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CIVIL

Heather Manor Care Ctr., Inc. v. Marshall, 2024 Ark. App. 596 **[arbitration clause; nursing home]** The circuit court denied appellant's motion to compel arbitration in a nursing home medical-negligence case. On appeal, appellant argued that the circuit court erred in finding that the Federal Arbitration Act (FAA) did not apply; that the appellee daughter signed the arbitration agreement in her individual capacity; and that the power of attorney executed by the appellee father was invalid. **[arbitration]** The FAA has an expansive interpretation in order to reach all transactions or contracts that fall within the broad scope of Congressional powers relating to interstate commerce. Although no Arkansas case has addressed the specific question presented in this appeal, nearly all jurisdictions that have considered whether a nursing home arbitration agreement "involves interstate commerce" have concluded that it does. Accordingly, the appellate court held that the FAA applied to the nursing home contract between the parties. **[individual capacity]** When a third party signs an arbitration agreement on behalf of another the court must determine whether the third party was "clothed with authority" to bind the other person to arbitration. Not only must the agent agree to act on the principal's behalf and subject to his or her control, but the principal must also indicate that the agent is to act for him or her. Here, appellee marked a check in a space on the arbitration agreement indicating that she was acting under the legal authority of a power of attorney and that a copy of that power of attorney had been provided

to the facility. In cases in which the appellate court has affirmed the denial of a motion to compel arbitration, that box was not checked. There was thus evidence that she was signing the agreements in a representative capacity, not in her individual capacity. The circuit court therefore erred in determining that appellee signed the admission and arbitration agreements in her individual capacity. **[validity of power of attorney]** Arkansas Code Annotated § 28-68-105 provides that a power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney document is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments. Moreover, a document signed by a mark is just as effective as if signed by a written signature, absent an affirmative showing that it was not signed. Here, the power of attorney, which was signed with an "X," bears the signature of two witnesses and the seal of a notary public. The signature of the notary public suffices for authentication purposes. Thus, the appellate court found that the circuit court erred in finding that the power of attorney was not properly executed. (Culpepper, D.; 29CV-20-27; 12-4-24; Thyer, C.)

J&C Motors of Morrilton, LLC v. Clagett, 2024 Ark. App. 622 **[electronic filing; timely; default judgment]** The circuit court entered an order striking appellant's answer to appellee's cross-claim and then entered default judgment on the cross-claim. On appeal, appellant argued that the circuit court erred because the appellant's answer to the cross-claim, although it contained a technical error, was timely electronically filed. The appellant also argued the circuit clerk improperly rejected the answer and filed it on the following day when the technical error was corrected. Administrative Order No. 21(6)(b) provides that electronic filing of documents does not change the rules and practice for the acceptance or rejection of documents presented to the clerk for filing. Rule 5(c) of the Arkansas Rules of Civil Procedure sets forth the considerations for filing pleadings, and subsection (c)(1) provides that the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form. The interplay between Administrative Order No. 21 and Rule 5 dictates that an electronic document shall be considered filed in the circuit court upon transmission to the electronic filing system, and the clerk shall not refuse to accept a document for filing solely because it is not in proper form. Here, at 4:44 pm on the last day to file an answer to the cross-claim, appellant transmitted its answer to the cross-claim through eFlex. However, the caption of the pleading contained an incorrect case number. The following morning, appellant received a rejection notice. The appellant then retransmitted its answer, which was file-stamped by the clerk as being electronically filed at 8:49 am. The facts show that appellant timely transmitted its answer, but the answer was not in proper form because, although filed in the proper case and correct in all other respects, it contained an incorrect case name in the caption. Because Rule 5(c)(1) expressly provides that the clerk shall not refuse to accept for filing a document that is not presented in the proper form, the appellate court concluded that appellant's answer should have been deemed filed on 4:44 p.m. on the last day to file, which was timely. Because appellant's answer was timely filed, the appellate court held that the circuit court abused its discretion in striking the answer and in entering a default judgment on the appellee's cross-claim. (Weaver S.; 23CV-22-1318; 12-11-24)

Kusper v. Guisbiers, 2024 Ark. App. 625 **[default judgment; motion to strike answer and counterclaim]** The circuit court entered an order striking appellant's answer and counterclaim and granted appellee's motion for default judgment. On appeal, appellant argued that the circuit court erred in granting default judgment and striking his answer and counterclaim. **[default judgment]** Rule 55 of the Arkansas Rules of Civil Procedure provides, that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court. The Reporter's Notes to the rule state that the words "otherwise defend" refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. Default judgments are not favored, and they should be avoided when possible. Here, appellant moved to strike a complaint and to lift and dismiss an injunction after the circuit court entered an ex parte order granting a temporary injunction against the appellant. An order was entered on August 8 denying appellant motion to strike and dismiss. A three-day trial was set for the following April. However, appellee moved for default judgment, arguing that appellant had ten days from the entry of the August 8 order to file an answer, and he had not done so. The appellate court found that appellant defended when he filed his motion to dismiss and motion to strike. He amended and refiled the motion when appellee amended his complaint. Appellant included exhibits comprising over a hundred pages with his brief in support and appeared before the court and made arguments concerning the same. He also submitted a proposed order. Thus, the appellate court held that appellant did not fail to plead or otherwise defend, and it was erroneous to enter default judgment at that point in the litigation. **[amended answer and counterclaim]** Pursuant to Arkansas Rule of Civil Procedure 12(f), when a party fails to timely file a responsive pleading, the circuit court "may" strike the pleading. Here, appellant filed an "amended answer" and a counterclaim after appellee moved for default judgment, and appellee moved to strike it. In light of the allegations in the complaint and the motion to dismiss, it is clear that the parties were aware of the claims and defenses and could proceed with the case. The trial was scheduled, and nothing prohibited the parties from moving toward that goal. The appellate court explained that punishing appellant for not filing a formal document titled "answer" at this stage under these circumstances places form over substance. Furthermore, with the exception of Rule 12(h)(1) defenses, a party may amend his pleadings at any time without leave of the court, including asserting counterclaims. Thus, the circuit court erred in striking the entirety of the answer and counterclaim without having identified any prejudice or without prejudice being readily apparent. (Houston, B.; 63CV-22-499; 12-11-24; Murphy, M.)

CRIMINAL

Sawyers v. State, 2024 Ark. App. 590 **[jury instruction; motion for mistrial]** Appellant was convicted by a jury of rape and second-degree sexual assault. On appeal, appellant argued that the circuit court erred in denying his proffered jury instruction and denying his motions for mistrial.

[jury instruction] 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; however, there is no error in refusing to give a jury instruction when there is no basis in the evidence to support the giving of the instruction. Here, appellant argued that the circuit court erred in denying an instruction because there was testimony that he could have been sleeping during the offenses. Although the victim acknowledged using the term "sleep moving" in her interview, the victim testified she was sure appellant was awake during the offenses, and she specifically described separate actions he took and things he said to her. Any assertion that appellant was asleep and did not commit a voluntary act was based on his own self-serving statements and was contradicted by the victim's testimony. As such, the circuit court did not abuse its discretion by refusing the proffered jury instruction. **[motion for mistrial]** A mistrial is a drastic remedy and should be declared only when there is an error so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. Here, appellant requested a mistrial based on the court's response to his request to approach near the end of the State's closing argument. When appellant's counsel asked, "[M]ay we approach?" the court responded, "No. Sit down." Here, the circuit court admonished the jury not to hold its frustrated tone against appellant or his counsel. The appellate court held that the circuit court did not abuse its discretion in denying the motion for mistrial. (Casady, K.; 63CR-22-824; 12-4-24; Klappenbach, N.)

Rolfe v. State, 2024 Ark. App. 603 **[motion to transfer to juvenile division]** The circuit court denied appellant's motion to transfer his case to the juvenile division of the circuit court. On appeal, appellant argued that the circuit court's order denying the transfer motion was deficient with respect to its factual findings. On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of the circuit court having jurisdiction. The moving party bears the burden of proving that the case should be transferred to the juvenile division of the circuit court. The circuit court shall order the case transferred to another division of the circuit court only upon a finding by clear and convincing evidence that the case should be transferred. A circuit court shall make written findings on all of the factors set forth in Ark. Code Ann. § 9-27-318(g); however, there is no requirement that proof be introduced against the juvenile on each factor, and the circuit court is not obligated to give equal weight to each of these factors in determining whether a case should be transferred. The ninth factor that must be considered is "written reports and other materials relating to the juvenile's mental, physical, educational, and social history." Here, appellant sat for a five-hour interview with a psychologist, which culminated in an extensive seventeen-page report on her assessment of appellant's "present level of social, emotional, academic, cognitive, and attentional functioning." While the trial court did refer to the psychologist's interview with appellant, it made no mention of the report. Because the trial court did not make specific findings with respect to the ninth factor despite evidence in the record, the circuit court must make further findings. The appellate court also noted that while the statute does not require that the findings be made in chronological order, it may be better practice to list the factors sequentially and make

findings on each one in turn, before moving to the next one. (Morledge, C.; 62CR-23-51; 12-11-24; Virden, B.)

Nowlin v. State, 2024 Ark. App. 607 **[search warrant affidavit]** Appellant was convicted by a jury on charges of negligent homicide while intoxicated and driving while intoxicated. On appeal, appellant argued that the search-warrant affidavit incorrectly listed a Louisiana criminal statute, which invalidated it. Probable cause must be established by an affidavit or recorded testimony showing that the things subject to seizure will be found in a particular place. The affidavit, however, does not have to be completely without inaccuracy. As long as the inaccuracies are relatively minor when viewed in the context of the totality of the circumstances the appellate court will uphold the validity of a search warrant. Here, a Louisiana judge granted a search warrant to obtain appellant's medical records after he was airlifted to a Louisiana hospital following a crash in Arkansas. The search warrant affidavit referenced Louisiana Statute Annotated § 14:32.1 instead of Arkansas Code Annotated § 5-10-105. The appellate court found this was a minor error that did not affect the validity of the warrant. The affidavit clearly stated appellant was speeding when he caused a fatal accident in Arkansas, and that he was subsequently transported to a hospital in Louisiana. It explained that witnesses observed that appellant smelled and appeared intoxicated after the accident. The affidavit, when viewed as a whole, showed there was probable cause to believe the Louisiana hospital possessed evidence concerning a fatal accident the appellant caused in Arkansas while intoxicated, even though it incorrectly listed the Louisiana statute. Furthermore, the elements of the offense for vehicular homicide in Louisiana are similar to those for negligent homicide in Arkansas. Accordingly, the appellate court held that the minor discrepancy in the search warrant affidavit did not render the warrant invalid. The Louisiana judge who signed the warrant was not misled by the facts constituting probable cause in the affidavit. Thus, the minor discrepancy in the search warrant affidavit did not render the warrant invalid. (Chesshir, B.; 41CR-21-136; 12-11-24; Gladwin, R.)

Rodgers v. Arkansas Parole Board, 2024 Ark. 176 **[violent felony offense; parole eligibility]** The circuit court entered an order denying appellant's petition for declaratory judgment, injunctive relief, and mandamus relief; denying his motion for judgment on the pleadings; and granting the cross motion for judgment on the pleadings filed by appellees. On appeal, appellant argued that the circuit court erred by finding that Act 683 of 2023 did not apply to him. The amended version of Ark. Code Ann. § 16-93-609 provides in pertinent part that unless the sentencing order expressly designates that the defendant was sentenced under this section, "a violent felony offense or any felony sex offense" does not include residential burglary, § 5-39-201, committed before April 1, 2015, unless the defendant was sentenced on or after May 24, 2022. In order for residential burglary to constitute a prior "violent felony offense" for purposes of calculating parole eligibility, the plain language of Ark. Code Ann. § 16-93-609(b)(2)(B) requires that a defendant's sentencing order expressly designate that the defendant was sentenced under that section. Here, appellant's sentencing order contained a notation stating that "DEF WILL SERVE 100% ON AGG ROBBERY[.]" This notation did not constitute a direct citation to Ark. Code Ann. § 16-93-609,

nor did it clearly or unmistakably represent that appellant had been sentenced under that section. Act 683 was meant to dispel any further confusion by clarifying that a prior residential burglary would only be considered a "violent felony offense" within the meaning of Ark. Code Ann. § 16-93-609 if a defendant's sentencing order contained an express designation to that section. Therefore, appellant's residential burglary conviction was not a "violent felony offense" for purpose of calculating his parole eligibility. Thus, the circuit court erred in its interpretation of Ark. Code Ann. § 16-93-609(b)(2)(B). (Pierce, M.; 60CV-23-8667; 12-12-25; Baker, K.)

DOMESTIC

Cline v. Simpson, 2024 Ark. App. 611 **[modification of custody; contempt]** The circuit court entered an order finding that custody of the parties' two children should be modified to joint custody with a week-on-week-off visitation arrangement and found appellant in contempt. On appeal, appellant argued that the circuit court erred in finding a material change in circumstances to warrant a modification of custody and in finding her in contempt. **[material change]** To change custody, the circuit court must first determine that a material change in circumstances has occurred since the last order of custody. Determining whether there has been a change of circumstances requires a full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances at the time the change of custody is considered. Certain factors, when examined in the aggregate, may support a finding that a change in custody is warranted where each factor, if examined in isolation, would not. The 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. Here, the circuit court found from the evidence instances in which appellant manipulated the children by discouraging them from engaging in activities provided by their father and also referenced appellant's refusal to allow the boys to attend a significant event in the father's life and share it with him. The circuit court also cited appellant's failure to give advance notice to appellee so he could attend doctor's appointments as well as her failure to include him in decision-making regarding activities to make sure there were no conflicts with his visitation schedule. While the circuit court did not make a finding that appellant had alienated the children from appellee, it noted that if the behavior continued, it would result in alienation. After reviewing the circuit court's findings, the record as a whole, and the applicable case law, the appellate court concluded that the finding of a material change in circumstances was not clearly erroneous. **[contempt]** It is well settled that suspension of a sentence for contempt is, in effect, a complete remission of the contempt. If a suspended sentence is suspended conditionally for a specific period of time, the suspension amounts to a mere postponement rather than a remission. A circuit court cannot indefinitely suspend a contempt sentence but can conditionally postpone a sentence for a specified period of time. Here, the circuit court sentenced appellant to fourteen days in the Benton County Jail and ordered her to pay the appellee's attorney's fees, suspended on the condition she never again disregard the court's orders. The circuit court stated she would be permitted to purge herself of contempt by complying with all orders of the court and, by fostering the relationship between the children and their father and his household and supporting the court order. The appellate court

found this suspension was for an indefinite time period and amounted to a complete remission of the contempt and punishment. Thus, the point being moot, the decree was modified to set aside the sentence for contempt. (Duncan, X.; 04DR-20-289; 12-11-24; Barrett, S.)

Croley v. Fenech, 2024 Ark. App. 626 **[in loco parentis]** The circuit court entered an order awarding appellant's ex-boyfriend in loco parentis status and visitation to her child. On appeal, appellant argued the circuit court erred. A person who stands in loco parentis to a child puts himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to a legal adoption. This relationship involves more than a duty to aid and assist and more than a feeling of kindness, affection, or generosity. The doctrine of in loco parentis focuses on the relationship between the child and the person asserting that he or she stands in loco parentis. The focus should be on what, if any, bond has formed between the child and the nonparent. Here, the circuit court found that appellee had been viewed as, treated as, and acted as the child's only father since the date of her birth. The appellate court found that appellee's relationship developed from before the child's birth as a genuine parent-child relationship, and the facts here were more similar to those in same-sex-partnership cases, where the child grows up believing a person to be his or her parent, and the parent raises and interacts with that child as his or her own, versus the appellate court's stepparent cases in which the relationship with the child develops as a byproduct of a relationship with the child's biological parent. Having reviewed the record, the appellate court held that there was evidence to support the circuit court's finding that appellee stood in loco parentis to the child. Appellant did not argue that the finding was not in the child's best interest. There was testimony that the appellee loved the child, and she loved him; there was ample evidence that he assumed the obligations and responsibilities of having a child—he paid the child's every bill from the day she was born, working long hours to do it; and he is the only father the child had ever known. Thus, the circuit court did not err in finding the appellee stood in loco parentis and granting visitation with the child. (Bryan, B.; 72DR-23-182; 12-11-24; Murphy, M.)

JUVENILE

Robbins v. Ark. Dep't of Human Servs., 2024 Ark. App. 593 **[TPR-best interest; adoptability]** Even though there was no specific mention of "adoptability" in testimony at the termination hearing, the trial court had ample evidence bearing on adoptability when evidence was presented about the status of each child, their success in their current placements, and each child's positive characteristics. No magic words are required nor is adoptability a necessary finding. The statute merely requires that a court "consider" the likelihood that the children would be adopted, which this court clearly did as asserted in its written order and supported by the evidence received at the hearing. (Broadaway, M.; CV-24-533; 12-4-24; Klappenbach, N.)

Beanblossom v. Ark. Dep't of Human Servs., 2024 Ark. App. 605 **[TPR-best interest; potential harm]** There was no error in finding potential harm when supported by evidence of Appellant's inability to care for the child's daily needs and protect her from harm. Appellant could not provide a stable home for the child, even with family support, and she had not demonstrated the necessary awareness to protect the child from harm. Appellant had not obtained stable housing, employment, or a driver's license so that she could drive the child to her many therapy and medical appointments necessary for her developmental progress as a result of injuries caused by her father that led to the present case. Appellant still believed that the child's injuries were caused simply by the father's rough handling, and his anger had not been a problem; she also could not articulate what she would do differently to protect the child in the future. No clear error. (Warren, D.; CV-24-467; 12-11-24; Virden, B.)

Ealy v. Ark. Dep't of Human Servs., 2024 Ark. App. 610 **[TPR-subsequent factors]** Appellant's failure to demonstrate the skills she learned from parenting classes as provided in her case plan was sufficient evidence of a subsequent factor supporting termination of her parental rights. Despite Appellee working with her for two years, Appellant's poor judgment still resulted in safety concerns such that supervision of her parenting time was required. Furthermore, Appellant's mental instability, complete with multiple in-patient psychiatric stays, was a significant subsequent factor that persisted despite ongoing therapy. No clear error. (Hendricks, A.; CV-24-510; 12-11-24; Klappenbach, N.)

Jodi v. Ark. Dep't of Human Servs., 2024 Ark. App. 619 **[ADJ - risk to siblings]** Appellant challenged the adjudication of all of her children dependent-neglected based upon the sexual abuse of only the oldest child by Appellant's husband, the children's stepfather. The trial court specifically found that that child was chronically sexually abused for an extended period of time and that Appellant knew about the abuse and did not take reasonable steps to stop it. Moreover, the court found that Appellant refused to believe the child had been sexually abused despite her husband's confession. The court was concerned with Appellant's attitude and lack of empathy toward the child regarding the abuse and did not believe she could or would adequately protect the other children. Thus, the circuit court did not find the younger siblings dependent-neglected solely on the basis of the oldest child's status as dependent-neglected. No clear error. (Broadaway, M.; CV-24-410; 12-11-24; Wood, W.)

Ibarra v. Ark. Dep't of Human Servs., 2024 Ark. App. 628 **[TPR-subsequent factors]** There was no clear error in terminating Appellant's parental rights as throughout the entirety of the case, Appellant was never in full compliance with the case plan. Specifically, she did not ever have a stable and safe home of her own: Appellant lived at the child's paternal grandmother's house during most of the case, even when the father had relapsed and was still allowed around the house. While Appellant left the grandmother's house briefly for a transitional drug-treatment facility and then to an aunt's house, she ultimately returned to the grandmother's house about a month later.

Appellant never attained her own housing. In addition to the lack of stability, the house was unsafe because the father frequented it with illegal substances, and Appellant stated there was nothing she could have done to make him leave because he was "a grown man." This indifference supports the trial court's finding that Appellant was incapable of protecting the child or providing him a stable home. Moreover, while there is evidence that Appellant had employment, it was sporadic and inconsistent. **[TPR-best interest; potential harm]** The trial court believed Appellant still failed to understand how to protect the child and keep him safe from harm. Over a year into the case, Appellant did not have stable and safe housing, had not resolved her criminal charges, and did not demonstrate she was capable of taking proactive measures to ensure her child's ongoing safety, leading to the trial court finding this could lead to potential future harm. **[TPR-best interest; potential harm]** During the case, Appellant delivered another child who was not yet removed to foster care. When making its best-interest analysis, a circuit court must make an individual determination whether termination is in each child's best interest and cannot treat the children as an amorphous group in which the best interest of one will meet the interests of all. It was not reversible error for the trial court to give no weight to Appellant's relationship with the new baby in her custody when making its best-interest finding regarding this child. (Zimmerman, S.; CV-24-376; 12-11-24; Murphy, M.)

Cornier v. Ark. Dep't of Human Servs., 2024 Ark. App. 631 **[TPR-subsequent factors]** In contending that the evidence did not support termination under the subsequent-other-factors ground, Appellant stated it was a single lapse in judgment to leave the children in the car during the trial home placement; and as such was not enough to support termination. However, appellant was granted a trial home placement with the children and had that trial placement revoked once she left the children in the car unattended at Appellee's office. She was then granted supervised visitation, which was revoked due to her behavior at those visits: emotional outbursts and refusal to engage in redirection with Appellee. Appellant also violated the court's order of no contact with the children, at least twice, and was found in contempt and sent to jail for twelve hours for having contact with the children against court orders. Appellant's progress diminished as time progressed in this case. After the children were returned to foster care following the trial home placement, Appellant never advanced to having even unsupervised visitation before she lost visitation completely. **[TPR-best interest; potential harm]** The same evidence relied on to support statutory grounds may be used to support potential harm, as is the case here: Appellant seemed to go backward and eventually lost visitation completely with the children for failing to control her emotions and failing to follow the circuit court's orders. Additionally, Appellant testified at the termination hearing that although she had divorced the father in August 2023, they had recently begun living together again and had plans to stay together. The father had a history of domestic violence against Appellant, and it was this violence that caused a protective case to be opened on the family prior to the children's removal. Appellant also admitted at the hearing that she had been violent towards the father in the past. A history of domestic violence indicates potential harm. **[TPR-best interest; relative placement]** Appellant also argued that termination of her parental rights was not in the children's best interest because Appellee failed to follow the law and give relatives preferential consideration for placement of the children. However, there was no

testimony of any relationship the children had with Appellant's parents, or any indication that the children's grandparents reached out to Appellee for placement; thus, the rationale in favoring a less-restrictive alternative to termination of parental rights to preserve the children's relationship with a grandparent does not apply. Further, there was no compelling reason for the court to choose permanent custody rather than adoption through termination of parental rights because there was no reasonable prospect that Appellant would eventually reunify with her children as demonstrated by her actions throughout the case. (Zimmerman, S.; CV-24-412; 12-11-24; Brown, W.)