuit court did not err in granting summary judgment in favor of appellees. (Smith, V.; 41PR-17-1; 4-24-24; Gruber, R.)

## DOMESTIC RELATIONS

*Reynolds v. Reynolds*, 2024 Ark. App. 229 [**modification of custody; material change in circumstances**] The circuit court denied appellant's petition for modification of custody of his children. On appeal, appellant argued that the circuit court erred in finding that he failed to prove a material change in circumstances to warrant a modification of custody. A party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts were unknown to the court when the decree was entered. If that threshold requirement is met, the court must then determine who should have custody with the sole consideration being the best interest of the child. If the threshold requirement of a material change in circumstances is not met, there is no need for a best-interest finding. Custody awards are not made or changed to punish, reward, or gratify the desires of either parent. A violation of the circuit court's previous orders does not compel a change in custody. Even when a custodial parent willfully violates court orders, modification is not necessarily warranted because a court's contempt powers should be used prior to the more drastic measure of changing custody. Here, the circuit court considered all of appellant's allegations that he claimed supported a material change in circumstances, which included that appellee was violating the divorce decree's prohibition of overnight guests of a romantic nature when the children are present and complaints regarding telephone visitation and school and medical information. The appellate court noted that the circumstances of appellant's petition involved similar allegations to another petition that was denied two months prior to the petition at issue here. Additionally, since the entry of the last

custody order, appellee's home, job, and the children's schools remained the same. The circuit court found that both the appellee and appellant were good parents. Although the circuit court made a credibility determination against appellee, it was specific to her testimony about her relationship with her ex-boyfriend, and the court found her in contempt for violating the order prohibiting overnight guests of a romantic nature. Based upon the circuit court's findings and the court record, the appellate court held that the circuit court did not err in finding that there was no material change in circumstances. (Hannah, C.; 59SDR-17-41; 4-3-24; Wood, W.)

*Moore v. Moore*, 2024 Ark. App. 230 [**motion to modify child support**] The circuit court denied appellant's motion to modify child support. On appeal, appellant argued that the circuit court erred in calculating child support. A party seeking modification of a child-support order has the burden of showing a material change in circumstances. In determining whether there has been a change in circumstances warranting an adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, ability to meet current and future obligations, and the child-support chart. Here, appellant's motion to modify child support did not allege that there had been a material change in circumstances. Appellant's argument appeared to be directed more toward the considerations for making an initial child-support award, and appellant did not appeal from the divorce decree after the initial support was set. Thus, the circuit court did not err in denying the motion to modify child support. (Farmer, J.; 63DR-21-447; 4-3-24; Hixson, K.)

*White v. Merrigan*, 2024 Ark. App. 265 [**child support; alimony**] The circuit court entered an order dismissing appellant's motion for modification of support and alimony. On appeal, appellant argued that the circuit court erred in failing to modify both obligations because his income decreased and there was no longer a need. [**child support**] Arkansas Code Annotated § 9-14-107(a)(1) dictates that a change in the payor's gross income in an amount equal to or more than 20 percent or more than one hundred dollars a month shall constitute a material change of circumstances sufficient to petition the court for modification of child support in accordance with the family-support chart after appropriate deductions. In determining whether there has been a change in circumstances warranting a modification of support, the circuit court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. Here, appellant's basis for modifying child support was that his income had decreased by more than 20 percent. At trial, the exact percentage amount of appellant's decreased income was disputed with a range of 28 to 15 percent reduction. Additionally, change in income and financial conditions of the parties was the only factor on which evidence was presented. There was no change in custody, appellant was still contributing to the children's college fund, and he did not state that he was unable to meet his current and future obligations or that he had significant debt. Instead, appellant took a job that required him to work fewer hours. The appellate court found that overall, the circuit court's ultimate decision to maintain the same level of support was well within its informed

discretion. There is no requirement or directive that the circuit court must modify an existing child-support obligation, even where a change in the payor's income meets or even exceeds, the threshold requirement of the statute. Thus, the circuit court did not err in denying appellant's motion for modification of child support. **[alimony]** The primary factors to be considered in making or changing an award of alimony are the need of one spouse and the ability of the other spouse to pay. Here, the evidence established that appellee's income increased by approximately 6 percent, and her expenses had remained the same. The parties contracted the amount of alimony less than three years ago, and it will terminate in three more years. Appellant was still capable of meeting his obligations, even with his reduced income. The appellate court held that based on the evidence and their standard of review, the circuit court did not err in denying the appellant's motion for modification of alimony. (Duncan, X.; 04DR-20-595; 4-17-24; Murphy, M.)

*Zihala v. Staley*, 2024 Ark. App. 269 **[joint custody; relocation]** The circuit court entered a final divorce decree. On appeal, appellant argued that the circuit court erred in finding that joint physical custody was in their child's best interest and denying her request to relocate. **[joint custody]** In an action concerning an original custody determination, there is a rebuttable presumption that joint custody is in the child's best interest, but this presumption may be rebutted if the court finds by clear and convincing evidence that joint custody is not in the child's best interest. Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. Here, appellant's status as the child's primary caretaker during the marriage and pursuant to the temporary order was not determinative, although relevant. Appellant did not allege that being in appellee's custody was unsafe or contrary to the child's best interest. Thus, the circuit court did not err in finding that the joint-custody presumption had not been rebutted and awarding the parties joint custody of the child. **[relocation]** 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, 532 S.W.3d 58 the Arkansas Supreme Court clarified the *Hollandsworth* presumption should be applied 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, it appeared that the circuit court's primary basis for denying the motion was the fact that a final custody determination had not been entered, and without that determination, it was premature to decide a relocation issue. In effect, the court would not know which standard to apply until the parties' custody arrangement had been decided. Additionally, it was not in the child's best interest to disrupt his life and move him away from half of his family support system. Thus, the circuit court did not err in denying the motion to relocate. (Tucker, C.; 60DR-21-349; 4-24-24; Harrison, B.)

## JUVENILE

*Davis v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 240 [**appeals**] Probable cause orders are not appealable. [**adjudication; Munchausen Syndrome by proxy (MBP)**] Witnesses whom the circuit court deemed credible testified that Appellants' behavior constituted both current and future harm to the children: one testified that not only could invasive medical procedures occur with MBP, but significant emotional harm can occur because the children—like the ones in this case—take on the role of a sick child, which can impair their normal day-to-day lives. Witness also stated that Appellant mother's behavior was escalating in that she was bringing the juveniles to the hospital more frequently for unnecessary medical care; she was attempting to have a gastro tube surgically placed in one child's stomach for alleged feeding issues; and even after the children were placed in Appellee's custody, Appellant mother was still attempting to have additional invasive swallowing tests done despite normal results in all prior testing. Two witnesses also testified that Appellant mother requested a wheelchair for one child despite that child's denial of mobility issues. Another testified Appellant mother was providing the children with dextrose intravenously, which would make the children hypoglycemic if they did not already have the condition. There was credible evidence that the Appellant mother made multiple false claims concerning her child's supposed illnesses; these claims led to a significant amount of unnecessary medical treatment; the child's health improved significantly when removed from the Appellants' care; and the Appellant father knew about the Appellant mother's actions but stood by her throughout the case and took no action to protect his children; a fit parent would not exaggerate or misrepresent symptoms to medical providers, nor would a fit parent acquiesce to another caregiver's false reporting. Appellate court would not reweigh the circuit court's credibility determinations and assessment of the evidence. Additionally, there is no requirement under the Juvenile Code that a parent be officially diagnosed with MBP to meet the definition—all that the statute requires is that the diagnosis be reported and confirmed by a medical facility or medical personnel, which was done in this case. No error. (Smith, T.; CV-23-598; 4-10-24; Gruber, R.)

*Hill v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 247 [**reopening closed DN case**] According to the Juvenile Code, a court loses jurisdiction in a dependency-neglect case when the child is no longer dependent-neglected, most often occurring when the child achieves permanency through custody, guardianship, or adoption, and the case is closed. The Juvenile Code does not allow for continued jurisdiction after the child is no longer dependent-neglected, and the Code contains no provision that would permit a court to reopen a closed case. Here, Appellant filed a motion to reopen the case for reconsideration three (3) months after the case was closed upon his children's adoption and eleven (11) months after his parental rights were terminated. He then filed a motion to reconsider the termination fourteen (14) months after the termination order had been entered. There was no error in the trial court determining that it did not have the authority to open a closed dependency-neglect case when the children were no longer dependent-neglected and had achieved permanency. (Cooper, T.; CV-23-737; 4-17-24; Harrison, B.)

*Boykins v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 273 [**guardianship factors**] The list found at Ark. Code Ann. § 28-65-204(b) is not a list of preferences to be followed by a court, but is instead a list of factors to be considered by the court when deciding on a guardian. [**best interest; guardianship**] In considering the best interest of the children, a court is certainly allowed to consider how long the children had been in foster care and how much longer another potential guardianship would take to complete. Here, Appellant had waited until the guardianship hearing to request that her children be placed with their uncle, Appellant's brother. [**guardianship considerations**] The circuit court found the testimony of the guardian and the children to be credible and made the appropriate considerations in making its finding, which was to promote permanency and stability for the children. Furthermore, the evidence supported the circuit court's finding. Both children had a significant relationship with the guardian; both expressed a desire to remain in the placement of the guardian; the children testified that they felt safe in the guardian's home; the guardian was found to be appropriate; and the guardianship would allow both children to remain at their current schools and to continue to participate in their current therapies. No error was found. (Byrd Manning, T.; CV-23-730; 4-24-24; Gladwin, R.)

*Garza v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 276 [**TPR-best interest; potential harm**] Appellant father had not demonstrated stability or a reasonable hope for reunification due to his incarceration; his potential release date was a few months away, but he had not obtained appropriate housing or employment. There was no error in the potential-harm finding based on incarceration because the lack of stable housing and employment due to incarceration were sufficient to prove potential harm. Additionally, the record was silent as to what kind of bond he had with the child; he chose to abscond for over a year instead of fulfill parental obligations, he refused a drug screen at the beginning of the case; and when arrested for absconding, he was discovered to be in possession of controlled substances. [**TPR-best interest; potential harm**] Appellant mother attempted to make a least-restrictive-placement argument, yet there was no appropriate or approved relative in the picture. Where relatives have not been approved for placement and children remained in foster care, the existence of potential relatives is not a basis to reverse a termination decision. Because there were no approved relative-placement options available at the time of the termination hearing, and because there was no reasonable hope for reunification within a reasonable time frame from the child's perspective, the court's termination decision as to mother was not in error. (Weeks, A.; CV-23-836; 4-24-24; Thyer, C.)

*Rice v. Ark. Dep't of Human Servs.*, 2024 Ark. App. 278 [**case record for TPR hearing**] Appellee does not have an affirmative duty to reprove factual findings made by the circuit court in earlier orders. Arkansas Code Annotated § 9-27-341(a)(4) specifically requires a court to "rely upon the record of the parent's compliance in the entire dependency-neglect case and evidence presented at the termination hearing in making its decision on whether it is in the best interest of the juvenile to terminate parental rights." The record in the "entire dependency-neglect case" as contemplated necessarily includes the previous orders of the court contained in the circuit court's record. Therefore, Appellant father's argument that the circuit court failed to take judicial notice of the

previous orders in the record and that Appellee failed to introduce said orders has no merit because they were part of this dependency-neglect case. **[TPR; aggravated circumstances; little likelihood]** This case had been open for approximately twenty-two months, and Appellant father still had failed to address and resolve his substance-abuse issues. In fact, he had new drug charges pending against him. Although he claimed at the termination hearing that he intended to seek inpatient rehabilitation for the first time and had obtained a grant to pay for it, the circuit court was not required to believe his self-serving testimony that he would follow through and achieve stability. Further, Appellee testified that there were no additional services that could be offered that would result in successful reunification. As such, the appellate court could not say that the circuit court's finding that there was little likelihood that services would result in successful reunification was clearly erroneous. **[TPR; ADA reasonable accommodations]** Appellant father argued that there was insufficient evidence for the circuit court to find that Appellee "had made reasonable or meaningful efforts to reunify the family," explaining that his own testimony showed that he lacked an understanding of what services had been provided to him and that Appellee failed to offer him services or accommodate his illiteracy in accordance with the Americans with Disabilities Act of 1990 (ADA) or provide him with inpatient drug rehabilitation. However, Appellant father did not raise any argument at the termination hearing regarding Appellee's failure to provide him reasonable accommodations or even state that he had requested ADA accommodations. Further, the requirement that Appellee make reasonable accommodations for a disability is not an overarching mandate applicable to all grounds for termination but is instead one of the elements contained only in the other-subsequent-factors ground. Similarly, even though father testified that he did not know of any services Appellee could provide him other than inpatient drug rehabilitation, a finding of aggravated circumstances does not require proof that meaningful services toward reunification were provided. **[TPR - best interest; potential harm]** Appellants failed to comply with the case plan and court orders throughout the case. Further, the circuit court heard testimony that the longest period of sobriety for either parent was only a month. Appellant mother's most recent hair-follicle test was positive for methamphetamine and amphetamine. Although she was allowed unsupervised visitation, Appellee had recently scaled back from the overnight unsupervised visitation that she had been receiving because of safety concerns. Appellant father had failed to maintain stable and appropriate housing and was living with a friend and sleeping on his couch at the time of the hearing. He failed to engage in drug treatment or even complete an assessment until the eleventh hour and continued to use drugs. Even though there was evidence that appellants were bonded with the children, the existence of a bond between the biological parent and child may not be sufficient to prevent termination of parental rights when weighed against other facts in the case. Even full compliance with the case plan is not determinative; the issue is whether the parent has become a stable, safe parent able to care for his or her child. Appellants' behaviors over the course of the entire case did not show sufficient stability to render the circuit court's finding that they posed a risk of potential harm to the children clearly erroneous. (Layton, D.; CV-23-785; 4-24-24; Hixson, K.)