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CIVIL

Motal v. Doe, 2024 Ark. App. 162 **[lack of jurisdiction; appeal]** The circuit court entered orders denying appellant's motion for a stay, holding him in contempt, and dismissed his complaint with prejudice. On appeal, appellant argued the circuit court lacked jurisdiction to act while his appeal involving a service issue on one of the appellees was pending. Once the record is lodged in the appellate court, the trial court no longer exercises jurisdiction over the parties and the subject matter in controversy and loses jurisdiction to act further in the matter. A trial court retains only limited subject-matter jurisdiction over matters that are independent of, or collateral or supplemental to, the matters on appeal. The appellate court then retains jurisdiction over a case until it issues a mandate to the trial court instructing it to recognize, obey, and execute the appellate court's decision. Before the issuance of the mandate, no party to the lawsuit can obtain relief from the trial court for any matter that is so intertwined with the primary litigation as to be part and parcel of it. Here, the appellate court held that the circuit court lacked jurisdiction to act in this matter after the appellate court took jurisdiction of the case with the lodging of the record for appeal. Actions taken by a court without jurisdiction are null and void. Therefore, the circuit court erred by entering the orders. (James, P.; 60CV-19-6738; 3-6-24; Virden, B.)

Vanhook v. Med. Emergency Trauma Assocs., PLLC, 2024 Ark. App. 214 **[summary judgment; hearsay]** The circuit court granted summary judgment in favor of appellee and dismissed appellant's breach-of-contract complaint after determining that the appellee had the right under the parties' contract to terminate the appellant. On appeal, the appellant argued that the circuit court erred by relying on hearsay evidence when determining that cause existed to terminate the contract. Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. When hearsay is offered and would not be admissible at trial, the circuit court may not consider the hearsay in its summary-judgment analysis. Only testimony setting forth such facts as would be admissible in evidence may be offered in support of a motion for summary judgment. Here, appellant, an emergency-room physician, entered into a contract with the appellee, which provides emergency-room physicians to certain Arkansas hospitals. Appellee agreed to pay appellant for services performed at two of Arkansas Heart Hospital's (AHH) locations. After appellee received numerous complaints about appellant's performance from the two hospitals, appellee sent a letter to terminate the contract. Appellee attached several letters to its motion for summary judgment in which their president stated that a hospital demanded appellant not be scheduled in any of its facilities. The president also quoted from his letters in his affidavit. Further, in his deposition, the president of appellee stated, "I was told directly by the president of [the hospital] that [appellant] could no longer work there," and "[the hospital] said he could not work [there]. The circuit court found that AHH instructed appellee not to place appellant on the work schedule at either of their facilities and that appellee had the right under the contract to terminate the appellant "due to the fact that he was restricted from working at the only two facilities to which he was assigned." Therefore, the circuit court found that appellant could not demonstrate a breach of the agreement, and his contract claim failed. The appellate court found that the circuit court's summary-judgment order considered the statements on the issue of cause and specifically found the statements to be true. Other than the president's hearsay, there was no other admissible evidence in the record that AHH would not allow appellant to work at its hospitals. Because the circuit court improperly considered these hearsay statements, the circuit court erred in granting summary judgment because there remained disputed fact questions about whether appellant was terminated for cause. (Pierce, M.; 60CV-21-5887; 3-27-24; Wood, W.)

CRIMINAL

Thomas v. State, 2024 Ark. App. 159 **[custodial statements; motion to suppress]** The circuit court convicted appellant of trafficking cocaine and possession of drug paraphernalia. On appeal, appellant argued that the circuit court erred by denying her motion to suppress her custodial statements. A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily. In determining whether a defendant's custodial statement was spontaneous, the courts focus on whether it was made in the context of a police interrogation, meaning direct or indirect questioning put to the defendant by the police with the purpose of eliciting a statement from the defendant. A suspect's spontaneous statement while in police custody is admissible, and it is

irrelevant whether the statement was made before or after Miranda warnings because a spontaneous statement is not compelled or the result of coercion under the Fifth Amendment's privilege against self-incrimination. Here, appellant argued that the circuit court erred by denying her motion in limine concerning her statements taking responsibility for the car. The appellant engaged the officer while handcuffed in the back of a patrol car. Appellant stated, "Excuse me," and asked, "What happened?" The officer did not question appellant. He responded to appellant that they had found narcotics in the vehicle and that they were testing it. The officer then stated that the narcotics "[c]ould be Fentanyl. I don't want to die today." Appellant then declared the statements at issue. Given these circumstances, the appellate court held that the circuit court did not err in finding that appellant's statements were spontaneous and thus denying appellant's motion to suppress her custodial statements. (McCune, M.; 17CR-21-420; 3-6-24; Abramson, R.)

Thepharath v. State, 2024 Ark. App. 171 **[double jeopardy; domestic-battering]** The circuit court entered an order denying appellant's motion to dismiss a third-degree domestic-battering charge. On appeal, appellant argued that the circuit court erred in denying her motion because a retrial of the domestic-battering charge was barred by double jeopardy. The Double Jeopardy Clause protects criminal defendants from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. In order to determine whether the same act violates two separate statutory provisions, the courts apply the same-elements test, commonly referred to as the *Blockburger* test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which states that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. The Arkansas General Assembly codified this constitutional protection at Ark. Code Ann. § 5-1-110(b), which provides that an offense is included in an offense charged if the offense is established by proof of the same or less than all the elements required to establish the commission of the offense charged. Here, the case arose from an incident involving appellant and her then seventeen-year-old son. Appellant was charged with aggravated assault of a family or household member under Ark. Code Ann. § 5-26-306(a)(3) and third-degree domestic battering under Ark. Code Ann. § 5-26-305(a)(1). A jury trial took place in 2022, in which the jury acquitted appellant of aggravated assault of a family or household member but was deadlocked on the domestic battering charge. The circuit court declared a mistrial. The aggravated assault charge requires proof of impeding or preventing the respiration of a family or household member or circulation of a family or household member's blood, which domestic battering does not require. Third-degree domestic-battering requires proof of physical injury, which the charge of aggravated-assault of a family or household member does not. Appellant's boyfriend testified that he witnessed appellant grab the victim by the neck and take him to the ground. There were testimony and photographs that appellant's actions caused physical injury to the victim, including scratches and bruising. In conclusion, the appellate court held that the *Blockburger* test did not bar prosecution of the

domestic-battering charge. Thus, the circuit court did not err in denying appellant's motion to dismiss the third-degree domestic-battering charge. (Compton, C.; 60CR-19-4619; 3-6-24; Wood, W.)

Cottrell v. State, 2024 Ark. App. 175 **[third-degree domestic battery; felony]** The circuit court found appellant guilty of felony third-degree domestic battery after a bench trial. On appeal, appellant argued that the circuit court erred in finding him guilty of felony third-degree domestic battery because the State failed to present sufficient evidence that he had been convicted of third-degree domestic battery in the past five years. A person commits domestic battering in the third degree if with the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member. Domestic battering in the third degree is a Class D felony if the person committed the offense of domestic battering in the third degree within five years of the offense of domestic battering in the third degree. Here, the statute states that to be guilty of felony third-degree domestic battery, a person must have committed the offense of third-degree domestic battery within the past five years. While interpreting an earlier version of the statute in question, the Arkansas Supreme Court held that a criminal act is not elevated to the status of an offense for the purpose of a sentencing enhancement until there is a conviction. Although evidence showed that appellant was facing third-degree domestic-battery charges resulting from a 2019 incident against the same victim, at the time of his conviction in this case, he had not yet been tried or convicted for the prior incident. Without a prior conviction, the State lacked sufficient evidence to support its contention that appellant's sentence for the 2020 incident should be enhanced based on the 2019 incident. Therefore, the circuit court erred in denying his motion to dismiss the felony domestic-battery charge because the State failed to meet its burden of proof. However, sufficient evidence did exist for the circuit court to convict appellant of the lesser-included misdemeanor offense of third-degree domestic battering under Arkansas Code Annotated section 5-26-305(b)(1). (Compton, C.; 60CR-21-449; 3-6-24; Brown, W.)

Stowers v. State, 2024 Ark. App. 216 **[motion to transfer to juvenile division; misdemeanor charges]** The circuit court entered an order denying appellant's motion to transfer the case to the juvenile division of the circuit court, after he was charged in the criminal division. On appeal, appellant argued the circuit court erred in denying his motion to transfer. Arkansas Code Annotated § 9-27-318(c)(1) provides that a prosecuting attorney may charge a juvenile in either the juvenile or criminal division of circuit court when a case involves a juvenile at least sixteen years old when he or she engages in conduct that, if committed by an adult, would be any felony. Arkansas Code Annotated § 9-27-318(d) would allow for the misdemeanors to be charged in the criminal division only if a transfer was ordered after a hearing before the juvenile division of circuit court. Here, this was not done. The prosecutor did not have the discretion to file the misdemeanor charges in the criminal division of the circuit court. Thus, the circuit court never had jurisdiction over the two misdemeanor charges. (Webb, G.; 03CR-20-354; 3-27-24; Hixson, K.)

DOMESTIC RELATIONS

Tumey v. Tumey, 2024 Ark. App. 166 **[alimony; child support; retroactive child support]** The circuit court entered an order awarding appellee alimony and child support. On appeal, appellant argued that it was erroneous to award appellee permanent alimony after she disclaimed it, the child-support calculation was flawed, and the circuit court erred in awarding retroactive child support. **[alimony]** Oral stipulations made in open court that are taken down by the reporter and acted on by the parties and court are valid and binding, and such stipulations are in the nature of a contract. Parties to a divorce may contract both in and out of something to which the party may otherwise be entitled. The issue here was whether the circuit court abused its discretion when the party who was awarded permanent alimony did not ask for it, and there was an agreement in place between the parties that any alimony would be temporary. The only request for alimony contained within a pleading was in appellee's counterclaim, which the appellee withdrew at a November 2021 hearing and chose not to replead. At some point, the parties agreed that appellant would pay appellee alimony, with the understanding that it was temporary and would cease upon the buyout of her interest in appellant's business. Appellee stipulated at an April 2022 hearing that the issue of alimony was "moot," and most importantly, the parties had an agreement that any alimony would be temporary. Under the circumstances, the appellate court held that the circuit court abused its discretion in awarding appellee permanent alimony. **[child support]** Supreme Court Administrative Order No. 10 (Admin. Order 10) mandates that circuit courts use the "Income Shares Model" adopted by the Arkansas Supreme Court in *In re Implementation of Revised Administrative Order No. 10*, 2020 Ark. 131. Under the revised "Family Support Chart," each parent's share is that parent's prorated share of the two parents' combined gross income, subject to certain deviations or adjustments. Income is intentionally broad and designed to encompass the widest range of sources consistent with the State's policy to interpret "income" broadly for the benefit of the child. Gross income includes, but is not limited to, wages; earnings generated from a business, partnership, contract, self-employment, or other similar arrangement; SSD payments; or any money or income due or owed by another individual, source of income, government, or other legal entity. **[child support; SSD payments]** Here, the circuit court did not consider appellee's SSD in calculating her income. SSD benefits (but not SSI) are considered income for purposes of determining child support. Thus, the appellate court held that the circuit court erred in failing to include that amount in its calculations. **[child support; marital property monthly payments]** Here, the parties' 50% share of the company was marital property. The testimony presented to the circuit court was that there were insufficient funds to award appellee the value of her half of the 50% share of the company in one lump sum. The circuit court ordered that her share of the marital property be awarded in monthly installments. While income is broadly defined, there is no instance in which the value of a marital asset awarded to a party as part of the parties' property distribution can then be utilized in determining the party's income for purposes of calculating child support. The appellate court held that the circuit court erred in utilizing half of the monthly property-distribution award to appellee in calculating her income for child-support purposes. **[child support; extraordinary medical expenses]** Appellant spent approximately $375 a month on counseling for the children, which was ordered by the circuit court to be continued. This meets the definition of extraordinary medical expenses found in Administrative Order 10. Thus, the

circuit court erred in failing to consider appellant's monthly counseling payments for the children. **[retroactive child support]** The circuit court ordered appellant to pay appellee eleven months' retroactive child support. The record reflected that from the time a March 2021 ex-parte order was entered granting appellant temporary custody, all subsequent orders continued temporary custody with appellant. This was so until the final order was entered on May 2022, awarding the parties joint custody. Thus, during the pendency of the divorce, appellant was the sole custodial parent, and the circuit court erred in ordering that the child support be retroactive. (Weeks, A.; 68DR-21-39; 3-6-24; Gruber, R.)

Mathis v. Hickman, 2024 Ark. App. 172 **[contempt; child support]** The circuit entered several orders in favor of appellee. On appeal, appellant argued that the circuit court erred in finding her in contempt regarding appellee's visitation with their child and regarding appellee's telephone communication with the child; awarding appellee attorney's fees incurred in Rhode Island; and calculating support owed and in imputing full-time income to her. **[contempt; communication and visitation]** In order to establish civil contempt, there must be willful disobedience of a valid order of a court. However, before one can be held in contempt for violating the circuit court's order, the order must be definite in its terms and clear as to what duties it imposes. Here, the circuit court found that appellee willfully denied appellee his spring break visitation, had interfered and/or attempted to interfere with appellee's visitation by harassing him by contacting the city police department, and had interfered with appellee's phone communication with the child despite previous court orders that warned her against it. The appellate court found that the circuit court provided appellant with clear orders. Because these actions were in violation of the circuit court's orders, the circuit court did not err in finding appellee in contempt. **[contempt; ex parte motion in Rhode Island]** A circuit court has the inherent power to award attorney's fees in domestic-relations proceedings, and no statutory authority is required. However, this inherent authority was inapplicable here because the fees awarded were not from the domestic relations proceeding before this circuit court but were the result of a proceeding before another jurisdiction. Here, on the advice of local counsel in Rhode Island and relying on its interpretation of the UCCJEA, appellant filed an ex parte motion for relief in Rhode Island, that was dismissed. Appellee specifically requested that he be reimbursed attorney's fees he expended in Rhode Island as a sanction for appellant's civil contempt. The record did not reflect that appellant's filing the ex parte motion in Rhode Island violated any court order in the Pulaski County Circuit Court. Therefore, the circuit court erred in finding that appellant was guilty of contempt of court for filing the ex parte motion in Rhode Island and awarding attorney's fees for the Rhode Island case. **[child support]** Appellant next argued that the circuit court erred in calculating support owed and in imputing full-time income to her. In a March 2022 order, the circuit court retroactively modified appellee's child support obligation. The circuit court calculated the amount appellee had overpaid on the basis of the modified amount and attached its calculations to its order. The circuit court determined that appellee was entitled to an overpayment credit by taking the amounts appellee should have paid during those time periods on the basis of its modified amount and subtracting the amounts appellee actually paid during those time periods. The appellate court held that there was not an abuse of discretion in the circuit court's methodology and calculations as appellant contended on appeal. Section III, paragraph 8 of

Administrative Order No. 10 addresses "Income Imputation Considerations." The circuit court may consider a disability or the presence of young children or disabled children who must be cared for by the parent as being a reason why a parent is unable to work. Appellant argued that the circuit court erred in imputing full-time income to her even though her husband testified that her being a stay-at-home mother to their children, two of whom have special needs, allowed him to make more money for their family. After the circuit court heard all the evidence and followed the directives of Administrative Order No. 10(III)(8), the appellate court could not say that the circuit court's decision to impute income as it did for the purposes of calculating child support was an abuse of discretion. (Pierce, M.; 60DR-08-2009; 3-6-24; Hixson, K.)

Barter v. Barter, 2024 Ark. App. 182 **[material change in circumstances; parental alienation]** The circuit court entered an order changing primary custody of the parties' four children to the children's father, appellee, and awarded attorney's fees to appellee. **[custody]** The primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the children or when there is a showing of facts affecting the best interest of the children that were either not presented to the circuit court or were not known by the court at the time the original custody order was entered. Generally, courts impose more stringent standards for modifications of custody than they do for initial determinations of custody. A parties' continuing pattern of alienation constitutes a material change in circumstances warranting a change of custody. Here, the appellant failed to notify appellee about medical and school issues. Appellant interfered with appellee's access to records by requiring a phone call to her first and interfered with access to the children during medical procedures by insisting she couldn't be alone with appellee and by listing others as emergency contacts. The circuit court found that appellant had caused scenes in front of the kids connected with these issues. Additionally, appellant was in direct violation of a court order by registering the children for church camp without appellee's input, interfering with his summer visitation for a week, and then bombarding the children with texts. The court noted that appellee had wanted the children to attend church camp, and the parties had agreed to add an extra week at the end of his summer visit; however, appellant canceled church camp and blamed appellee because she wanted the Fourth of July holiday as well, which was during appellee's extra week. The appellant used similar tactics regarding a school Disneyland trip with one of the children as well. The circuit court stated that appellant's goal was to ruin everything good at appellee's house, and to intentionally box him in by discussing activities and events with eh kids before even mentioning it to appellee. Giving due deference to the superior position of the circuit court to view and judge the credibility of the witnesses, the appellate court held that the circuit court did not err in determining that a material change in circumstances occurred and that changing primary custody to appellee was in the children's best interest. **[attorney's fees]** In domestic-relations proceedings, the circuit court has the inherent power to award attorney fees, and the decision to award fees and the amount of those fees are matters within the discretion of the circuit court. Because the circuit court did not err in its decision to change custody, the circuit court did not err in awarding attorney's fees. (Duncan, X.; 04DR-20-1504; 3-13-24; Virden, B.)

Hartman v. Hatman, 2024 Ark. App. 194 **[child support; spousal support; division of marital debt]** The circuit court entered a divorce decree. On appeal, appellant argued that the circuit court abused its discretion in its calculation of child support, in its award of alimony, and in its division of marital debt. **[child support]** Appellant argued that the circuit court erred in failing to deduct his payments for the children's supplemental health-insurance policy. Appellant admitted at trial that the insurance policy at issue was a supplemental accident policy, not health insurance. It is a policy that pays out a certain amount to the policyholder above and beyond what is covered by health insurance upon an accident or emergency. The children's actual health insurance was covered by ARKids First and is provided at no cost to either party. Even if the policy was considered supplemental health insurance, nothing in Administrative Order No. 10 requires the court to deduct the cost of supplemental health insurance from the calculation of child support. Thus, the court did not abuse its discretion in the calculation of child support on this basis. **[spousal support]** Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is charged. 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. In addition, the following secondary factors should be considered: (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the parties' income, both current and anticipated; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of income of each that is spendable; (7) the earning ability and capacity of each party; (8) the property awarded or given to one of the parties, either by the court or the other party; (9) the disposition made of the homestead or jointly owned property; (10) the condition of health and medical needs of both parties; (11) the duration of the marriage; and (12) the amount of child support. Here, the circuit court considered all the factors when making its alimony award, including the length of the parties' marriage, appellee's disability, and her ability to live solely on her disability income. The court also considered the respective incomes of the parties and found that appellant had the ability to pay alimony to appellee. The circuit court did note that appellant's decision to financially provide for his live-in girlfriend while forcing his disabled wife to rely on financial assistance from family and credit cards to survive was offensive. However, rather than viewing this as a decision to punish appellant, it could also be seen as the circuit court's awareness that he had an ability to provide for someone other than himself and that he was voluntarily reducing his disposable income by financially supporting his girlfriend and her son. Appellant testified that he did not require her to contribute to the household because he believed it was his responsibility to do so. Thus, the record did not demonstrate that the circuit court's rulings were motivated by a desire to punish appellant. Because the circuit court considered all the factors and based its decision on the facts presented at trial, the court did not abuse its discretion in awarding alimony. **[division of martial debt]** An allocation of the parties' debt is an essential item to be resolved in a divorce dispute, and it must be considered in the context of the distribution of all the parties' property. Arkansas Code Annotated § 9-12-315 provides that all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable, and when property is divided unequally the court must state its basis and reasons for not dividing the marital property equally between the

parties, and the basis and reasons should be recited in the order entered in the matter. However, Ark. Code Ann. § 9-12-315 does not apply to the division of marital debts. Here, the circuit court ordered appellant to pay 73 percent of the parties' marital debt. Appellee testified that the purchases she made on credit cards were for essential items, like food, gas, and clothing for the children, even while the parties were separated but living in the same household. Appellant testified that appellee had a spending problem and that the credit-card bills were due to inappropriate and excessive spending. He did not present any documentation to support his claims, and the circuit court found that his testimony was not credible. Thus, the circuit court did not err in its division of the marital debt. (Pierce, M.; 60DR-19-1563; 3-13-24; Thyer, C.)

Dorey v. Dorey, 2024 Ark. App. 199 **[sua sponte order; terminating alimony]** The circuit court entered an order terminating appellee's alimony obligation as originally ordered in the divorce decree and gave appellee credit for the alimony he already paid against the parties' joint marital debt. On appeal, appellant argued that the circuit court erred in terminating appellee's alimony obligation, converting his alimony payments to payments on the joint debt, and in the manner in which the trial court altered and amended the divorce decree. In order to vacate or modify a judgment or order more than ninety days after it has been entered, the trial court must determine that at least one of the enumerated list of circumstances in Rule 60(c) of the Arkansas Rules Civil Procedure exists. Rule 60(c)(4) of the Arkansas Rules of Civil Procedure allows a trial court to vacate or modify a judgment in the case of misrepresentation or fraud by an adverse party. Here, appellant filed a motion for contempt against appellee. Appellant filed a response that he was no longer obligated to pay alimony because appellant had remarried. A hearing on appellant's motion for contempt was held, where appellee testified that the PSA signed by the parties agreed that neither party would pay alimony, and when he signed the divorce decree prepared by appellant's attorney he did not know the divorce decree required him to pay monthly alimony. From the bench, the trial court found that appellee never agreed to pay alimony and that appellant placed the alimony provision in the divorce decree to cover the parties' joint debt obligation. The trial court stated from the bench that it thought that she misled him or frauded him. The trial court then modified the divorce decree more than two years after the decree was entered. Appellant specifically argued on appeal that the trial court erred in modifying the terms of the divorce decree in this manner because appellee never filed any pleading alleging fraud or requesting such relief, and appellant was not on notice that this would be an issue or would even be contemplated by the trial court at the contempt hearing. Appellee never filed a Rule 60 motion to modify the divorce decree, nor did he ever reference Rule 60 in any of the proceedings below. Nor did the trial court ever mention Rule 60 either in its written order or in its comments from the bench. Instead, the trial court sua sponte modified the terms in the divorce decree. The appellate court held that the circuit court erred in modifying the divorce decree because fraud had not been pled, and appellant was not on notice to prepare a defense or that modification was even an issue. In the absence of a Rule 60(c) motion to modify the parties' divorce decree or proper notice to appellant that such modification was at issue, the circuit court erred in sua sponte modifying the decree more than ninety days after the decree had been entered. (McCune, M.; 17DR-19-147; 3-17-24; Hixson, K.)

Buckley v. Buckley, 2024 Ark. App. 210 **[marriage validity; solemnization]** The circuit court entered a judgment and divorce decree. On appeal, appellant argued that the circuit court erred in finding that the parties had a valid and enforceable marriage and in ordering the division of certain "marital" and "non-marital" property. The question here is whether the parties' September 16, 2014 "Renewal of Vows" ceremony—performed without a marriage license at Graceland Wedding Chapel in Las Vegas, Nevada, between two Arkansas residents who had not previously been married to one another, held a wedding ceremony, or requested, signed, or filed a marriage license together—was sufficient to solemnize their relationship and therefore create a valid and enforceable marriage under Arkansas law. Marriage is considered in law a civil contract to which the consent of the parties capable in law of contracting is necessary. The doctrine of common law marriages has never obtained or become a part of the laws of Arkansas. Arkansas appellate courts have held that Arkansas statutes requiring a marriage license are directory rather than mandatory. There is a presumption of validity in favor of any marriage which is shown to have been solemnized, and that the burden of proving its invalidity rests upon him who questions its validity, and that this is true, notwithstanding it requires proof of a negative. Here, the parties never obtained, much less executed and filed, a marriage license. Regarding the parties' ceremony in Nevada, the certificate signed by a person denoted as "Minister" who performed the ceremony was admitted without objection at trial. Additionally, Ark. Code Ann. § 9-11-215(a) states that marriages solemnized by a minister of the gospel or priest shall be according to the forms and customs of the church or society to which he or she belongs. The certificate from Graceland Wedding Chapel demonstrated that the ceremony in which the parties took part was performed by a minister, and appellee's testimony and the photos taken at that time demonstrated that their marriage was according to the forms and customs of the church or society to which he or she belongs. Those customs included purchasing engagement and wedding rings for one other, riding in a limousine to and from the ceremony, appellant's carrying a bouquet, holding the ceremony in a chapel, having family members attend and witness the ceremony, taking traditional wedding vows, and exchanging rings. Graceland Wedding Chapel records referenced a "wedding date" of "9-16-14" and referred to appellant as "Bride" and appellee as "Groom." And the certificate itself, which was admitted without objection, provided additional evidence that their marriage was solemnized. Further, Arkansas Appellate Courts have repeatedly held that when a man and woman have lived together for any considerable time, holding each other out to the public as husband and wife, a strong presumption arises that they were lawfully married, and the presumption of the legality of the marriage increases with the passage of time. The record supported the fact that the parties began living together in September 2013. Thereafter, they referred to themselves as "married" and referred to one other as "husband" and "wife" to family, friends, and congregants of appellant's church. The parties purchased rings for one another, held themselves out as spouses, and introduced one another as such in both employment and social settings. The appellate court found that the evidence that the parties held themselves out to the community at large as a married couple was overwhelming and irrefutable. Coupled with the strong presumption of a lawful marriage that arises when a man and a woman have lived together for any considerable time and hold each other out to the public as husband and wife; that the presumption of the legality of the marriage increases with the passage of time; and the fact that one attacking the validity of a

marriage has the burden of proving its nonexistence, the appellate court held that under the particular factual circumstances, the circuit court did not err by finding that the parties had solemnized their relationship to the extent that it was a valid and enforceable marriage. (Batson, B.; 10DR-20-162; 3-27-24; Gladwin, R.)

Graf v. Graf, 2024 Ark. App. 212 **[change in custody; material change in circumstances]** The circuit court granted appellee's motion to change custody of one of the children to him. On appeal, appellant argued that the circuit court erred in finding that there had been a material change in circumstances since the last custody order and that it was in their daughter's best interest to change custody. Modification of custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; and second, if the court finds that there has been a material change in circumstances, the court must determine whether a change of custody is in the child's best interest. The best interest of the child is the polestar in every child-custody case; all other considerations are secondary. A child-custody determination is fact-specific, and each case ultimately must rest on its own facts. The combined, cumulative effect of particular facts may together constitute a material change. In deciding whether a modification of custody is in a child's best interest, the circuit court should consider factors such as the psychological relationship between the parents and the child, the need for stability and continuity in the relationship between parents and the child, the past conduct of the parents toward the child, and the reasonable preference of the child. Here, the parties separated in 2016 and were divorced in 2018 by an Arizona court. The parties have four children, an adult son with disabilities (AS), two teenage daughters (TD and TD2), and a younger son (YS). Appellee was awarded custody of TD and YS, and they live in Arizona. Appellant was awarded custody of AS and TD2, and they live in Arkansas. The circuit court concluded that there were material changes in circumstances. Both parties had remarried, and appellant had violated prior court orders that prohibited AS from living in appellant's home with TD2. The circuit court found that it was in TD2's best interest to be in appellee's custody. Additionally, the parties could not or would not co-parent effectively. Appellant had openly defied a court order that she not allow AS to be around TD2. Appellant and her husband had frequent brushes with the law and problems with physical, loud arguments in the home. TD2 expressed a clear desire to live with her father. After reviewing the record, the appellate court found that the circuit court did not err in finding a material change in circumstances had occurred and that it was in the child's best interest to change custody. (Weeks, A.; 68DR-18-48; 3-27-24; Klappenbach, N.)

Merrifield v. Penner, 2024 Ark. App. 218 **[custody modification; material change in circumstances]** The circuit court entered an order declining to modify the custody arrangement she had with appellee, regarding their son. On appeal, appellant argued that the circuit court erred when it did not find that a material change in circumstances existed to warrant modifying custody. Modification of custody is a two-step process: first, the circuit court must determine whether a material change in circumstances has occurred since the last custody order; and second, if the court finds that there has been a material change in circumstances, the court must determine whether a

change of custody is in the child's best interest. In *Montez v. Montez*, 2017 Ark. App. 220, 518 S.W.3d 751, the appellate court held that the circuit court erred in failing to find a material change in circumstances when the evidence showed, among other things, that one of the parties and her new partner had a volatile domestic relationship that adversely affected the children. Additionally, in *Skinner v. Shaw*, 2020 Ark. App. 407, 609 S.W.3d 454, the appellate court held that a material change had occurred when the mother failed to protect her children from abuse by someone else. Here, the last order of custody was a 2019 default order awarding appellee full custody, while appellant was incarcerated. Since the entry of the 2019 order, appellee was arrested for domestic battery; was under investigation by DHS for child abuse; and had slapped the child in the face when the child would have been six years old or younger. There was significant evidence of domestic violence at appellee's hand. Therefore, the circuit erred when it did not find that a material change in circumstances occurred. (Zimmerman, S.; 72DR-17-1601; 3-27-24; Murphy, M.)

JUVENILE

Cheater v. Ark. Dep't of Human Servs., 2024 Ark. App. 183 **[terminating reunification services]** The grounds for terminating reunification services must be proven by clear and convincing evidence, and not merely a preponderance of the evidence. (Blatt, S.; CV-23-703; 3-13-24; Virden, B.)

Price v. Ark. Dep't of Human Servs., 2024 Ark. App. 192 **[TPR; best-interest; adoptability]** Termination of parental rights will not be reversed based upon an argument of a child-parent bond, especially as in this case, when Appellant father exerted less than half of his scheduled visits. **[TPR; best-interest; potential harm]** Potential harm is not an element of the cause of action and does not need to be established by clear and convincing evidence; rather, after considering both adoptability and potential harm, the circuit court must find by clear and convincing evidence that termination of parental rights is in the child's best interest. Here, Appellant father's continued drug use demonstrated potential harm to the child. (Ladd, D.; CV-23-692; 3-13-24; Barrett, S.)

Shipp v. Ark. Dep't of Human Servs., 2024 Ark. App. 197 **[TPR; best interest; potential harm]** In the absence of any evidence to Appellant's ability to obtain or maintain sobriety, her participation in a drug treatment program while incarcerated is insufficient to demonstrate that her children are no longer at risk of harm given her history of drug use, especially considering that Appellant's lack of stable housing and employment due to incarceration are sufficient in and of themselves to prove potential harm. (Warren, D.; CV-23-658; 3-13-24; Wood, W.)

Elkins v. Ark. Dep't of Human Servs., 2024 Ark. App. 204 **[ICWA preferences]** Pursuant to the Indian Child Welfare Act, in any foster-care or preadoptive placement of an Indian child preference

must be given, in descending order to the following: (1) a member of the Indian child's extended family; (2) a foster home that is licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe operated by an Indian organization that has a program suitable to meet the child's needs. **[ICWA preferences]** ICWA requires the court to place an Indian child with an Indian caretaker, if one is available, even if the child is already living with a non-Indian family and the court thinks it's in the child's best interest to stay there. In this case, it was error to change the goal to adoption through TPR when this Indian child's siblings were already placed with an out of state Indian relative through ICPC, and the facts presented at the hearing indicated that ICPC placement approval from the receiving state was imminent. (Ladd, D.; CV-23-642; 3-13-24; Brown, W.)