

Arkansas Circuit Courts

Judges' Benchbook

Domestic Relations Division



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The Arkansas Benchbooks provide a resource for members of the judiciary. The books attempt to take relevant statutes, court rules, case law, and forms for a particular area and consolidate them into one document. The benchbooks do not carry any legal authority and should not be cited in legal proceedings or documents. Instead, the readers are encouraged to use the books as a quick reference to the applicable law. A diligent effort is made after every substantive legislative session to update the publications so that the judiciary is aware of any changes in statutory provisions. When the books are updated, the drafters also highlight new cases that may be helpful to judges as they consider issues. The drafters of the publications strive to report the information in the books free from opinion or commentary.

I. Marriage

Age of Consent

Every male and every female who is at least eighteen (18) years of age shall be capable in law of contracting marriage.

However, males and females who are seventeen (17) years of age may contract marriage if they furnish the clerk with a verified affidavit signed in the presence of a notary public that states that the parent, parents, or guardian consent to the marriage.

The consent of both parents of each contracting party shall be necessary before the marriage license can be issued by the clerk unless:

the parents have been divorced and custody of the child has been awarded to one (1) of the parents exclusive of the other, or

unless the custody of the child has been surrendered by one (1) of the parents through abandonment or desertion, in which cases the consent of the parent who has custody of the child shall be sufficient, or

a guardian has been appointed for the child, in which case the consent of the guardian is sufficient.

The consent of the parent or guardian may be voided by the order of a circuit court on a showing by clear and convincing evidence that: (i) The parent or guardian is not fit to make decisions concerning the child; and (ii) The marriage is not in the child's best interest.

There shall be a waiting period of five (5) business days for any marriage license issued under this subsection.

If a child has a pending case in the circuit court, a parent or guardian who files consent under this subsection shall immediately notify the circuit court, all parties, and attorneys to the pending case.

Ark. Code Ann. § 9-11-102.

But also see *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.”

Age of Consent Exceptions

If an application for a marriage license is made where one (1) or both parties are under eighteen years of age but older than sixteen years of age and the female is pregnant, both

parties may appear before a judge of the circuit court of the district where the application for a marriage license is being made. Evidence shall be submitted as to:

(A) The pregnancy of the female in the form of a certificate from a licensed and regularly practicing physician of the State of Arkansas;

(B) The birth certificates of both parties; and

(C) Parental consent of each party who may be under the minimum age.

Thereupon, after consideration of the evidence and other facts and circumstances, if the judge finds that it is to the best interest of the parties, the judge may enter an order authorizing and directing the county clerk to issue a marriage license to the parties.

The county clerk shall retain a copy of the order on file in the clerk's office with the other papers.

However, if the female has given birth to the child, the court before whom the parties are to appear, if satisfied that it would be to the best interests of all the interested parties and if all the requirements are complied with, with the exception of the physician's certificate as to the pregnancy, may enter an order authorizing and directing the county clerk to issue a marriage license as provided.

Ark. Code Ann. § 9-11-103.

In all cases in which the consent of the parent or parents or guardian is not provided, or there has been a misrepresentation of age by a contracting party, the marriage contract may be set aside and annulled upon the application of the parent or parents or guardian to the circuit court having jurisdiction of the cause. Ark. Code Ann. § 9-11-104.

The marriage of any male under the full age of seventeen (17) years and the marriage of any female under the full age of sixteen (16) years is voidable.

All marriages contracted prior to March 26, 1964, where one (1) or both parties to the contract were under the minimum age prescribed by law for contracting marriage are declared to be voidable only and shall be valid for all intents and purposes unless voided by a court of competent jurisdiction.

All marriages contracted between July 30, 2007, and April 2, 2008, in which one (1) or both parties to the contract were under the minimum age prescribed by law for contracting marriage are voidable only and are valid for all intents and purposes unless voided by a court of competent jurisdiction.

Ark. Code Ann. § 9-11-105.

See State v. Graves, 228 Ark. 378, 307 S.W.2d 545 (1957)(where girl and boy, both residents of Arkansas, were less than minimum age for marriage in Arkansas, went to Mississippi which allowed marriages between persons of their ages, and were married with their parents' consent and returned to Arkansas and lived there as man and wife, marriage was not void).

Persons Who May Solemnize Marriage

- (1) The Governor;
- (2) Any former justice of the Supreme Court;
- (3) Any judges of the courts of record within this state, including any former judge of a court of record who served at least four (4) years or more;
- (4) Any justice of the peace, including any former justice of the peace who served at least two (2) terms since the passage of Arkansas Constitution, Amendment 55;
- (5) Any regularly ordained minister or priest of any religious sect or denomination;
- (6) The former mayor of any city of the first or second class who served at least five years as mayor or the current mayor of any city or town;
- (7) Any official appointed for that purpose by the quorum court of the county where the marriage is to be solemnized; or
- (8) Any elected district court judge and any former municipal or district court judge who served at least four (4) years.
- (9) The Religious Society of Friends (Quakers) through their traditional rites.

Ark. Code Ann. § 9-11-213.

Marriage Licenses

All persons contracting marriage in this state are required to first obtain a license from the clerk of the county court of some county in this state. Ark. Code Ann. § 9-11-201.

The form of the license can be found in Ark. Code Ann. § 9-11-202.

The clerks of the county courts are required to furnish the license upon 1) an application's being made, 2) being fully assured that applicants are lawfully entitled to the license, and 3) receipt of his or her fee. Ark. Code Ann. § 9-11-203. In 2015, the legislature added subsection (d) "It is not a requirement that a marriage license be signed by a county clerk for the license to be effective."

The license is required to be returned to the clerk within 60 days. Ark. Code Ann. § 9-11-218. But see Fryar v. Roberts, 346 Ark. 432, 57 S.W.3d 727 (2001)(failure to file marriage license within 60 days does not render a marriage void and stating marriage license statutes are merely directory and not mandatory- as distinguished from the solemnization statutes).

Common Law Marriage

Arkansas does not recognize common law marriages within the boundaries of this state. Fryar v. Roberts, 346 Ark. 432 (2001); Spicer v. Spicer, 239 Ark. 1013 (1965); Furth v. Furth, 97 Ark. 272 (1911).

All marriages contracted in other states are valid in Arkansas. Ark. Code Ann. § 9-11-107.

Note: for validity of Ark. Code Ann. § 9-11-107 in regard to marriage between persons of the same sex, see Obergefell v. Hodges, 135 S.Ct. 2584 (2015); Jernigan v. Crane, 64 F.Supp.3d 1260 (2014); and Jernigan v. Crane, 796 F.3d 976, (8th Cir. 2015) (same-sex couples brought action against state officials challenging constitutionality of Arkansas laws denying them right to marry- they won on summary judgment.)

See Craig v. Carrigo, 353 Ark. 761 (2003)(no valid common law marriage to be recognized in Arkansas because Alberta, Canada had no statutory law and the parties had not lived as married for the requisite time to meet the Alberta case law definition); Brissett v. Sykes, 313 Ark. 515 (1993)(although common law marriages valid in other states are recognized, evidence was insufficient to establish common law marriage so as to give man right of survivorship in real property); Knaus v. Relyea, 24 Ark. App. 7 (1988)(insufficient objective evidence that agreement existed between petitioner and the deceased to establish common-law marriage according to Colorado law).

Covenant Marriage

A covenant marriage is a marriage entered into by one (1) male and one (1) female who understand and agree that the marriage between them is a lifelong relationship.

Parties to a covenant marriage will have received authorized counseling emphasizing the nature, purposes, and responsibilities of marriage.

Only when there has been a complete and total breach of the marital covenant commitment may a party seek a declaration that the marriage is no longer legally recognized.

A man and a woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license as otherwise required under this chapter and executing a declaration of intent to contract a covenant marriage as provided in § 9-11-804. Ark. Code Ann. § 9-11-803.

The application for a marriage license and the declaration of intent shall be filed with the official who issues the marriage license.

The declaration of intent shall contain:

the requisite recitation found in § 9-11-804;

an affidavit by the parties that they have received authorized counseling, such as that found in § 9-11-805;

an attestation of the counselor; and

the notarized signatures of parties, along with those required to consent if they are minors.

Ark. Code Ann. § 9-11-804.

A couple who is already married may redesignate their marriage as a covenant marriage. Ark. Code Ann. § 9-11-807.

Parties to a covenant marriage may only dissolve the covenant marriage by meeting the requirements of Ark. Code Ann. §§ 9-11-808, 809, and 810.

These requirements include the following grounds for divorce:

(1) The other spouse has committed adultery;

(2) The other spouse has committed a felony or other infamous crime;

(3) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one (1) of the spouses;

(4) The spouses have been living separate and apart continuously without reconciliation for a period of two (2) years; or

(5)(A) The spouses have been living separate and apart continuously without reconciliation for a period of two years from the date the judgment of judicial separation was signed; or (B)(i) If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of two years and six months from the date the judgment of judicial separation was signed. (ii) However, if abuse of a child of the marriage or a child of one (1) of the spouses is the basis for which the judgment of judicial separation was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one (1) year from the date the judgment of judicial separation was signed.

And the following grounds for a judicial separation:

- (1) The other spouse has committed adultery;
- (2) The other spouse has committed a felony and has been sentenced to death or imprisonment;
- (3) The other spouse has physically or sexually abused the spouse seeking the legal separation or divorce or a child of one (1) of the spouses;
- (4) The spouses have been living separate and apart continuously without reconciliation for a period of two (2) years; or
- (5) The other spouse shall:
 - (A) Be addicted to habitual drunkenness for one (1) year;
 - (B) Be guilty of such cruel and barbarous treatment as to endanger the life of the other; or
 - (C) Offer such indignities to the person of the other as shall render his or her condition intolerable.

Ark. Code Ann. § 9-11-808

II. Divorce

Jurisdiction

The circuit court shall have power to dissolve and set aside a marriage contract. Ark. Code Ann. § 9-12-301.

The action for divorce shall be by equitable proceedings. Ark. Code Ann. § 9-12-302.

Venue

The proceedings shall be in the county where the complainant resides unless the complainant is a nonresident of the State of Arkansas and the defendant is a resident of the state, in which case the proceedings shall be in the county where the defendant resides. In any event, the process may be directed to any county in the state.

See Hargis v. Hargis, 292 Ark. 487, 731 S.W.2d 198 (1987)(venue of an action may be waived-- citing "the settled rule is that an objection to venue is waived by a defendant who enters his appearance...")

When a spouse initiates an action against the other spouse for an absolute divorce, divorce from bed and board, or separate maintenance, then the venue for the initial action shall also be the venue for any of the three (3) named actions filed by the other spouse, regardless of the residency of the other spouse. Ark. Code Ann. § 9-12-303.

See *Tortorich v. Tortorich* (“*Tortorich III*”), 333 Ark. 15, 968 S.W.2d 53 (1998)(order of absolute divorce, which was obtained after limited divorce was granted in another county, did not render order of chancellor from county that granted limited divorce, which order increased husband's alimony obligation, ineffectual during period before absolute divorce was reversed on appeal for improper venue).

The court issuing a final decree of divorce retains jurisdiction for all matters following entry of the decree. Ark. Code Ann. § 9-12-320.

However, either party, or the court on its own motion, may petition the court to request that the case be transferred to another county if:

- (a) Both of the parties to the divorce proceedings have established a residence in a county of another judicial district within the state; or
- (b) One (1) of the parties has moved to a county of another judicial district within the state and the other party has moved from the State of Arkansas.

The decision to transfer a case is within the discretion of the court where the final decree of divorce was rendered.

The case shall not be transferred absent a showing that the best interest of the parties justifies the transfer.

In cases in which children are involved and a justification for transfer of the case has been made, there shall be an initial presumption for transfer of the case to the county of residence of the custodial parent.

If the court that granted the final decree agrees to transfer the case to another judicial district, the court shall enter an order transferring the case and charging the circuit clerk of the court of original jurisdiction to transmit forthwith certified copies of all records pertaining to the case.

Ark. Code Ann. § 9-12-320.

Matters Which Must Be Proved

To obtain a divorce, the plaintiff must prove a legal cause for divorce which are listed in Ark. Code Ann. § 9-12-301.

See *Dee v. Dee*, 99 Ark. App. 159, 258 S.W.3d 405 (2007)(petitioner failed to prove statutory grounds of general indignities- simply stated “general indignities” without example; even though defendant/appellant admitted that he had waived corroboration of grounds, the injured party must always prove statutory grounds whether divorce is contested or uncontested; granting of divorce was reversed and dismissed).

The plaintiff must also prove residency by a showing of residence in the state by either the plaintiff or defendant for sixty (60) days immediately before the commencement of the action and a residence in the state for three (3) full months before the final judgment granting the decree of divorce. Ark. Code Ann. § 9-12-307.

No decree of divorce, however, shall be granted until at least thirty (30) days have elapsed from the date of the filing of the complaint.

When personal service cannot be had upon the defendant or when the defendant fails to enter his or her appearance in the action, no decree of divorce shall be granted the plaintiff until the plaintiff has maintained an actual residence in the State of Arkansas for a period of not less than three (3) full months. Ark. Code Ann. § 9-12-307.

See *Rogers v. Rogers*, 90 Ark. App. 321, 205 S.W.3d 856 (2005)(residency must be proved and corroborated in every instance and the question of whether it has been proven and corroborated is jurisdictional); *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989)(same).

Plaintiff must also show that the cause of the divorce occurred or existed in this state or, if out of the state, that it was a legal cause of divorce in this state, and that the cause of divorce occurred or existed within five (5) years next before the commencement of the suit. Ark. Code Ann. § 9-12-307.

Grounds for Divorce

A plaintiff who seeks to dissolve and set aside a covenant marriage shall state in his or her petition for divorce that he or she is seeking to dissolve a covenant marriage.

Grounds for absolute divorce or divorce from bed and board are:

- (1) When either party, at the time of the contract, was and still impotent;
- (2) When either party shall be convicted of a felony or other infamous crime;
- (3) When either party shall:
 - (A) Be addicted to habitual drunkenness for one (1) year;

(B) Be guilty of such cruel and barbarous treatment as to endanger the life of the other; or

(C) Offer such indignities to the person of the other as shall render his or her condition intolerable;

(4) When either party shall have committed adultery subsequent to the marriage;

(5) When husband and wife have lived separate and apart from each other for eighteen (18) continuous months without cohabitation;

(6) When husband and wife have lived separate and apart for three (3) consecutive years without cohabitation by reason of the incurable insanity of one (1) of them.

(7) When either spouse legally obligated to support the other, and having the ability to provide the other with the common necessities of life, willfully fails to do so.

Ark. Code Ann. § 9-12-301

Case Law

Existing statutory law does not allow spouse to stipulate to or waive grounds for divorce. *Harpole v. Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1989). *Rachel v. Rachel*, 21 Ark.App. 77, 733 S.W.2d 735 (1987).

Divorce is a creature of statute and can be granted only when statutory grounds have been proved and corroborated. *Mayland v. Mayland*, 2019 Ark. App. 390, 586 S.W.3d 179.

Limited Divorce: To obtain limited divorce (from bed and board/divorce a mensa et thoro", it is necessary for moving spouse to establish grounds, which are same as those specified for "absolute divorce," ("divorce from the bonds of matrimony" or "divorce a vinculo matrimonii") *Lytle v. Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979).

Separate Maintenance: However, grounds and corroboration of grounds are unnecessary in an action for separate maintenance. All that must be established are a separation and an absence of fault. *Kesterson v. Kesterson*, 21 Ark.App. 287, 731 S.W.2d 786 (1987). There is no statutory authority for an action for separate maintenance; instead it is maintained under the broad power of equity. *Wood v. Wood*, 54 Ark. 172, 15 S.W. 459 (1891). Also, in separate-maintenance action, a court cannot order absolute division of marital property. See *Kesterson*.

Although a husband and wife may not feel married when separated, as a matter of law they are married, and any voluntary sexual intercourse between a married person and a person other than the offender's spouse constitutes "adultery." *Atkinson v. Atkinson*, 32 S.W.3d 41, 72 Ark. App. 15 (2000).

Adultery may be proven by evidence leading to an inference of guilt. *Lytle v. Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979).

To constitute “cruel treatment” as ground for divorce, there must be proof of willfulness or malice of offending spouse and that such treatment impairs or threatens impairment of complaining party's health or is such as to cause mental suffering sufficient to make condition of complaining party intolerable, and mere incompatibility of temperament or want of congeniality is insufficient. *Disheroon v. Disheroon*, 211 Ark. 519, 201 S.W.2d 17 (1947).

Indignities to warrant divorce under statute must be habitual and systematically pursued to extent rendering life of one on which they are imposed intolerable. *Scales v. Scales*, 167 Ark. 298, 268 S.W. 9 (1925).

Mere want of congeniality and constant quarrels are insufficient to constitute general indignities justifying a divorce. The fact that parties to a marriage are not likely to live together again does not warrant granting of a divorce on that ground. *Copeland v. Copeland*, 2 Ark.App. 55, 616 S.W.2d 773 (1981).

Every minute detail of complainant’s testimony need not be corroborated to support grounds of general indignities. *Moore v. Davidson*, 85 Ark. App.104; 145 S.W.3d 833 (2004).

Indignities must be proven by evidence of specific acts and conduct. *Gunnell v. Gunnell*, 30 Ark. App. 4; 780 S.W.2d 597(1989).

Mere incompatibility is not grounds for divorce in Arkansas. *Poore v. Poore*, 76 Ark. App. 99; 61 S.W.3d 912 (2001).

Pleadings which Require Verification by Affidavit

The pleadings are not required to be verified by affidavit.

Ark. Code Ann. § 9-12-304. Exceptions:

Either party may file interrogatories to the other in regard to any matter of property involved in the action that shall be answered on oath as interrogatories in other actions and have the same effect.

Unless the court initiates proceedings on its own motion, any proceeding to punish for contempt committed outside presence of court must be initiated by an affidavit of a person who witnessed the contempt or otherwise has knowledge of it. *Hilton Hilltop v. Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980).

A notarized affidavit of financial means is to be exchanged by the parties at least three days before a hearing to establish or modify a family-support order. The affidavit should not be filed in the court file.

Complaint Statements Require Proof

The statements of the complaint for a divorce shall not be taken as true because of the defendant's failure to answer or admission of their truth on the part of the defendant. Ark. Code Ann. § 9-12-305.

Corroboration

In uncontested divorce suits, corroboration of the plaintiff's grounds for divorce shall not be necessary or required.

In contested suits, corroboration of the injured party's grounds may be expressly waived in writing by the other spouse.

This section does not apply to proof as to residence, which must be corroborated, and does not apply to proof of separation and continuity of separation without cohabitation, which must be corroborated.

In uncontested cases, proof as to residence and proof of separation and continuity of separation without cohabitation may be corroborated by either oral testimony or verified affidavit of persons other than the parties.

Ark. Code Ann. § 9-12-306.

Collusion

If it appears to the court that the adultery or other offense complained of has been occasioned by the collusion of the parties or done with an intent to procure a divorce, that the complainant was consenting thereto, or that both parties have been guilty of the adultery or other offense or injury complained of in the complaint, then no divorce shall be granted or decreed. Ark. Code Ann. § 9-12-308.

Condonation Abolished

The defense of condonation to any action for absolute divorce or divorce from bed and board is abolished. Abolition of condonation does not affect the defenses of collusion, consent, or equal guilt of the parties. Ark. Code Ann. § 9-12-325.

Maintenance and Attorney Fees

Ark. Code Ann. § 9-12-309.

During the pendency of an action for divorce, whether absolute or from bed and board, separate maintenance, or alimony, the court may:

Allow to the wife or to the husband maintenance;

Allow a reasonable fee for her or his attorneys; and

Allow expert witness fees; and

Enforce the payment of the allowance by orders and executions and proceedings as in cases of contempt.

In the final decree of an action for absolute divorce, the court may award the wife or husband costs of court, a reasonable attorney's fee, and expert witness fees.

The court may immediately reduce the sums so ordered to judgment and allow the party to execute upon the marital property for the payment of the allowance, except that the homestead shall not be executed upon for the payment of the sums so ordered.

The court may allow either party additional attorney's fees for the enforcement of alimony, maintenance, and support provided for in the decree.

All child support that becomes due and remains unpaid shall accrue interest at the rate of ten percent (10%) per annum. See also Ark. Code Ann. § 9-14-233.

The court shall award a minimum of ten percent (10%) of the support amount due as attorney's fees in actions for the enforcement of payment of alimony, maintenance, and support provided for in the decree, judgment, or order.

Collection of interest and attorney's fees may be by executions, proceedings of contempt, or other remedies as may be available to collect the original support award.

Ark. Code Ann. § 9-12-309.

Case Law on Attorney's Fees

In domestic-relations proceedings, the circuit court has the inherent power to award attorney's fees, and the decision to award fees and the amount thereof are matters within the discretion of the circuit court. *Baber v. Baber*, 2011 Ark. 40, 378 S.W.3d 699 (2011).

Also, see *Tiner v. Tiner*, 2012 Ark.App. 483, 422 S.W.3d 178 (2012). A court need not conduct an exhaustive hearing on the amount of attorney's fees because it has presided over the proceedings and gained familiarity with the case and the services rendered by the attorney. Documentation of time and expense is not strictly required in a divorce case where the trial court has had the opportunity to observe the parties, their level of cooperation, and their obedience to court orders.

In determining whether to award attorney's fees in a divorce case, the trial court must consider the relative financial abilities of the parties. *Page v. Page*, 2010 Ark. App. 188, 373 S.W.3d 408 (2010). But see *Webb v. Webb*, 2014 Ark. App. 697, 450 S.W.3d 265 (2014)

finding that Page does not hold that a circuit court abuses its discretion in refusing to order the party having more income to pay the other party's attorney's fees.

Parenting Classes

When the parties to a divorce action have minor children residing with one (1) or both parents, the court, prior to or after entering a decree of divorce, may require the parties to complete at least two (2) hours of classes concerning parenting issues faced by divorced parents.

Each party shall be responsible for his or her cost of attending classes or mediation. Ark. Code Ann. § 9-12-322.

Effect of Separation Agreements

Courts of equity may enforce the performance of written agreements between husband and wife made and entered into in contemplation of either separation or divorce and decrees or orders for alimony and maintenance by sequestration of the property of either party, or that of his or her sureties, or by such other lawful ways and means, including equitable garnishments or contempt proceedings, as are in conformity with rules and practices of courts of equity. Ark. Code Ann. § 9-12-313.

The court is not bound by a stipulation entered into by the parties; rather, it is within the sound discretion of the court to approve, disapprove, or modify parties' marital separation agreement. *Rutherford v. Rutherford*, 81 Ark. App. 122, 98 S.W.3d 842 (2003).

Divorce Decree Contents

No decree of divorce shall be granted until at least thirty (30) days have elapsed from the date of the filing of the complaint. Ark. Code Ann. § 9-12-307.

The decree should include an order containing provisions for:

Alimony (Ark. Code Ann. § 9-12-312);

Child support, custody, visitation and dependent health care (Ark. Code Ann. § 9-12-312);

Division of property (Ark. Code Ann. § 9-12-315);

Reservation of an estate by entirety (Ark. Code Ann. § 9-12-317) if not to be automatically dissolved; and

Restoration of the wife's previous name (Ark. Code Ann. § 9-12-318).

Division of debts - there is no presumption that an equal division of debts must occur. *Ellis v. Ellis*, 75 Ark.App. 173, 57 S.W.3d 220 (2001). An allocation of the

parties' debt is an essential item to be resolved in a divorce dispute, and that it must be considered in the context of the distribution of all of the parties' property. *Ellis and Boxley v. Boxley*, 77 Ark.App. 136, 73 S.W.3d 19 (2002). It is not error to determine that debts should be allocated between the parties in a divorce case on the basis of their relative ability to pay. *Ellis*. The effect of an allocation of debt on a spouse's lifestyle is a valid consideration; the supreme court has affirmed unequal debt allocations where a husband was able to pay the debts from income without materially changing his style of life but the wife could not pay the debts from her income without disposing of assets to pay part of the debt. *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510, (1983). When considering the allocation of debts, it is also appropriate that the judge consider who should equitably be required to pay them. *Keathley v. Keathley*, 76 Ark.App.150, 61 S.W.3d 219 (2001).

In divorce decree dissolving a covenant marriage, the court shall enter a finding that the marriage being dissolved is a covenant marriage. Ark. Code Ann. § 9-12-324.

Causes of Action

An absolute divorce, or a divorce from bed and board, is a statutory action based on the grounds set out in Ark. Code Ann. § 9-12-301. Property must be divided upon granting an absolute divorce. Ark. Code Ann. § 9-12-315. Corroboration is required in contested cases. Ark. Code Ann. § 9-12-306.

An independent cause of action for alimony shall be by equitable proceedings. Ark. Code Ann. § 9-12-302.

There are no meaningful distinctions between the action for alimony and an action for separate maintenance. In an action for separate maintenance, it is unnecessary to establish statutory grounds-- all that must be established are a separation and an absence of fault. In a suit for separate maintenance, there is no statutory requirement for corroboration. Property cannot be divided in a separate maintenance proceeding although possession may be awarded. Child custody actions between parents are actions derivative of divorce or separate maintenance. There is no independent cause of action by one parent against the other solely for child custody. *Spencer v. Spencer*, 275 Ark. 112, 627 S.W.2d 550 (1982).

Kesterson v. Kesterson, 21 Ark.App. 287, 731 S.W.2d 786 (1987). There is no statutory authority for an action for separate maintenance; instead it is maintained under the broad power of equity. *Wood v. Wood*, 54 Ark. 172, 15 S.W. 459 (1891). Also, in separate-maintenance action, a court cannot order absolute division of marital property. See *Kesterson* and next section for more on Separate Maintenance.

See also *Jones v. Earnest*, 307 Ark. 294, 819 S.W.2d 280 (1991)(divorce from bed and board does not constitute "final decree of divorce" so as to automatically dissolve tenancy by entirety).

III. Separate Maintenance

Authority

Until *Lytle v. Lytle*, a decree of separate maintenance did not exist as a separate cause of action unrelated to a decree from bed and board. 266 Ark. 124, 583 S.W.2d 1 (1979).

There is no statutory authority. Separate maintenance is maintained under the broad powers of equity. *Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987).

Grounds

For separate maintenance, a spouse must prove only separation, absence of fault on his or her part, and financial need. The spouse is not required to prove any other grounds as listed in Ark. Code Ann. § 9-12-301.

A wife may obtain separate maintenance without having grounds sufficient for divorce. *Hill v. Rowles*, 223 Ark. 115, 264 S.W.2d 638 (1954).

Grounds and corroboration of grounds are unnecessary in an action for separate maintenance; all that must be established are a separation and an absence of fault. *Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987).

Scope

Property cannot be divided in a separate maintenance proceeding although possession may be awarded. *Coleman v. Coleman*, 7 Ark. App. 280, 648 S.W.2d 75 (1983).

Child custody actions between parents are actions derivative of divorce or separate maintenance or domestic abuse actions. *Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987).

Trial court did not err in granting an absolute divorce upon wife's filing a Complaint for Separate Maintenance only where 1) neither party raised the issue, 2) both parties agreed to a divorce, 3) both parties treated the Complaint for separate maintenance as a complaint for divorce, 4) both parties stipulated to an equal division of marital property, and husband waived corroboration of grounds for divorce, and 5) both parties consented to the hearing being one for absolute divorce. *Hiett v. Hiatt*, 86 Ark. App. 31, 158 S.W.3d 720 (2004).

IV. Division of Property & Debt

Equitable Distribution

According to Ark. Code Ann. § 9-12-315, at the time a divorce decree is entered, all marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable.

The court is not required to address the division of property at the time a divorce decree is entered if either party is involved in a bankruptcy proceeding. Ark. Code Ann. § 9-12-315

Factors for Not Dividing Marital Property Equally

In that event the court shall make some other division that the court deems equitable taking into consideration:

- (i) The length of the marriage;
- (ii) Age, health, and station in life of the parties;
- (iii) Occupation of the parties;
- (iv) Amount and sources of income;
- (v) Vocational skills;
- (vi) Employability;
- (vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
- (viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
- (ix) The federal income tax consequences of the court's division of property.

When property is divided pursuant to the foregoing considerations 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.

Case Law

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. When a circuit court does not recite any of the statutory reasons why an unequal distribution is equitable, reversal is required. However, the circuit court is not required to list each factor in its order or to weigh each factor equally. Moreover, the specific enumeration of the statutory factors does not preclude the circuit court from considering other relevant factors, where exclusion of other factors would lead to absurd results or deny the intent of the legislature to allow for the equitable division of property. *Middleton v. Middleton*, 2020 Ark. App. 389.

Exceptions to the rule of equal distribution will always depend on the specific facts as reflected by the circuit court's findings and conclusions. The statute requires the lower court simply to explain its reasons for not dividing the marital property equally, not to recite each of the statutory factors in the order. *Doss v. Doss*, 2018 Ark. App. 487, 561 S.W.3d 348.

Equitable considerations are always proper factors for the chancellor to consider when dividing marital property unequally upon divorce. *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001).

The court should only consider potential taxes in valuing marital property in limited circumstances, including only that tax liability can be reasonably predicted. *Grace v. Grace*, 326 Ark. 312, 930 S.W.2d 362 (1996).

Marital vs. Nonmarital property

All nonmarital property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated above, in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

9-12-315 states that for the purpose of division, “**marital property**” means all property acquired by either spouse subsequent to the marriage except:

- (1) Property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement;
- (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) Property acquired by a spouse after a decree of divorce from bed and board;
- (4) Property excluded by valid agreement of the parties;
- (5) The increase in value of property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement, or in exchange therefor;

(6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and

(7) Income from property owned prior to the marriage or from property acquired by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement, or in exchange therefor.

Case Law

The trial court has broad powers to distribute both marital and nonmarital property to achieve an equitable division. *Ransom v. Ransom*, 2009 Ark. App. 273, 309 S.W.3d 204.

Note *Moore v. Moore*, 2016 Ark. 105, 486 S.W.3d 766, clarifying and overruling prior cases which found that the appreciation in the value of nonmarital property during the marriage can be a marital asset when one spouse makes significant contributions of time, effort and skill which are directly attributable to the increase in value of nonmarital property. *Moore* found that under section 9–12–315(b)(5) the increase in value of property during a marriage is nonmarital, without exception, and should be returned to the owning party. *Moore* overruled cases using this “active appreciation” analysis/exception. *Moore* also reminds that the courts have broad discretion and flexibility to redistribute marital and nonmarital property to achieve an equitable distribution but that they must work within the confines of the statute to accomplish this goal.

The fact that marital funds were used to pay off the mortgage loan on house that wife owned prior to the marriage did not automatically convert the house into marital property, for purposes of dividing property in divorce action. *Horton v. Horton*, 2011 Ark. App. 361, 384 S.W.3d 61 (2011).

Option to purchase leased real property acquired during marriage was marital asset subject to equitable distribution in divorce. *Dew v. Dew*, 2012 Ark. App. 122, 390 S.W.3d 764 (2012).

Once property, whether personal or real, is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption. *Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003).

Real Property

Every such final order or judgment shall designate the specific real and personal property to which each party is entitled. When it appears from the evidence in the case to the satisfaction of the court that the real estate is not susceptible of the division as provided for in this section without great prejudice to the parties interested, the court shall order a sale of the real estate. The sale shall be made by a commissioner to be appointed by the court for that purpose at public auction to the highest bidder upon the terms and conditions and at the time and place fixed by the court. The proceeds of every such sale, after deducting the cost and expenses of the sale, including the fee allowed the commissioner by the court for his or her services, shall be paid into the court and by the court divided among the parties in proportion to their respective rights in the premises.

Ark. Code Ann. §9-12-315

Other Property Issues in 9-12-315

The proceedings for enforcing these orders may be by petition of either party specifying the property the other has failed to restore or deliver, upon which the court may proceed to hear and determine the same in a summary manner after ten (10) days' notice to the opposite party. Such order, judgment, or decree shall be a bar to all claims of dower or curtesy in and to any of the lands or personalty then owned or thereafter acquired by either party;

When stocks, bonds, or other securities issued by a corporation, association, or government entity make up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair market value of the securities, may order and adjudge that the securities be distributed to one (1) party on condition that one-half ($\frac{1}{2}$) the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities.

Debts

Arkansas Code Annotated section 9-12-315 does not apply to the division of marital debt, and there is no presumption that an equal division of debts must occur. *Williams v. Williams*, 82 Ark. App. 294, 308, 108 S.W.3d 629, 638 (2003).

The circuit court has authority to consider the allocation of debt in the context of the distribution of all of the parties' property, and its decision to allocate debt to a particular party or in a particular manner is a question of fact. *McClure v. Schollmier-McClure*, 2011 Ark. App. 681.

A circuit court's allocation of debt based on the parties' relative ability to pay is not a decision that is clearly erroneous. *Ellis v. Ellis*, 75 Ark. App. 173, 177, 57 S.W.3d 220, 223 (2001).

Temporary Orders

Temporary Orders for Support, Attorney's Fees, Expert Witness Fees

During the pendency of an action for divorce, whether absolute or from bed and board, separate maintenance, or alimony, the court may allow to the wife or to the husband maintenance, allow a reasonable fee for her or his attorneys, and allow expert witness fees. The court may enforce the payment of the allowance by orders and executions and proceedings as in cases of contempt. Ark. Code Ann. § 9-12-309.

Rule 65 TROs/Ex Parte Orders

A preliminary injunction or a temporary restraining order (TRO) may be granted without written or oral notice to the adverse party or his attorney where it appears by affidavit or verified complaint that irreparable harm or damage will or might result to the applicant if such preliminary injunction or TRO is not granted. Ark. R. Civ. P. 65.

If it appears from affidavit or verified complaint that irreparable harm will or might result, the court has the authority to issue a preliminary injunction or temporary restraining order without notice to the opposing party. Otherwise, reasonable notice must be given to the adverse parties or their attorney of the application for a preliminary injunction or a TRO, and an opportunity for hearing must be given. Ark. R. Civ. P. 65.

Issued without notice? Rule requires an affidavit or verified complaint to state specific facts showing the harm that will result to the movant before the adverse party can be heard and requires that the movant's attorney certify in writing any efforts made to give notice and why notice should not be required (b)(1); also requires that a temporary restraining order issued without notice describe the circumstances underlying its issuance(b)(2). Ark. R. Civ. P. 65.

Every temporary restraining order issued without notice must expire not later than 14 days after entry -- unless for good cause it is extended before the 14 day expiration or with the adversary's consent it is extended. Also, the hearing on the temporary restraining order must be set for the earliest possible time and take precedence over other matters. In addition, the party against whom the order is issued may appear and move to dissolve or modify the order upon 2 days' notice to the party who obtained the temporary restraining order without notice. Ark. R. Civ. P. 65.

Caselaw: See *Simmering v. Simmering*; 2014 Ark. App. 722- In this type of request for emergency relief, temporary relief may be provided upon proof of immediate or irreparable

harm without emergency intervention by the court. See Ark. R. Civ. P. 65; see also Ark. Code Ann. § 9-19-204 (Repl. 2009); 28 U.S.C.A. § 1738A(c)(2)(C); and *Perez v. Tanner*, 332 Ark. 356, 965 S.W.2d 90 (1998). The standard is high: immediate or irreparable harm. Thus, there could conceivably be evidence that might not rise to a level sufficient to prove an emergency but might still be sufficient to support a finding of a material change of circumstances on a permanent change of custody request.

Temporary Orders of Protection

When a petition alleges an immediate and present danger of domestic abuse or that the respondent is scheduled to be released from incarceration within thirty (30) days and upon the respondent's release there will be an immediate and present danger of domestic abuse, the court shall grant a temporary order of protection pending a full hearing if the court finds sufficient evidence to support the petition. Ark. Code Ann. § 9-15-206.

An ex parte temporary order of protection is effective until the date of the hearing. Ark. Code Ann. § 9-15-206.

The court shall order the hearing to be held on the petition for the order of protection not later than thirty (30) days from the date on which the petition is filed or at the next court date, whichever is later. Ark. Code Ann. § 9-15-204.

A denial of an ex parte temporary order of relief does not deny the petitioner the right to a full hearing on the merits. Ark. Code Ann. § 9-15-204.

A copy of ex parte temporary order, if issued, shall be served, with copy of the petition, with notice of the date and place set for final hearing, upon the respondent:

at least 5 days before the date of the hearing;

in accordance with applicable Rules of Civil Procedure governing service.

If service cannot be made upon the respondent, the court may set a new date for the hearing. Ark. Code Ann. § 9-15-204.

An ex parte temporary order of protection may include any or all orders provided for in Ark. Code Ann. § 9-15-203 (Form of petition) and § 9-15-205 (Relief generally). Ark. Code Ann. § 9-15-206.

VI. Annulment

Venue

The action shall be by equitable proceedings in the county where the complainant or complainants reside.

The process may be directed in the first instance to any county in the state where the defendant may then reside or be found.

Ark. Code Ann. § 9-12-202.

Conflict of Laws

The validity of a marriage is determined by the law of the state where the marriage was contracted. *Feigenbaum v. Feigenbaum*, 210 Ark. 186, 194 S.W.2d 1012 (1946).

Grounds for Annulment

When either of the parties to a marriage is incapable from want of age or understanding of consenting to any marriage, or is incapable of entering into the marriage state due to physical causes, or when the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction. Ark. Code Ann. § 9-12-201.

Case Law

A state of marriage can be dissolved, by annulment, only during the lives of the parties to the marriage. *Stuhr v. Oliver*, 2010 Ark. 189, 363 S.W.3d 316 (2010).

In Arkansas, a marriage may be annulled only for causes set forth by statute. *Stuhr v. Oliver*, 2010 Ark. 189, 363 S.W.3d 316 (2010).

Where girl and boy, both residents of Arkansas, were less than minimum age required by Arkansas marriage statute and went to Mississippi which allowed such marriages and were married with their parents' consent and returned to Arkansas and lived there as man and wife, marriage was not void. *State v. Graves*, 228 Ark. 378, 307 S.W.2d 545 (1957).

A marriage induced by misrepresentation as to paternity of unborn child may be annulled, where parties have been having sexual intercourse before marriage and husband was induced to believe by false representations that he was father of child. *Shatford v. Shatford*, 214 Ark. 612, 217 S.W.2d 917 (1949).

Under the statute providing that in all cases where the male is under 21 years or the female is under 18 years and consent of parent or guardian is not given to a marriage, the marriage may be set aside and annulled upon application of parent or parents, the trial court has some discretion in the matter and it is not mandatory for the chancellor to grant an annulment upon application. *Mitchell v. Mitchell*, 219 Ark. 69, 239 S.W.2d 748 (1951).

Generally, a party lacks the mental capacity to enter into a contract for marriage if that party is incapable of understanding the nature, effect, and consequences of the marriage. The mental capacity necessary to enter into marriage does not require the ability to exercise

clear reason, discernment, and sound judgment. *Porter v. Arkansas Dep't of Health & Human Servs.* 374 Ark. 177, 286 S.W.3d 686 (2008).

To annul a marriage, fraud must be established by clear and convincing evidence. *Worden v. Worden*, 231 Ark. 858, 333 S.W.2d 494 (1960).

Failure to file a marriage license within 60 days, as required by Ark. Code Ann. §9-11-218, does not render a marriage void. *Fryar v. Roberts*, 346 Ark. 432, 57 S.W.3d 727 (2001).

Child Custody & Support in Connection with Annulment

A court of equity entering an annulment decree has authority to award custody of children and provide for their support. See Ark. Code Ann. §9-12-312.

Marriage Before Entry of Divorce

All marriages declared void because the parties had entered into an otherwise valid marriage after the rendition of a valid decree of divorce of either of the parties but before the entry for record of the decree are declared valid for all purposes.

All children born to any marriage declared valid by this section are deemed to be the legitimate children of both parents for all purposes.

Ark. Code Ann. § 9-11-706. The legislative intent was to validate marriages deemed void as a result of *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989).

VII. Alimony

Authority

When a decree is entered, the court shall make an order concerning the care of the children, if there are any, and an order concerning alimony, if applicable, as are reasonable from the circumstances of the parties and the nature of the case. Ark. Code Ann. § 9-12-312.

The court's jurisdiction to grant a divorce is distinct from its jurisdiction to award alimony and child support. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003)(trial court has power and duty to enter orders regarding support of individuals regardless of its power to terminate the marriage).

Maintenance & Attorney's Fees in Temporary Order

The court may grant either party maintenance and reasonable attorney fees during the pendency of an action for absolute divorce, bed and board divorce, separate maintenance, or alimony, or during the enforcement of alimony, maintenance, or support action. Ark. Code Ann. § 9-12-309.

Considerations in Awarding Alimony

An award of alimony is not mandatory but rather is discretionary, and the circuit court's decision regarding any such award will not be reversed on appeal absent an abuse of that discretion. This court has recognized that a circuit court is in the best position to view the needs of the parties in connection with an alimony award. *Smithson v. Smithson*, 2014 Ark. App. 340, 436 S.W.3d 491.

The purpose of alimony is to rectify the frequent economic imbalance in the earning power and standard of living of the divorced parties in light of the particular facts of each case. *Hiatt v. Hiatt*, 86 Ark. App. 31, 158 S.W.3d 720 (2004).

The primary factors to be considered in awarding alimony are the need of one spouse and the other spouse's ability to pay. *Kuchmas v. Kuchmas*, 368 Ark. 43, 49, 243 S.W.3d 270, 273 (2006).

The amount of alimony should not be reduced to a mathematical formula because the need for flexibility outweighs the need for relative certainty. *Kuchmas v. Kuchmas*, 368 Ark. 43

The need for flexibility outweighs the need for relative certainty in assessing alimony. If alimony is awarded at all, it should be an amount that is reasonable under all the circumstances. *Smithson v. Smithson*, 2014 Ark. App. 340, 436 S.W.3d 491.

Secondary factors to be considered in an award of permanent or rehabilitative alimony include the following: (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 husband and wife; (11) the duration of the marriage; and (12) the amount of child support. Fault is not a factor in the award of alimony unless it meaningfully relates to need or ability to pay. *Foster v. Foster*, 2016 Ark. 456.

See also:

William v. Williams, 2018 Ark. App. 79 (the court ordered alimony amount was found unreasonable given the fact that after the husband's monthly expenses are taken care of, he is left with \$1,206.64 from which he has to pay appellee \$1,100 in **alimony**, leaving appellant with only a little over \$100 after this payment.)

Hiett v. Hiett, 86 Ark. App. 31, 158 S.W.3d 720 (2004)(trial court considered factors and properly found that ex-wife entitled to lifetime award of alimony);

Holaway v. Holaway, 70 Ark. App. 240, 16 S.W.3d 302 (2000)(while the court may consider disparate levels of parties' earning abilities and sources of income, court cannot set alimony at a rate and for a time based upon the court's inability by law to divide husband's non-vested military retirement benefits);

Bolan v. Bolan, 32 Ark. App. 65, 796 S.W.2d 358 (1990)(chancellor did not abuse discretion in refusing to award alimony after considering factors; found that marriage was of short duration, plaintiff was relatively young and had a college degree and teaching certificate and no health problems);

Mearns v. Mearns, 58 Ark. App. 42, 946 S.W.2d 188 (1997)(husband was entitled to alimony where he was unemployed, 57 years old, in declining health, without college degree or professional license, and without independent financial means, while wife had secure job paying more than \$40,000 per year).

Rehabilitative Alimony

Alimony may be awarded under proper circumstances concerning rehabilitation to either party in fixed installments for a specified period of time so that the payments qualify as periodic payments within the meaning of the Internal Revenue Code.

When a request for rehabilitative alimony is made to the court, the payor may request, or the court may require, the recipient to provide a plan of rehabilitation for the court to consider in determining:

- (A) Whether or not the plan is feasible; and
- (B) The amount and duration of the award.

If the recipient fails to meet the requirements of the rehabilitative plan, the payor may petition the court for a review to determine if rehabilitative alimony shall continue or be modified.

A person paying alimony is entitled to petition the court for a review, modification, or both of the court's alimony order at any time based upon a significant and material change of circumstances.

Ark. Code Ann. § 9-12-312(b).

The concept of rehabilitative alimony shall be analyzed using the same factors that apply to permanent alimony. Rehabilitative alimony is "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support. Foster v. Foster, 2016 Ark. 456.

Section 9-12-312(b) does not mandate that a rehabilitative plan be submitted or approved; instead, the statute states that a plan “may” be requested by the payor or required by the circuit court. Carr v. Carr, 2019 Ark. App. 513.

Agreement of the Parties Does Not have to be Approved by Court

The court is not bound by a stipulation entered into by the parties on alimony or property division: rather, it is within the sound discretion of the court to approve, disapprove, or modify the agreement. The Court has the means to approve and enforce an agreement, but that does not limit the court's discretion to accept or reject the agreement of the disputing parties. Rutherford v. Rutherford, 81 Ark. App. 122, 98 S.W.2d 842 (2003).

Bankruptcy and Alimony

Bankruptcy does not discharge obligation to pay alimony. Barker v. Barker, 271 Ark. 956, 611 S.W.2d 787 (Ct. App. 1981); 11 U.S.C. §523(a)(5).

Modification of Alimony

The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance as may be proper. Ark. Code Ann. § 9-12-314.

See Holaway v. Holaway, 70 Ark. App. 240, 16 S.W.3d 302 (2000)(order that alimony would terminate only upon the death of either party appears to violate statutory and case authority in Arkansas that, in the absence of a settlement agreement to the contrary, an award of alimony is always subject to modification, upon application of either party).

Modification of an award of alimony must be based on a change in the circumstances of the parties.

See Honeycutt v. Honeycutt, 2017 Ark. App. 113 (Order reducing former husband's alimony obligation was not an abuse of discretion; former husband was laid off after an economic downturn in his employment field, he made a good faith effort to find new employment, and he incurred additional expenditures due to former wife's lack of cooperation in applying for Social Security disability benefits and her refusal to sign the parties' joint income tax return.)

But also see Cherry v. Cherry, 2021 Ark. 49 (trial court correctly determined that it did not need to reassess husband's **alimony** obligation, even though wife was unemployed when the award was determined and she had since obtained employment, was not clearly erroneous; while wife's employment situation had improved, it was not so great as to make **alimony** unnecessary, and wife's monthly expenses were essentially the same)

The burden of showing such a change in circumstances is always upon the party seeking the change in the amount of 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.

A finding of changed circumstances warranting the termination of an alimony obligation is a finding of fact that will not be reversed unless clearly erroneous or clearly against the preponderance of the evidence.

Hass v. Hass, 80 Ark. App. 408, 412, 97 S.W.3d 424, 427 (2003).

If a spouse shows a need for alimony, and the other spouse is shown to have the ability or earning capacity to pay alimony except for a circumstance at the time the parties' decree is entered, the chancellor may reserve jurisdiction, without assigning a nominal amount. This procedure would permit the spouse requesting alimony to petition for its payment after showing a change in circumstance. Mulling v. Mulling, 323 Ark. 88 (1996), overruling Ford v. Ford, 272 Ark. 506 (1981).

When a decree of alimony is based on an independent contract between the parties which is incorporated into the decree and approved by the Court as an independent contract, it does not merge into the court's award and is not subject to modification except upon consent of the parties. Rockefeller v. Rockefeller, 335 Ark. 145, 980 S.W.2d 255 (1998); Kersh v. Kersh, 254 Ark. 969, 497 S.W.2d 272 (1973); Kennedy v. Kennedy, 53 Ark. App. 22, 918 S.W.2d 197 (1996).

See also Grady v. Grady, 295 Ark. 94, 747 S.W.2d 77 (1988)(court may consider fact that supporting spouse voluntarily changes employment so as to lessen earning capacity and, in turn, ability to pay alimony and child support, and may in proper circumstances impute income to spouse according to what could be earned by use of his or her best efforts to gain employment suitable to his or her capabilities).

Termination of Alimony

Unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon the earlier of:

- (A) The date of the remarriage of the person who was awarded the alimony;
- (B) The establishment of a relationship that produces a child or children and results in a court order directing another person to pay support to the recipient of alimony, which circumstances shall be considered the equivalent of remarriage;
- (C) The establishment of a relationship that produces a child or children and results in a court order directing the recipient of alimony to provide support of another

person who is not a descendant by birth or adoption of the payor of the alimony, which circumstances shall be considered the equivalent of remarriage;

(D) The living full time with another person in an intimate, cohabitating relationship;

(E) The death of either party; or

(F) Any other contingencies as set forth in the order awarding alimony.

Ark. Code Ann. § 9-12-312.

See *Estate of Carpenter v. Carpenter*, 220 S.W.3d 263 (2005) (husband's obligation to pay wife \$500 per week in alimony for period of five years terminated upon husband's death, but estate was liable for any alimony arrearages accrued at time of death).

See also *Collins v. Collins*, 2015 Ark. App. 525, 471 S.W.3d 665 (evidence was sufficient to support finding that former wife and boyfriend were "cohabitating" within meaning of property-settlement agreement which provided that former husband's alimony payments would terminate upon wife's "remarriage or cohabitation"; while they did not share financial expenses and had separate homes, there was evidence boyfriend spent two or three nights a week at former wife's home, sometimes more, and that he spent most of one month there while new house was being constructed; also, separate and independent property-settlement agreement that has been incorporated into a divorce decree leaves a trial court without authority to modify the agreement; rather, the issue of whether alimony should be terminated is based on an analysis of the contract language.)

VIII. Child Support

Administrative Order No. 10 was revised in 2020. A complete copy of the law can be found at:

<https://www.arcourts.gov/content/administrative-order-10-arkansas-child-support-guidelines>

Arkansas Code Annotated section 9-12-312(a)(4)(A)(i) mandates that a committee appointed by the Chief Justice of the Arkansas Supreme Court review the Arkansas Family Support Chart every four years. The Supreme Court promulgated a revised order concerning child-support obligations in 2020. In re Implementation of Revised Admin. Ord. No. 10, 2020 Ark. 131 (per curiam). In accordance with Act 907 of 2019, the new family support chart is based on the "Income Shares Model," which provides "that children should receive the same proportion of parental income that they would have received had the parents lived together and shared financial resources." The new order provides that "each parent's share is that parent's prorated share of the two parents' combined income." "The pro-rata charted amount establishes the base level of child support" the payor parent must pay the payee parent. And a "rebuttable presumption" exists that this chart-derived amount "is the amount to be awarded." See *Parnell v. OCSE*, 2022 Ark. 52.

Parnell v. OCSE sets out the relevant procedure:

The gross income of both parents shall first be determined and combined. Each parent's share of the combined total gross income is then determined based on their percentage of the combined income. Next,

the basic child-support obligation is determined by looking at the Chart for the parties' combined income and the number of children they have. A presumptive child-support obligation is then determined by adding the allowed additional monthly child-rearing expenses (including health insurance premiums, extraordinary medical expenses, and childcare expenses). Each parent's share of additional child-rearing expenses is determined by multiplying the percentage of income they have available for support, which was determined in step 1. The total child-support obligation for each parent is determined by adding each parent's share of the child-support obligation with their share of allowed additional child-rearing expenses. *Parnell v. OCSE*, 2022 Ark. 52.

The child-support scheme in Arkansas is governed by Arkansas Supreme Court Administrative Order No. 10, which includes a family-support chart that sets the amount of support due based on the payor's income. It is a rebuttable presumption that the amount contained in the family-support chart is the correct amount of child support to be awarded. Ark. Code Ann. § 9-12-312(a)(3)(C) The amount of child support calculated pursuant to the most recent revision of the Chart is presumed to be the correct amount of child support to award in any judicial proceeding involving child support. See Ark. Sup. Ct. Admin. Order No. 10(II) See *Olinghouse v. Olinghouse*, 2022 Ark. App. 114.

Jurisdiction

The circuit courts shall have exclusive jurisdiction in all civil cases and matters relating to the support of a minor child or support owed to a person eighteen (18) or older that accrued during that person's minority. Ark. Code Ann. § 9-14-105.

Any person who establishes or acquires a marital domicile in this state, who contracts marriage in this state, or who becomes a resident of this state while legally married, and subsequently absents himself or herself from the state leaving a dependent natural or adopted child in this state and fails to support the child as required by the laws of this state, is deemed to have consented and submitted to the jurisdiction of the courts of this state as to any cause of action brought against that person for the support and maintenance of the child. Ark. Code Ann. § 9-14-101.

In an action to establish paternity or to establish or enforce a child support obligation in regard to a child who is the subject of the action, a person is deemed to have consented and submitted to the jurisdiction of the courts of this state if any of the following circumstances exists:

- (1) The person engaged in sexual intercourse with the child's mother in this state during the period of the child's conception or the affected child was conceived in this state;
- (2) The person resides or has resided with the child in this state.

Ark. Code Ann. § 9-14-101.

Service of process upon any person who is deemed by this section to have consented and submitted to the jurisdiction of the courts of this state may be made pursuant to Rule 4 of the Arkansas Rules of Civil Procedure. Ark. Code Ann. § 9-14-101.

A court's jurisdiction to grant a divorce is distinct from its jurisdiction to award child support and alimony. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003).

Transfer of Cases Between Local Jurisdictions- Child Support and Custody

The court where the final adjudication of child support is rendered shall retain jurisdiction of all matters following the entry of the decree.

If more than six (6) months subsequent to the final adjudication, however, each of the parties to the action has established a residence in a county of another judicial district within the state, one (1) or both of the parties may petition the court that entered the final adjudication to request that the case be transferred to another county.

The case shall not be transferred absent a showing that the best interest of the parties justifies the transfer.

If a justification for transfer of the case has been made, there shall be an initial presumption for transfer of the case to the county of residence of the physical custodian of the child.

At the request of the person seeking to transfer the case to another judicial district, upon proper motion and affidavit, notice and payment of a refiling fee, the court shall enter an order transferring the case and the refiling fee and charging the clerk of the court to transmit forthwith certified copies of all records pertaining to the case to the clerk of court in the judicial district where the case is being transferred.

An affidavit shall accompany the motion to transfer and recite that the parent or parents, the physical custodian, and the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration, as appropriate, have been notified in writing that a request has been made to transfer the case to another judicial district.

Notification pursuant to this section must inform each recipient that any objection must be filed within twenty (20) days from the date of receipt of the affidavit and motion for transfer.

The circuit clerk receiving a transferred case shall within fourteen (14) days of receipt set up a case file, docket the case, and afford the case full faith and credit as if the case had originated in that judicial district.

Ark. Code Ann. § 9-14-108.

Petition for Order of Support

The following may file a petition to require the noncustodial parent or parents of a minor child to provide support for the minor child:

- (1) Any parent having physical custody of a minor child;
- (2) Any other person or agency to whom physical custody of a minor child has been given or relinquished;
- (3) A minor child by and through his or her guardian or fictive kin; or
- (4) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration when a person to whom physical

custody has been relinquished or awarded, parent, or putative father is receiving certain assistance or services, or has contracted with the department for the collection of support.

Ark. Code Ann. § 9-14-105.

Attorney employed by OCSE represents the interests of that office and does not represent the assignor. Ark. Code Ann. § 9-14-210.

Any person eighteen (18) years of age or above to whom support was owed during his or her minority may file a petition for a judgment against the nonsupporting parent or parents. Upon hearing, a judgment may be entered upon proof by a preponderance of the evidence for the amount of support owed and unpaid. Such a person has 5 years from his eighteenth birthday to file a petition for owed support. Ark. Code Ann. § 9-14-105.

Child was entitled to bring action for, and receive, accrued child support from his father from date on which he left his mother's residence and moved in with his maternal grandparents until his eighteenth birthday, even though father was not then under court order to pay support. *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998).

Parties to a case must provide the clerk of the appropriate circuit court with the following information: names, residential and mailing addresses, social security numbers, telephone numbers, drivers' license numbers, and names and addresses of employers, where applicable.

This information shall be filed on a form provided by the AOC and maintained separately by the clerk from the file of the case. The information is considered confidential and is open to inspection only by OCSE, attorneys in the case and pro se parties, and anyone authorized access by the circuit court in which the form is filed.

Ark. Code Ann. § 9-14-205.

"Child support order" or "support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing state, or of the parent with whom the child is living, that provides for monetary support, health care, including health insurance or cash medical support, arrearages, or reimbursement, and that may include related costs and fees, interest and penalties, income withholding, attorney's fees, and other relief. Ark. Code Ann. § 9-14-201.

Enforcement Provisions

In all decrees or orders that provide for the payment of money for the support and care of any children, the court shall include a provision directing a payor to deduct from:

Money, income, or periodic earnings due the noncustodial parent an amount that is sufficient to meet the periodic child support payments imposed by the court plus an additional amount of not less than twenty percent (20%) of the periodic child

support payment to be applied toward liquidation of any accrued arrearage due under the order; and

Any lump-sum payment as defined in § 9-14-201, the full amount of past due support owed by the noncustodial parent not to exceed fifty percent (50%) of the net lump-sum payment. Ark. Code Ann. § 9-14-218.

The use of income withholding does not constitute an election of remedies and does not preclude the use of other enforcement remedies. Ark. Code Ann. § 9-14-218.

See *Stewart v. Norment*, 328 Ark. 133, 941 S.W.2d 419 (1997)(order for child-support arrearages is final judgment subject to garnishment or execution until order is modified or otherwise set aside, regardless of whether order also provides for income withholding to satisfy accrued support arrearages, in view of statutes stating that remedies provided in child-support enforcement subchapter shall not be exclusive of other remedies and that use of income withholding in orders providing for child support does not constitute election of remedies and does not preclude use of other enforcement remedies).

In determining good cause, the court may take into consideration evidence of the degree of the respondent's past financial responsibility, credit references, credit history, and any other matter the court considers relevant in determining the likelihood of payment in accordance with the support order. Ark. Code Ann. § 9-14-102.

Orders of income withholding for support shall have priority over all other legal processes under state law against the money, income, or periodic earnings of the noncustodial parent. Ark. Code Ann. § 9-14-219.

If there is more than one (1) notice or order for income withholding for current child support against a noncustodial parent and the total amount requested exceeds the limits imposed under the Consumer Credit Protection Act, the payor shall make pro rata disbursements, "pro rata" being the proportionate amount each notice or order bears to the total amount due for current support under all notices and orders. Ark. Code Ann. § 9-14-228.

See *Bitzer v. Bitzer*, 65 Ark. App. 162, 986 S.W.2d 122 (1999)(finding that father was supporting his spouse, for purposes of determining the maximum percentage of his income that could be withheld for child support under the Federal Consumer Protection Act, was supported by evidence that father's spouse earned approximately \$3,100 per month, father earned approximately \$4,000 per month, father and spouse had a monthly mortgage payment of \$1,400, total monthly payment on two vehicles owned by father's spouse was \$900, and father's spouse was supporting a child from a previous marriage).

Any decree, judgment, or order that contains a provision for payment of money for the support and care of any child or children through the registry of the court or through the Arkansas child support clearinghouse shall become a lien upon all real property, not otherwise exempt by the Arkansas Constitution, owned by the noncustodial parent or that the noncustodial parent may afterwards, or before the lien expires, acquire. Ark. Code Ann. § 9-14-230.

Such lien originating in another state shall be accorded full faith and credit as if such lien originated in the State of Arkansas. Ark. Code Ann. § 9-14-230.

When a person is ordered by a court of record to pay for the support of his or her children, the court, at the time an order of support is made or any time thereafter, upon a showing of good cause, may order periodic drafts of his or her accounts at a financial institution to deduct moneys due or payable for child support in amounts the court may find to be necessary to comply with its order for the support of the children. Ark. Code Ann. § 9-14-107.

Arrearage

“Accrued arrearage” means a delinquency that is past due and unpaid and owed under a court order or an order of an administrative process established under state law for support of any child or children. “Accrued arrearage” may include past due support that has been reduced to a judgment if the support obligation under the order has not been terminated. Ark. Code Ann. § 9-14-201.

See *Hendrickson v. State, Office of Child Support Enforcement ex rel. Henderson*, 77 Ark. App. 103, 72 S.W.3d 124 (2002)(chancellor should have considered the applicability of equitable estoppel to prevent enforcement of child support order and collection of arrears).

“Overdue support” means a delinquency pursuant to an obligation created under a court decree, order, or judgment or an order of an administrative process established under the laws of another state for the support and maintenance of a minor child.

“Past due support” is the total amount of support determined under a court order established under state law which remains unpaid.

Ark. Code Ann. § 9-14-201.

All child support that becomes due and remains unpaid shall accrue interest at the rate of ten percent (10%) per annum unless the owner of the judgment or the owner's counsel of record requests prior to the accrual of the interest that the judgment shall not accrue interest. Ark. Code Ann. § 9-14-233.

If the obligated parent who is not incapacitated refuses to pay past due support or refuses to engage in work activities or seek work activities as ordered by the court, the court may order the obligated parent to be incarcerated.

In any action brought for the enforcement of a child support obligation, whenever the court orders an obligated parent to be incarcerated for failure to obey a previous order, the court may further direct that the obligated parent be temporarily released from confinement to engage in work activity upon such terms and conditions as the court deems just.

Ark. Code Ann. § 9-14-233.

Any decree, judgment, or order that contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or

execution as to any installment or payment of money that has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order. Ark. Code Ann. § 9-14-234.

See *Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997)(administrator of mother's estate had standing to bring action against father for child support arrearages, even though statute which defined "moving party" who could bring suit for child-support arrearages did not specifically list administrator; administrator, as appointed representative of mother's estate, was entitled under Probate Code to enforce mother's estate's entitlement to any existing money or personal property judgment or decree, and statute governing who could bring suit for child support arrearages could be read in harmony with applicable probate provisions).

Existing child support order is a final order and is not subject to modification until a motion for modification is filed, and it follows that, if no motion for modification is filed, the existing judgment remains intact until such time as a proper motion is filed. *Martin v. Martin*, 79 Ark. App. 309, 87 S.W.3d 817 (2002)(since no motion for modification of child support had been filed by ex-husband, the trial court's modification of the existing support order violated statute providing that any decree which contains a provision for the payment of money for child support shall be final judgment subject to writ of garnishment or execution as to any payment of money which has accrued until the time either party moves to set aside or modify the decree).

Any person eighteen (18) years of age or above to whom support was owed during his or her minority may file a petition for a judgment against the nonsupporting parent or parents. Upon hearing, a judgment may be entered upon proof by a preponderance of the evidence for the amount of support owed and unpaid. Ark. Code Ann. § 9-14-105

If a child support arrearage or judgment exists at the time when any child entitled to support reaches the age majority, is emancipated, or dies, or when the obligor's current duty to pay child support otherwise ceases, the obligor shall continue to pay an amount equal to the court-ordered child support, or an amount to be determined by a court based on the application of guidelines for child support under the family support chart, until such time as the child support arrearage or judgment has been satisfied. Ark. Code Ann. § 9-14-235.

An action for arrearage may be brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches eighteen (18) years of age. Ark. Code Ann. § 9-14-236.

See *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 47 S.W.3d 227 (2001)(mother had statutory right to bring action against father, after child reached age 18, for arrearages of child support that had been payable before child reached age 18, and thus, mother's assignment of such right to OCSE was valid).

No statute of limitation shall apply to an action brought for the collection of a child support obligation or arrearage against any party who leaves or remains outside the State of

Arkansas with the purpose to avoid the payment of child support. Ark. Code Ann. § 9-14-236.

Res judicata applied to child support is a “modified res judicata,” which is subject to changed circumstances and the best interest of the child. Office of Child Support Enforcement, et al. v. King, 81 Ark. App. 190, 100 S.W.3d 95 (2003)(any past-due child support accrues and is a judgment until altered prospectively by proper motion and order of the court. Here, no court order modifying earlier order, so “modified res judicata” did not come into play).

The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration shall provide individual monthly reports to the county circuit clerk concerning money received by the office in payment of arrearages owed by a person convicted of nonsupport. Ark. Code Ann. § 9-14-242.

Modification of Support

Consistent with 9-14-107(c)(2), Administrative Order No. 10 states that an inconsistency between an existing child support award and the amount of child support that results from applying the Family Support Chart shall be a material change of circumstances sufficient to petition the Court for modification of child support after appropriate deductions unless one of these three exceptions apply:

- Doesn't meet the quantitative standard (20%)
- Justified deviation that has not changed
- Inconsistency due solely to promulgation of revised Family Support Chart

A subsequent child support obligation shall not constitute the sole basis for a material change of circumstances sufficient to support a petition to the court for modification of a prior child support order.

A change in a parent's ability to provide health insurance may be a material change of circumstances sufficient to petition for modification of child support.

The incarceration of a parent shall not be treated as voluntary unemployment for purposes of determining a reasonable amount of support either initially or upon review.

Ark. Code Ann. § 9-14-107.

Expedited Hearings

Child support and paternity cases brought pursuant to Title IV-D shall be heard within a reasonable period of time following service.

Title IV-D cases, including paternity, have specific time periods within which they must be heard.

The Chief Justice may direct redistribution of caseload or may appoint other trial judges to a district to insure compliance with state and federal law in meeting time requirements of IV-D cases.

Sheriff must make return of service or nonservice within 10 days in Title IV-D cases.

Court clerk must file or docket IV-D papers on the date received but no later than the close of business the day after papers are received in the clerk's office.

Ark. Code Ann. § 9-14-204.

Termination of Duty of Support

Unless a court order for child support specifically extends child support after these circumstances, a payor parent's duty to pay child support for a child shall automatically terminate by operation of law:

When the child reaches eighteen (18) years of age unless the child is still attending high school. If the child is still attending high school, upon the child's high school graduation or the end of the school year after the child reaches nineteen (19) years of age, whichever is earlier;

When the child is emancipated by a court of competent jurisdiction, marries, or dies; or

Upon the entry of a final decree of adoption or an interlocutory decree of adoption that has become final under § 9-9-201 et seq. and thereby relieves the payor parent of all parental rights and responsibilities.

Ark. Code Ann. § 9-14-237.

The court may provide for the payment of child support beyond the eighteenth birthday of the child to address the educational needs of a child whose eighteenth birthday falls before graduation from high school so long as such child support is conditional on the child remaining in school.

The court also may provide for the continuation of support for an individual with a disability that affects the ability of the individual to live independently from the custodial parent. Ark. Code Ann. § 9-12-312.

See *Kimbrell v. Kimbrell*, 47 Ark. App. 56, 884 S.W.2d 268 (1994)(chancellor did not abuse discretion by ordering disabled father to pay \$60 a month for support of handicapped adult son; chancellor did not ignore son's independent source of income but determined that son's necessary expenses exceeded his disability income by \$100 per month and in setting amount of support, he considered poor financial conditions of both parents and concluded that each should share responsibility for providing for son's needs based on their respective incomes and relative abilities to pay and considered fact that mother was also disabled and that her source of income was also derived from disability).

But see *Aikens v. Lee*, 53 Ark. App. 1, 918 S.W.2d 204 (1996)(no special circumstances existed which would require father to continue making child support payments until child finished college even though mother was contributing between \$120 and \$150 per month towards college expenses; child had reached age of majority, child worked 40 hours per week during summer, and child received college scholarships).

However, even if child support terminates by operation of law, any unpaid child support obligations owed under a judgment or in arrearage pursuant to a child support order shall be satisfied. Ark. Code Ann. § 9-14-237.

Also, see *Mixon v. Mixon*, 65 Ark. App. 240, 987 S.W.2d 284 (as a matter of law, child support terminated upon his child's eighteenth birthday, as the child had already graduated from high school; chancellor did not attempt to retroactively modify a judgment and simply recalculated the actual amounts owed in obedience to the law; there was no legal right to receive child support for emancipated child when the General Assembly prescribed that support for that child would “automatically terminate by operation of law.”)

Additionally, even if child support terminates by operation of law, for the remaining minor children, support shall be determined:

by the court upon a motion filed within 30 days after expiration of the 10-day provision to notify of termination of support; or

by operation of law after the 30-day period expires, using the most recent version of the family support chart; or

by the court if the most recent order was entered prior to adoption of the guidelines or if the most recent order deviated from the family support chart.

Ark. Code Ann. § 9-14-237.

Deviations from the chart shall be noted in the Order or on the record as appropriate. Ark. Code Ann. § 9-14-237.

Ark. Code Ann. § 9-14-240 provides an administrative procedure for terminating income withholding when the duty to support terminates.

Bankruptcy

Bankruptcy does not discharge obligation to pay child support. 11 U.S.C. § 523(a)(5).

Qualified Domestic Relations Orders

“Domestic relations order” means any judgment, decree, or order, including approval of a property settlement agreement, that relates to the provisions for child support, alimony payment, or marital property rights to a spouse, former spouse, child, or other dependents of a participant under Arkansas law.

“Qualified domestic relations order” means a domestic relations order:

(A) Which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant's retirement plan;

(B) Which clearly specifies the name and last known mailing address, if any, of the participant and the name and mailing address of each alternate payee covered by the order, the amount or percentage of the participant's benefits to be paid by the

plan to each alternate payee or the manner in which the amount or percentage is determined, the number of payments or period of time to which the order applies, and each retirement plan to which the order applies; and

(C) Which does not require the retirement plan to provide any type or form of benefit, or pay options not otherwise available under the plan, does not require the plan to provide increased benefits, and does not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order

Ark. Code Ann. § 9-18-101.

The circuit courts of Arkansas are empowered to enter qualified domestic relations orders to reach any and all retirement annuities and benefits of any retirement plan and to specify that a designated percent of a fractional interest on any retirement benefit payment may be paid to an alternate payee. Ark. Code Ann. § 9-18-102.

Any state-supported retirement system shall comply with any qualified domestic relations order. Ark. Code Ann. § 9-18-103.

IX. Uniform Interstate Family Support Act (UIFSA)

Jurisdiction Under UIFSA

In a proceeding to establish, enforce, or modify a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

- (1) the individual is personally served with summons within this state;
- (2) the individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- (3) the individual resided with the child in this state;
- (4) the individual resided in this state and provided prenatal expenses or support for the child;
- (5) the child resides in this state as a result of the acts or directives of the individual;
- (6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
- (7) the individual asserted parentage of a child in the Putative Father Registry maintained in this state by the Department of Health; or

(8) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

The bases of personal jurisdiction above may not be used to acquire personal jurisdiction to modify a child support order of another state unless the requirements of § 9-17-611 or § 9-17-615 are met.

Ark. Code Ann. § 9-17-201.

Tompkins v. Tompkins, 2020 Ark. App. 122 (Circuit court had subject matter jurisdiction to establish child support for parties' son, who was long-time resident of Germany and who lived with mother, upon mother's request as part of divorce proceedings; state statute authorized circuit court to issue support orders binding on obligor over whom court has personal jurisdiction when person requesting support order is outside state and no other support order exists, circuit court had personal jurisdiction over father for child-support purposes, and no child support order in other forum existed.) See also Ark. Code Ann. §§ 9-14-105(b)(1), 9-17-401.

Establishment of Support Order

If a support order has not been issued, a responding tribunal of this state with personal jurisdiction over the parties may issue a support order if:

- (1) the individual seeking the order resides outside this state; or
- (2) the support enforcement agency seeking the order is located outside this state.

The tribunal may issue a temporary child support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:

- (1) a presumed father of the child;
- (2) petitioning to have his paternity adjudicated;
- (3) identified as the father of the child through genetic testing;
- (4) an alleged father who has declined to submit to genetic testing;
- (5) shown by clear and convincing evidence to be the father of the child;
- (6) an acknowledged father as provided by § 9-10-120;
- (7) the mother of the child; or
- (8) an individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to § 9-17-305.

Ark. Code Ann. § 9-17-401.

Continuing, Exclusive Jurisdiction

The court that issues a support order shall have continuing, exclusive jurisdiction to modify and enforce its order.

Ark. Code Ann. § 9-17-202

A tribunal of this state that has issued a child-support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child-support order if the order is the controlling order and:

- (1) at the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or
- (2) even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

A tribunal of this state that has issued a child-support order consistent with the law of this state may not exercise continuing, exclusive jurisdiction to modify the order if:

- (1) all of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or
- (2) its order is not the controlling order.

Ark. Code Ann. § 9-17-205

Continuing, exclusive jurisdiction also applies to spousal-support order pursuant to 9-17-211.

Determination of Controlling Order under UIFSA

If a proceeding is brought under this chapter and only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized. If a proceeding is brought under this chapter, and two or more child support orders have been issued by differing states, then you should look at

Ark. Code Ann. § 9-17-207 to determine the controlling order.

Provisions of UIFSA

Except where otherwise noted, a responding tribunal of this state shall apply Arkansas procedural and substantive law. Ark. Code Ann. § 9-17-303.

The respective duties of the initiating and responding tribunals are set out in Ark. Code Ann. § 9-17-304 & 305.

Responding tribunal should not address collateral matters such as visitation or setoff.

See *Chaisson v. Ragsdale*, 323 Ark. 373, 914 S.W.2d 739 (1996)(actions under UIFSA are not intended to open for renewed scrutiny all issues arising out of foreign divorce but purpose of UIFSA is support of child and enforcement of same and other issues, such as visitation and payment of debts under divorce decree, are collateral matters that burden child support determinations and run counter to Act's goal of streamlining proceedings).

See also *Office of Child Support Enforcement v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999)(mother's failure to allow father visitation with child was a collateral matter that trial court should not have considered in determining whether father owed child support arrearages).

If a petition or comparable pleading is received by an inappropriate tribunal of this state, the tribunal shall forward the pleading and accompanying documents to an appropriate tribunal of this state or another state and notify the petitioner where and when the pleading was sent. Ark. Code Ann. § 9-17-306.

If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety, or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice. Ark. Code Ann. § 9-17-312.

Ark. Code Ann. § 9-17-313 provides for certain fees and costs to be assessed, except that OCSE or a contract entity shall not be charged fees or costs for actions brought under UIFSA.

Nonparentage is not a defense where that issue has been previously litigated. Ark. Code Ann. § 9-17-315.

Ark. Code Ann. §§ 9-17-316, 317, & 318 provide for certain special rules of evidence and procedure, communication between tribunals, and assistance with discovery.

Terms of Withholding Order

The employer shall withhold and distribute the funds as directed in the withholding order by complying with terms of the order which specify:

- (1) the duration and amount of periodic payments of current child support, stated as a sum certain;
- (2) the person designated to receive payments and the address to which the payments are to be forwarded;
- (3) medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
- (4) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and
- (5) the amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

Ark. Code Ann. § 9-17-502.

Direct Enforcement of Another State's Order

An income-withholding order issued in another state may be sent by or on behalf of the obligee, or by the support enforcement agency, to the person defined as the obligor's employer under the income-withholding law of this state without first filing a petition or comparable pleading or registering the order with a tribunal of this state. Ark. Code Ann. § 9-17-501.

An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state by registering the order in a tribunal of this state and filing a contest to that order in the same manner as if the order had been issued by a tribunal of this state. Ark. Code Ann. § 9-17-506.

An employer that willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state. Ark. Code Ann. § 9-17-505.

Enforcement and Modification after Registration

A support order or an income-withholding order issued in another state or a foreign support order may be registered in this state for enforcement. Ark. Code Ann. § 9-17-601.

The procedures for registration are found in Ark. Code Ann. §§ 9-17-602 & 603.

The law of the issuing state or foreign country governs (1) the nature, extent, amount, and duration of current payments under a registered support order; (2) the computation and payment of arrearages and accrual of interest on the arrearages under the support order; and (3) the existence and satisfaction of other obligations under the support order.

In a proceeding for arrears under a registered support order, the statute of limitation of this state or of the issuing state or foreign country, whichever is longer, applies.

Ark. Code Ann. § 9-17-604.

See *Clemmons v. Office of Child Support Enforcement*, 72 Ark. App. 443, 37 S.W.3d 687 (2001)(where California statute of limitations applied).

A hearing to contest the validity or enforcement of the registered order must be requested within twenty (20) days after notice. Ark. Code Ann. § 9-17-605. Procedure for notice and contest found in Ark. Code Ann. § 9-17-605, 606.

A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one (1) or more of the defenses in Ark. Code Ann. § 9-17-607.

Statutory procedures by which obligor under foreign child support order must request hearing to contest validity of order within 20 days of notice of its registration in state do not contravene federal due process guarantees. *State of Wash. v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999).

See also *Office of Child Support Enforcement v. Cook*, 60 Ark. App. 193, 959 S.W.2d 763 (1998)(chancery court did not have authority to modify out-of-state child support order entered at divorce, in action to register order under UIFSA, where mother and child were nonresidents and did not consent to jurisdiction of chancery court. Divorced father could not seek modification of out-of-state child support order in state, but rather had to apply to issuing tribunal, even though his support obligation exceeded his income, where he failed to appeal from child support order and failed to appeal from finding in present case that child support order would be given full faith and credit.)

Ark. Code Ann. §§ 9-17-609 - 612 set out provisions for modifying an order from another state and for recognizing an order modified by another state which was originally issued by this state.

See *Jefferson Cnty. Child Support Enforcement Unit v. Hollands*, 327 Ark. 456, 939 S.W.2d 302 (1997)(order filed by Arkansas court imposing child support obligation that differed from obligation originally imposed in Michigan did not change or modify Michigan child support decree).

See also Office of Child Support Enforcement v. Neely, 73 Ark. App. 198, 41 S.W.3d 423 (2001)(Arkansas court does not nullify or supersede a sister court's support decree unless it specifically provides for nullification).

Determination of Parentage

§ 9-17-402: A tribunal of this state authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage of a child brought under this chapter or a law or procedure substantially similar to this chapter.

Foreign Support Orders

9-17-701 through 9-17-713 for Foreign Support Orders registration and enforcement.

X. Child Custody

Award of Custody

Note: significant legislative changes were made in 2021 and caselaw in the section may have been decided under prior law.

Rebuttable Presumption and Best Interest.

In an action concerning an original child custody determination in a divorce or paternity matter, there is a rebuttable presumption that joint custody is in the best interest of the child.

The presumption that joint custody is in the best interest of the child may be rebutted:

- (1) If the court finds by clear and convincing evidence that joint custody is not in the best interest of the child;
 - (2) If the parties have reached an agreement on all issues related to custody of the child;
 - (3) If one (1) of the parties does not request sole, primary, or joint custody;
- or
- (4) If a rebuttable presumption described in subsection (c) or subsection (d) of this section is established by the evidence (Note: see domestic violence and sex offenders section on following page).

Ark. Code Ann. § 9-13-101(a)(1)(A)(iv).

After a hearing on the merits of a child custody action, if a court determines that the presumption in subdivision (a)(1)(A)(iv)(a) of this section is rebutted, the court shall enter a written order that includes the following:

- (A) Facts, findings, and conclusions of law concerning the basis for the court's determination; and

- (B) A parenting time schedule that:
- (i) Maximizes the amount of time that each parent has with the child; and
 - (ii) Is consistent with the best interest of the child.

Ark. Code Ann. § 9-13-101(b)(3)

Record. In any contested case, a verbatim record must be made; no exception is made for domestic relations cases. Administrative Order No. 4; Ark. Code Ann. § 16-13-510.

See *McNair v. Johnson*, 75 Ark. App. 261, 57 S.W.3d 742 (2001)(testimony of children in a child custody proceeding had to be unsealed in order for father to make a record on appeal that contained evidence relevant to his contention that the evidence was insufficient to support change of custody to mother and to make required abstract of that evidence).

See also *Mattocks v. Mattocks*, 66 Ark. App. 77, 986 S.W.2d 890 (1999)(chancery court's failure to make record of in camera hearing with minor children required remand).

The circuit court shall require the official court reporter to make a verbatim record of all proceedings, pertaining to any matter before the court or the jury, regardless of whether these proceedings occur in-person, in court, or in chambers; telephonically; or through video-conference. This may be waived by the parties in all matters except criminal cases. Circuit Courts are courts of records and waivers are discouraged in most circumstances. The verbatim record shall include a transcription of all spoken words from any source including but not limited to: colloquies between the court and counsel and self-represented litigants; arguments; objections; testimony; jury instructions; communications between the court and members of the jury; discussions concerning juror notes; and audio contained in videos or other recordings that are presented to the court or jury, whether in open court or in camera.

Administrative Order No. 4.

Both Parents. When in the best interest of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents. Ark. Code Ann. § 9-13-101.

A parent who is not granted sole, primary, or joint custody of his or her child is entitled to reasonable parenting time with the child unless the court finds after a hearing that parenting time between the parent and the child would seriously endanger the physical, mental, or emotional health of the child.

At the request of a party, a court shall issue a written order that:

- (1) Is specific as to the frequency, timing, duration, condition, and method of scheduling parenting time with a parent who is not granted sole, primary, or joint custody of his or her child; and

(2) Takes into consideration the developmental age of the child.

Ark. Code Ann. § 9-13-101(b)(1)(A)(vii)

Domestic Violence.

If a party to an action concerning custody of or a right to visitation with a child has committed an act of domestic violence against the party making the allegation or a family or household member of either party and such allegations are proven by a preponderance of the evidence, the circuit court must consider the effect of such domestic violence upon the best interests of the child, whether or not the child was physically injured or personally witnessed the abuse, together with such facts and circumstances as the circuit court deems relevant in making a direction pursuant to this section.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse.

Ark. Code Ann. § 9-13-101(c).

Sex Offenders. If a party to an action concerning custody of or a right to visitation with a child is a sex offender who is required to register under the Sex Offender Registration Act, the circuit court may not award custody or unsupervised visitation of the child to the sex offender unless the circuit court makes a specific finding that the sex offender poses no danger to the child.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the care or custody of a sex offender or to have unsupervised visitation with a sex offender.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the home of a sex offender or to have unsupervised visitation in a home in which a sex offender resides.

Ark. Code Ann. § 9-13-101(d).

Tender Years Doctrine Abolished. In an action for divorce, the award of custody of a child of the marriage shall be made without regard to the sex of a parent but solely in accordance with the welfare and best interest of the child. Ark. Code Ann. § 9-13-101(a).

The presumption that the mother could best care for a young child (the "tender years" doctrine) was abolished in 1987.

By enacting § 9–13–101, the legislature intended to abolish any gender-based legal preference in child custody determinations, and thus court should not apply tender years doctrine. *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

Natural Parent Preference.

“Without a finding of parental unfitness, our courts have never abrogated the custody rights of a biological parent.” *Priesmeyer v. Huggis*, 2021 Ark. App. 410 (2021).

Stepparent can be awarded custody of minor child; however, there is preference for natural parent in custody matters, and preference must prevail unless it is established that natural parent is unfit. *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988)(custody of five-year-old child should have been left with natural mother, rather than stepfather, in light of chancellor's finding that mother was fit and proper person for custody).

See also *Freeman v. Freeman*, 360 Ark. 445 (wherein court rejected argument that “the natural-parent preference must prevail unless it is established that the natural parent is unfit,” observing that *Stamps* is a modification-of-custody case which is governed by the case-law preference, not a guardianship case like *Freeman* which has a statutory preference found in Ark. Code Ann. § 28–65–204(a).” The Court took this opportunity to clarify that the sole considerations in determining guardianship pursuant to Ark. Code Ann. § 28–65–204(a) are whether the natural parent is qualified and suitable and what is in the child's best interest.)

Sory v. Woodall, 73 Ark. App. 344, 43 S.W.3d 765 (2001)(although there is a preference to award custody of a child to a biological parent, this preference is not absolute; in this case, it was in the children's best interests to be in the custody of their grandmother).

See also *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997).

For time limit on requesting stepparent visitation, see *Blackwood v. Floyd*, 342 Ark. 498.

Caselaw.

While there exists a preference for the natural parent to have custody over all others, the paramount consideration is at all times the best interest of the child, which can overcome the parental preference when a child is left in the care of a non-parent for a substantial period of time. *Coffee v. Zolliecoffer*, 93 Ark. App. 61, 216 S.W.3d 636 (2005).

The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003).

While there is a preference in child custody cases to award a child to its biological parent, that preference is not absolute; rather, of prime concern, and the controlling factor, is the best interest of the child. *Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998).

Also see 9-13-101(a)(2) for grandparent visitation rights and notice requirements in custody case.

Fault. Fault in the divorce is not the determining factor in awarding custody since an award of custody is neither a reward nor a punishment for a parent. The children's welfare is the controlling consideration. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

Criminal Records. Any parent of a minor child in a circuit court case may petition the court to order a criminal records check of the other parent of the minor child or other adult members of the household eighteen (18) years of age or older who reside with the parent for custody and visitation determination purposes. Ark. Code Ann. § 9-13-105.

Drug Test. In a proceeding concerning a child, the court may order drug testing of a party upon application of a party or by its own motion. Ark. Code Ann. 9-13-109.

Best Interest Factors

A court shall consider the best interest of the child when making a child custody determination. Ark. Code Ann. § 9-13-101

In determining the best interest of the child, the court may consider the preferences of the child if the child is of a sufficient age and mental capacity to reason, regardless of chronological age. Ark. Code Ann. § 9-13-101.

The primary consideration in awarding custody of children is the welfare and best interests of the children involved; all other considerations are secondary. *Fitzgerald v. Fitzgerald*, 63 Ark. App. 254, 976 S.W.2d 956 (1998).

Factors the court may consider in determining what is in best interest of child include the psychological relationship between the parents and the child, the need for stability and continuity in child's relationship with the parents and siblings, the past conduct of the parents toward the child, and the reasonable preference of child. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997).

Father was granted custody after testifying regarding the actions he took with respect to the care of the children, his relationship with them, their relationship with their extended family, his educational concerns, his parenting philosophy; the trial court also had before it evidence of the parties' relationship with each other and their ability to interact with each other with respect to the children and visitation issues, as well as considered the children's

stated preference as to their living arrangements before reaching its best-interest determination. *Emis v. Emis*, 2017 Ark. App. 372.

Modification of Custody Order

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 child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999). Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody.

See *Hamilton v. Barrett*, 337 Ark. 460, 466, 989 S.W.2d 520, 523 (1999)(evidence of former wife's violation of custody and settlement agreement by having male guests overnight when children were present, former wife's remarriage, and birth of child to former husband and his new wife, demonstrated material changes in parties' circumstances arising since prior order of custody in divorce decree and justifying award of custody of parties' children to former husband).

The burden of proving such a change is on the party seeking the modification. There must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. See *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003)(mother's actions in alienating children from father and interfering with visitation detrimentally impacted children's well being such that best interests of the children required that custody be changed from mother to father, where mother repeatedly interfered with visitation, mother instigated a fruitless sexual-abuse investigation, children were subjected to medical examination for sexual abuse, and mother obtained a protective order to prohibit father from seeing children).

To facilitate stability and continuity in the life of a child and to discourage repeated litigation of the same issues, custody can be modified only upon a showing of a material change of circumstances. *Stills v. Stills*, 2010 Ark. 132, 361 S.W.3d 823.

Vo v. Vo, 78 Ark. App. 134, 79 S.W.3d 388 (2002)(former wife's request to relocate from Arkansas to California was not a material change of circumstances that warranted modification of child custody).

A party cannot use the circumstances he created as grounds to modify custody. *Brown v. Brown*, 2012 Ark. 89, 398 S.W.3d 159 (2012). And see *Davenport v. Uselton*, 2013 Ark. App. 344 (holding that the father failed to prove a material change in circumstances to support his petition when he was the one who relocated, and a party should not be permitted to allege a material change of circumstances that he himself has created; father's relocation, his developing relationship with the child, and the change in his work schedule

were circumstances attributable to him and were insufficient, standing alone, to support a material change in circumstances. Moreover, as found by the trial court, there were no changes with the mother's situation that would constitute a material change of circumstances.)

Relocation as a Factor in Custody

Relocation of a custodial parent and children is not, by itself, a material change in circumstance justifying a change in custody.

A presumption exists in favor of relocation for custodial parents with primary custody, with the burden to rebut the presumption on the noncustodial parent.

A custodial parent in Arkansas no longer has to prove a real advantage to himself or herself and the children in relocating.

Although polestar in making a relocation determination is the best interest of the child, the court should take into consideration the following matters:

- (1) the reason for the relocation;
- (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate;
- (3) visitation and communication schedule for the noncustodial parent;
- (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and,
- (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

Hollandsworth v. Knyzewski, 353 Ark. 470, 109 S.W.3d 653 (2003). In *Hollandsworth*, the Arkansas Supreme Court announced a presumption in favor of relocation for parents with primary custody. The court held that the noncustodial parent should have the burden to rebut the relocation presumption. Therefore, the custodial parent no longer has the obligation to prove a real advantage to parent and child when relocating.

For application of the factors, see *Benedix v. Romeo*, 94 Ark. App. 412 (2006); *Sill v. Sill*, 94 Ark. App. 211 (2006); *Hurt v. Hurt*, 93 Ark. App. 37 (2005).

However, see *Singletary v. Singletary*, 2013 Ark. 506, for analysis of relocation in joint custody case, wherein a parent is not entitled to the *Hollandsworth* favorable presumption when they share joint custody. *Singletary* clarified that the proper analysis for a court facing a change-in-custody request due to relocation of one parent when the parents have joint

custody is essentially the same as a change-in-custody analysis when relocation is not involved.

Also see *Cooper v. Kalkwarf*, 2017 Ark. 331, 532 S.W.3d 58 (2017). “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. This standard preserves the rights of a primary custodian when he or she has shouldered the vast majority of the responsibility of caring for and making decisions on behalf of the child, and it also more accurately reflects the best interest of the child, which is the polestar consideration in any custody decision. Joint-custody arrangements cannot be defined with mathematical precision. See Ark. Code Ann. § 9–13–101(a)(5) (defining joint custody as the “approximate and reasonable equal division of time with the child by both parents...”). Thus, we do not attempt to oversimplify the issue of relocation by imposing an arbitrary percentage of time that a parent must spend with the child for the Singletary analysis to apply. Rather, by this opinion, we seek to recognize the realities of modern parenting and to emphasize that a joint-custody arrangement does not necessarily involve a precise “50/50” division of time. We further note that parental influence and commitment, involvement in the child's daily activities, and responsibility for making decisions on behalf of the child are important factors in the circuit court's consideration of the relocation issue. By limiting the Hollandsworth presumption to those situations where the child spends significantly less time with the alternate parent, the disruptive impact that a relocation would have on that relationship is minimized.”

Conflict/Lack of Cooperation of Parties and Joint Custody Considerations:

The circuit court may enter an order to reduce areas of conflict in a manner determined appropriate by the court.

If, at any time, the circuit court finds by a preponderance of the evidence that one (1) parent demonstrates a pattern of willfully creating conflict in an attempt to disrupt a current or pending joint-custody arrangement and the circuit court is unable to enter an order that will reduce areas of conflict caused by the disruptive parent, the circuit court may deem such behavior as a material change of circumstances and may change a joint custody order to an order of primary custody to the nondisruptive parent.

Ark. Code Ann. 9-13-101

Cases before 2021 Legislation:

Pace v. Pace, 2020 Ark. 108 (2020)(The General Assembly amended Arkansas Code Annotated section 9-13-101 to announce that an award of joint custody is “favored” in Arkansas. Previously, case law held that joint custody was not favored unless circumstances clearly warrant

such action. This change in the law is profound; the parties were no longer obligated to maintain a careful balance of cooperation to stave off a judicial dissolution of a joint-custody arrangement.)

Szwedo v. Cyrus, 2020 Ark. App. 319 (2020)(The Pace court noted that in 2013, the General Assembly amended Arkansas Code Annotated section 9-13-101 to announce that an award of joint custody is now “favored” in Arkansas. The court called this change in the law “profound.” Although Pace involved a modification where joint custody had already been ordered, its rationale supports the circuit court's award of joint custody in this case.)

Hoover v. Hoover, 2016 Ark. App. 322, 498 S.W.3d 297 (2016)(Although the record demonstrates that there is a significant level of animosity between these parties, the record also shows that both parties are capable parents who love their children and are equally involved with their activities. The attorney ad litem stated on the record that all three children expressed the desire to spend significantly more time with their father, and a joint shared physical custody arrangement accommodates those wishes. The appellate court affirmed the circuit court’s award of joint custody.)

Attorney’s Fees

Ark. Code Ann. § 9-12-309(a), which authorizes award of attorneys’ fees in divorce actions, is construed to permit fees in child custody modifications. *Finkbeiner v. Finkbeiner*, 226 Ark. 165, 288 (1956).

The court has inherent authority to award attorneys’ fees in custody modification cases. *Jones v. Jones*, 327 Ark. 195, 938 S.W.2d 228 (1997).

The courts’ authority to award attorneys’ fees applies to contempt proceedings arising from custody cases as well.

Payne v. White, 1 Ark. App. 271, 614 S.W.2d 684 (1981)(trial court had inherent power to allow attorney fees in proceeding for contempt brought against mother for violation of custody decree by secreting child outside jurisdiction of court, notwithstanding statute which appears to limit award of attorney fees to actions to enforce payment of alimony, maintenance and support).

Transfer of Custody on School Property

The transfer of a child from a custodial parent to a noncustodial parent is prohibited on the real property of a public school on normal school days during school hours.

This does not prevent one parent from taking a child to school and the other parent from picking the child up.

Ark. Code Ann. § 9-13-104.

Attorneys Ad Litem

For a complete list of requirements and responsibilities, see Administrative Order No. 15

XI. Visitation

Both Parents.

When in the best interest of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents. Ark. Code Ann. § 9-13-101.

A parent who is not granted sole, primary, or joint custody of his or her child is entitled to reasonable parenting time with the child unless the court finds after a hearing that parenting time between the parent and the child would seriously endanger the physical, mental, or emotional health of the child.

At the request of a party, a court shall issue a written order that:

- (1) Is specific as to the frequency, timing, duration, condition, and method of scheduling parenting time with a parent who is not granted sole, primary, or joint custody of his or her child; and
- (2) Takes into consideration the developmental age of the child.

Ark. Code Ann. § 9-13-101(b)(1)(A)(vii)

See “Custody” section for rebuttable presumption of joint custody.

Modification of Visitation

The test for determining whether modification is warranted based on whether a material change in circumstances has occurred is the same regardless of whether it is a visitation case or a child-custody case. See *Brown v. Brown*, 2012 Ark. 89.

See, *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002) (stating that before the circuit court can order a modification of custody, it must first determine that a material change in circumstances has transpired from the time of the divorce decree and, then, determine that a modification of custody is in the best interest of the child).

Grandparent Visitation

A grandparent or great-grandparent may petition a circuit court of this state for reasonable visitation rights with respect to his or her grandchild or grandchildren or great-grandchild or great-grandchildren under this section if...

See Ark. Code Ann. § 9-13-103.

Case Law

A grandparent's right to visit a grandchild is a right created by statute. *Painter v. Kerr*, 2009 Ark. App. 580, 336 S.W.3d 425 (2009) (grandparents failed to overcome presumption that

mother's decision denying or limiting visitation was in best interest of child, and grandparents failed to prove by preponderance of evidence that loss of their relationship with child was likely to harm her).

In re Adoption of J.P., 2011 Ark. 535, 385 S.W.3d 266 (2011)(to prove visitation with maternal grandmother and great-grandmother was in child's best interest, as required to rebut presumption that father's decision limiting visitation was in child's best interest, grandmother and great-grandmother were required to prove, by preponderance of the evidence, that: (1) they had the capacity to give child love, affection, and guidance; (2) loss of the relationship between them and child was likely to harm child; and (3) they were willing to cooperate with father if visitation with child was allowed);

Harrison v. Phillips, 2012 Ark. App. 474 (2012)(evidence was sufficient to show that paternal grandparents established a significant and viable relationship with grandson, for purposes of the grandparents visitation statute, in action by grandparents seeking visitation; mother acknowledged that early in child's life there may have been 12 consecutive months of regular and frequent contact between the child and his grandparents, while the parents were still married; however, evidence was insufficient to show that the loss of the relationship between paternal grandparents and grandson was likely to harm him); and

Hollingsworth v. Hollingsworth, 2010 Ark. App. 101, 377 S.W.3d 313 (2010)(paternal grandfather was not entitled to order establishing grandparent visitation rights, since mother had not denied, but only limited, grandfather's visitation with child; grandfather continued to exercise meaningful visitation and interaction with the child, seeing child on occasions at school and at extracurricular activities such as ball games, and mother testified that she intended to continue to permit visitation and would try to accommodate grandfather's visitation requests).

In Loco Parentis Visitation

A circuit court may award visitation to a stepparent standing in loco parentis over the natural parent's objection. Robinson v. Ford-Robinson, 362 Ark. 232, 208 S.W.3d 140 (2005)(ex-wife stood in loco parentis to stepson, and thus was entitled to visitation with stepson; ex-wife was the only mother stepson had even known, stepson did not know that ex-wife was not his biological mother until he was in first grade, stepson called ex-wife "Mommy," and ex-wife described herself as stepson's mother). Also, see McKenzie v. Moore, 2015 Ark. App. 6453 S.W.3d 686, wherein the appellate court upheld finding of in loco parentis.

In loco parentis is defined as "in place of a parent; instead of a parent; charged factitiously with a parent's rights, duties, and responsibilities." 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. One's mere status as a stepparent does not support a finding of in loco parentis. A stepparent who furnishes necessities for a minor child of his or her spouse and who exercises some control over the child does not, by those acts alone, establish a parental relationship. In making a determination as to whether a nonparent stands in loco parentis, courts consider the totality of the circumstances and do not lightly infer the intent of the person seeking to be considered as standing in loco parentis. While the length of time a person spends with a child is not determinative, it is a significant factor in considering whether that person intended to assume parental obligations or has performed parental duties. *Daniel v. Spivey*, 2012 Ark. 39, 386 S.W.3d 424, 428 (2012).

See *McKenzie v. Moore*, 2015 Ark. App. 6 (circuit court's finding that stepmother stood in loco parentis to child, so as to support award of visitation rights to stepmother after father died, was not clearly erroneous; father had full custody of child before he died, stepmother took care of child during the years that she dated father before they were married, child lived with father and stepmother as a family unit after father and stepmother married, and child testified that she considered stepmother as family and a parent figure.)

Bethany v. Jones, 2011 Ark. 67, 378 S.W.3d 731 (2011)(circuit court did not clearly err in finding that biological mother's former same sex partner stood in loco parentis to the child for visitation purposes; former partner was the stay-at-home mom for over three years who took care of child, child called partner mommy, child thought of partner's parents as her grandparents and spent holidays with partner's family, and intentions of mother and partner were always to co-parent until mother unilaterally determined she no longer wanted to allow partner to have visitation);

Daniel v. Spivey, 2012 Ark. 39, 386 S.W.3d 424 (2012), reh'g denied (Mar. 15, 2012)(stepfather did not stand in loco parentis to mother's child from previous marriage, and thus trial court could not award stepfather visitation rights with child as part of divorce decree, even though stepfather had been part of child's life for five of child's seven years, relationship between them was like that of parent and child, stepfather and child engaged in recreational activities together, and stepfather disciplined child when necessary and praised her when justified; stepfather's actions demonstrated that he assumed the role of a caring stepparent, but not that he embraced the rights, duties, and responsibilities of a parent); and

Blackwood v. Floyd, 342 Ark. 498, 29 S.W.3d 694 (2000)(stepmother did not request visitation with stepson at divorce hearing and did not claim in loco parentis; child was not mentioned in divorce proceeding; therefore, no jurisdiction to modify decree more than 90 days after entry).

Sibling Visitation Rights

A brother or sister, regardless of the degree of blood relationship, may petition the Court to grant reasonable visitation rights when their parents have denied such access.

The circuit courts may issue any further order that may be necessary to enforce the visitation rights.

Ark. Code Ann. 9-13-102.

Domestic Violence & Sex Offenders

If a party to an action concerning a right to visitation with a child has committed an act of domestic violence against the party making the allegation or a family or household member of either party and such allegations are proven by a preponderance of the evidence, the circuit court must consider the effect of such domestic violence upon the best interests of the child, whether or not the child was physically injured or personally witnessed the abuse, together with such facts and circumstances as the circuit court deems relevant in making a direction pursuant to this section.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse.

If a party to an action concerning a right to visitation with a child is a sex offender who is required to register under the Sex Offender Registration Act, the circuit court may not award custody or unsupervised visitation of the child to the sex offender unless the circuit court makes a specific finding that the sex offender poses no danger to the child.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the care or custody of a sex offender or to have unsupervised visitation with a sex offender.

There is a rebuttable presumption that it is not in the best interest of the child to be placed in the home of a sex offender or to have unsupervised visitation in a home in which a sex offender resides.

Ark. Code Ann. § 9-13-101.

XII. Uniform Acts for Custody & Visitation

Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)

See Ark. Code Ann. §9-19-101 et seq.

The UCCJEA, codified at Arkansas Code Annotated sections 9-19-101 to-401 (Repl. 2015), provides the exclusive method for determining the proper state for jurisdictional purposes in child-custody proceedings

that involve other jurisdictions. *Harris v. Harris*, 2010 Ark. App. 160, 379 S.W.3d 8. The appellate court reviews rulings under the UCCJEA de novo, although they will not reverse a circuit court's findings of fact unless they are clearly erroneous. *Piccioni v. Piccioni*, 2011 Ark. App. 177, 378 S.W.3d 838. A circuit court has the discretion to decide whether to decline to exercise jurisdiction, and the appellate court will not reverse the court's decision absent an abuse of discretion. *Id.*, 378 S.W.3d 838.

Note: See the National Conference of Commissions on Uniform State Laws: <http://www.uniformlaws.org> which provides the following history and summary:

THE OBJECTIVE OF THE UCCJEA. The UCCJEA, the UCCJA and the PKPA are necessary because Americans are a mobile people who seldom stay in one state. Child custody disputes between parents, which arise when there is a divorce or when unmarried biological parents want to have custody adjudicated in a court, are impacted by that very mobility. When parents and children live and have lived in one state, the courts of that state may take jurisdiction over any child custody matter without question. But it is common for a parent to live in a different state from the one in which the other parent and the child live. More than one state may have the power to adjudicate a dispute between them. If more than one state does exercise its power, the competing decisions simply confuse, rather than conclude the dispute. Child custody orders also have a quality that exaggerates the problem. They are modifiable orders, subject to reconsideration and change, until the children subject to them reach the age of majority. Circumstances may change between the parties governed by an order, and that may require a court to change the order - to modify it. A common scenario involves a child custody order issued in a state where the parents and the child lived together before the parents divorce each other. Then the custodial parent moves with the child to another state. If there is a need to modify the order, in which state can that modification take place? And if the second state purports to modify the order from the first state, which order is to be recognized and enforced in the first state and in every other state in the United States? When there were no clear answers to these questions, the result was parental kidnapping of children to exploit the confusion. The UCCJEA, and the UCCJA and the PKPA before it, tries to answer these very important questions. It answers by establishing clear bases for taking jurisdiction and by providing rules that discourage competing child custody orders.

HOME STATE PRIORITY. In the UCCJA, there are four principles, or bases, for taking jurisdiction over a child custody dispute. These are child's home state; significant connection between state and parties to a child custody dispute; emergency jurisdiction when the child is present and the child's welfare is threatened; and, presence of the child in the event there is no other state with another sound basis for taking jurisdiction. (The term "taking jurisdiction" simply means that a state's courts have a good reason for summoning the contestants to come before them to adjudicate the dispute no matter where they reside. If there is jurisdiction, the court's orders are valid and enforceable.) The original drafters of the UCCJA always thought that the home state of the child was the best state within which to find the information for making a custody decision in the best interests of the child. But it was also assumed that once a court took jurisdiction on any other acceptable basis, that state should be able to proceed without delaying to determine if some other state has home state status. But the drafters of the PKPA took the opposite position, regarding "home state" as so significantly better than any other jurisdictional ground, that it should always be the priority ground. Under the PKPA the home state always has the first opportunity to take jurisdiction. The UCCJEA now supports the PKPA position. Any state that is not the "home state" of the child will defer to the "home state," if there is one, in taking jurisdiction over a child custody dispute. Temporary emergency jurisdiction

may be taken, but only long enough to secure the safety of the threatened person and to transfer the proceeding to the home state, or if none, to a state with another ground for jurisdiction.

CONTINUING EXCLUSIVE JURISDICTION. The UCCJEA also provides for continuing exclusive jurisdiction. If a state once takes jurisdiction over a child custody dispute, it retains jurisdiction so long as that state, by its own determination, maintains a significant connection with the disputants or until all disputants have moved away from that state. In contrast, the UCCJA allows jurisdiction to shift if the initial ground for taking jurisdiction ceases to exist. Thus, if a state takes jurisdiction over a child custody dispute because that state is the home state of the child, and the child subsequently establishes a new home state, jurisdiction can shift to the new home state, even if one parent remains in the child's original home state. The UCCJEA would not allow the jurisdiction to shift in this fashion, keeping it in the original home state so long as the parent remains there. TEMPORARY EMERGENCY JURISDICTION Under the UCCJA, grounds for taking emergency jurisdiction are on an equal footing with the other grounds for taking jurisdiction, including the "home state" ground. If the child is present in a state and there is evidence of abandonment or abuse to or mistreatment of the child, that state can take jurisdiction under the UCCJA. The UCCJEA provides for temporary emergency jurisdiction, that can ripen into continuing jurisdiction only if no other state with grounds for continuing jurisdiction can be found or, if found, declines to take jurisdiction. The child's presence and its abandonment, mistreatment or abuse still trigger the taking of emergency jurisdiction, but threats to siblings or a parent also can trigger the taking of emergency jurisdiction. Because of the priority given to the home state of the child, the home state will most often be the state from which continuing jurisdiction is exercised. The impact of these changes in the UCCJEA from the UCCJA is to reinforce the impact of the PKPA. Priority for home state jurisdiction, continuing exclusive jurisdiction and temporary emergency jurisdiction mean that orders made pursuant to the UCCJEA will have the full weight of the Full Faith and Credit Clause of the U.S. Constitution behind them.

ENFORCEMENT OF CUSTODY AND VISITATION ORDERS. The UCCJEA also adds enforcement provisions to the jurisdictional provisions. Interstate enforcement of custody and visitation decrees has proved frustrating to parents and to the courts. The UCCJEA requires a state to enforce a custody or visitation order from another state that conforms substantially with this Act. An order from a state that has continuing exclusive jurisdiction, therefore, will surely be enforced. One enforcement procedure is reminiscent of procedures for enforcement under the Uniform Interstate Family Support Act for interstate spousal and child support orders and the Uniform Enforcement of Foreign Judgments Act, which governs the interstate enforcement of any civil judgment. The basic procedure is to register the outof-state order. If the registration is not contested, the registered order may be enforced by any means available to enforce a domestic order. This would ordinarily mean using the contempt powers of the court to assure that the custody or visitation order is honored by the parent subject to it. There is an expedited remedy, however, that also is available. Upon receiving a verified petition, the court orders the party with the child to submit to an immediate hearing (the next judicial day unless impossible) for enforcement. The court may rule with respect to enforcement at the hearing, although there are provisions to allow for extended hearing and standards to contest enforcement. This remedy operates much like habeas corpus, in which the body subject to the writ must be presented immediately to the court. If there is danger to a child or if it appears that the child will be removed from the enforcing jurisdiction, a petition may also be filed for a warrant to take physical custody of the child along with a petition for an expedited proceeding. If the warrant issues, law enforcement officers will serve the warrant and obtain physical custody of the child. As a last enforcement device, the UCCJEA gives prosecutors the power to enforce custody or visitation orders, and law enforcement officers the power to locate a child under instructions from prosecutors. These

powers give 4 parents and others who are the victims (along with children) of parental kidnapping the ability to seek help from those who enforce the criminal law. The effect is to provide a complete group of effective remedies.

This article points out the impact of major provisions. Here are the Arkansas citations:

Proceedings Governed by Other Law

“Child-custody proceeding” is defined as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under subchapter 3 of this chapter (subchapter relates to the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child-custody determination).

Ark. Code Ann. § 9-19-102.

The UCCJEA does not govern adoption proceedings or proceedings pertaining to the authorization of emergency medical care for a child.

Ark. Code Ann. § 9-19-103.

The UCCJEA applies to interstate custody disputes only, not to intrastate custody matters.

Abeyta . Abeyta, 2013 Ark. App. 726; Seamans. v. Seamans, 73 Ark. App. 27 (2001)(UCCJEA does not apply to purely intrastate custody disputes; court has no authority to award attorney fees under the Act).

Application of UCCJEA to Indian Tribes

A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C., 25 § 1901 et seq., is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act. A tribe shall be treated as if it were a state for the purposes of applying subchapters 1 and 2 of this chapter.

A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under subchapter 3 of this chapter.

Ark. Code Ann. §9-19-104.

Effect of Child-Custody Determination

A child-custody determination made by a court of this state that had jurisdiction under the UCCJEA binds all persons who have been served in accordance with Arkansas law or in accordance with the law of the state in

which service was made. Persons are also bound who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard.

Ark. Code Ann. § 9-19-106.

Priority

Upon the request of a party, questions that arise in child-custody proceedings regarding the existence or exercise of jurisdiction under the UCCJEA must be given priority on the calendar and handled expeditiously.

Ark. Code Ann. § 9-19-107.

Appearance and Limited Immunity

A party to a child-custody proceeding is not subject to personal jurisdiction in Arkansas for another proceeding or purpose solely for being physically present in the state to participate in that proceeding.

One subject to personal jurisdiction in Arkansas on some basis other than physical presence is not immune from service of process here.

The immunity granted for purposes of a child-custody proceeding is not immune to civil litigation based on acts unrelated to the child-custody proceeding that an individual commits while in Arkansas.

Ark. Code Ann. § 9-19-109.

Communication Between Courts

Arkansas courts may communicate with a court in another state concerning a proceeding arising under the UCCJEA.

The court may allow the parties to participate in the communication. If they are not able to participate, they must have the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

Courts may communicate on schedules, calendars, records, and similar matters without informing the parties, and no record need be made of the communications. Otherwise, a record must be made of a communication and the parties must be informed and granted access to the record. For these purposes, "record" means information inscribed on a tangible medium or stored electronically or in another retrievable medium.

Ark. Code Ann. § 9-19-110.

Taking Testimony in Another State

A party to a child-custody proceeding may offer testimony of witnesses who are in another state, by deposition or other means allowable in Arkansas. The court on its own motion may order that testimony of a person be taken in another state and may prescribe the manner and terms upon which the testimony is taken.

An Arkansas court may permit a person in another state to be deposed or to testify by telephone, audiovisual, or other electronic means before a designated court or at another location in that state. An Arkansas court shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

Documentary evidence transmitted from another state to an Arkansas court by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

Ark. Code Ann. § 9-19-111.

Cooperation Between Courts

An Arkansas court may request a court of another state to:

Hold an evidentiary hearing;

Order a person to produce or give evidence pursuant to that state's procedures;

Order a custody evaluation be made of a child involved in the proceeding;

Forward to the Arkansas court a certified copy of the transcript of the hearing, evidence presented, or the requested evaluation; and

Order a party to the proceeding or anyone having physical custody of the child to appear in the proceeding with or without the child.

A court of another state may request an Arkansas court to hold such a hearing or to enter an order as described above.

Travel and other necessary and reasonable expenses for the above may be assessed against the parties in accordance with Arkansas law.

Pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding shall be preserved until the child is 18 years old. If a court or law enforcement official of another state requests it, the Arkansas court shall forward a certified copy of the records.

Ark. Code Ann. § 9-19-112.

Child-Custody Jurisdiction under the UCCJEA

Initial Child Custody Jurisdiction

Except as provided in § 9-19-204, an Arkansas court has jurisdiction to make an initial child-custody determination only if:

Arkansas is the home state of the child on the date of the commencement of the proceeding; or

Arkansas was the home state of the child within six months before the commencement of the proceeding and the child is absent from Arkansas, but a parent or person acting as a parent continues to live here; or

A court of another state does not have home state jurisdiction, or a court of the home state of the child has declined to exercise jurisdiction on the ground that Arkansas is the more appropriate forum under § 9-19-207 or § 9-19-208; and

The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Arkansas other than mere physical presence; and substantial evidence is available in Arkansas concerning the child's care, protection, training, and personal relationships; or

All courts having jurisdiction through significant connection as set out immediately above have declined to exercise jurisdiction on the ground that a court of Arkansas is the more appropriate forum to determine the custody of the child under § 9-19-207 or § 9-19-208; or

No court of any other state would have jurisdiction under any of the criteria set out above.

The above is the exclusive jurisdictional basis for an Arkansas court to make a child-custody decision by an Arkansas court.

Physical presence of, or personal jurisdiction over a party or a child is not necessary or sufficient to make a child-custody determination.

Ark. Code Ann. § 9-19-201; Ullrich v. Walsh, 2010 Ark. App. 290.

Exclusive Continuing Jurisdiction

Except as provided in § 9-19-204, an Arkansas court which has made a child custody determination consistent with § 9-19-201 or § 9-19-203 has exclusive, continuing jurisdiction over the determination until:

- (1) An Arkansas court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with Arkansas, and that substantial evidence is no longer available in Arkansas concerning the child's care, protection, training, and personal relationships; or
- (2) An Arkansas court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in Arkansas.

An Arkansas court which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9-19-201.

Ark. Code Ann. § 9-19-202;

Hatfield v. Miller, 2009 Ark. App. 832, 373 S.W.3d 366; Harris v. Harris, 2010 Ark. App. 160, 379 S.W.3d 8 (2010); Shields v. Kimble, 2010 Ark. App. 479, 375 S.W.3d 738.

The state of initial custody jurisdiction retains exclusive jurisdiction when one parent remains a resident no matter how long the child and the other parent have been away.

West v. West, 364 Ark. 73 (2005)(Arkansas had exclusive, continuing subject-matter jurisdiction to determine modification of Arkansas custody order); Bridges v. Bridges, 93 Ark. App. 358 (2005)(Arkansas had jurisdiction under PKPA and UCCJEA).

Jurisdiction to Modify Determination

Except as provided in § 9-19-204, an Arkansas court may not modify a child custody determination made by a court of another state unless an Arkansas court has jurisdiction to make an initial determination under § 9-19-201(a)(1) or (2) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9-19-202 or that an Arkansas court would be a more convenient forum under § 9-19-207; or

(2) An Arkansas court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Ark. Code Ann. § 9-19-203; Bridges v. Bridges, 93 Ark. App. 358, 219 S.W.3d 699 (2005); Devine v. Martens, 371 Ark. 60, 263 S.W.3d 515 (2007); Ullrich v. Walsh, 2010 Ark. App. 290.

Temporary Emergency Jurisdiction

An Arkansas court has temporary emergency jurisdiction if the child is present in Arkansas and the child has been abandoned or it is necessary in an emergency to protect the child because the child or the child's sibling or parent is subjected to or threatened with mistreatment or abuse.

If no previous child-custody determination has been made that is entitled to enforcement under the UCCJEA, and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under this Act, a child custody determination made under this section remains in effect until an order is entered by a court of a state having jurisdiction under the Act. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under the Act, a child-custody determination made under this temporary-emergency-jurisdiction section becomes a final determination, if it so provides and this state becomes the home state of the child.

If there is a previous child-custody determination that is entitled to be enforced or a child-custody proceeding has been commenced in a court of a state having jurisdiction under the Act, any order issued by an Arkansas court under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under the Act. The order issued in Arkansas remains in effect until the order is obtained from the other state within the period specified or the period expires.

An Arkansas court which has been asked to make a child-custody decision based upon this temporary-emergency-jurisdiction section, upon being informed that a child-custody proceeding has been commenced in, or a determination has been made by, a court of a state having jurisdiction under the Act, shall communicate immediately with the other court. An Arkansas Court exercising jurisdiction pursuant to the jurisdictional sections of this Act, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section, shall communicate immediately with the court of the other state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Ark. Code Ann. § 9-19-204; Arkansas HHS v. Jones, 97 Ark. App. 267, 248 S.W.3d 507 (2007); Devine v. Martens, 371 Ark. 60, 263 S.W.3d 515 (2007); Davis v. Arkansas HHS, 98 Ark. App. 275, 254 S.W.3d 762 (2007).

Notice – Opportunity to be Heard – Joinder

Ark. Code Ann. § 9-19-205; Ark. Dep't of Human Servs. v. Cox, 349 Ark. 205, 82 S.W.3d 806 (2002).

Simultaneous Proceedings

Ark. Code Ann. § 9-19-206; *Bridges v. Bridges*, 93 Ark. App. 358, 219 S.W.3d 699 (2005); *Ullrich v. Walsh*, 2010 Ark. App. 290; *Casas-Cordero v. Mira*, 2012 Ark. App. 457.

Inconvenient Forum

An Arkansas court with jurisdiction under the UCCJEA to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

The length of time the child has resided outside the state;

The distance between the court in Arkansas and the court in the state that would assume jurisdiction;

The relative financial circumstances of the parties;

Any agreement of the parties about which state should assume jurisdiction;

The nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;

The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

The familiarity of the court of each state with the facts and issues in the pending litigation.

If an Arkansas court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

An Arkansas court may decline to exercise its jurisdiction under this chapter if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Ark. Code Ann. § 9-19-207; *Uttley v. Bobo*, 97 Ark. App. 15, 242 S.W.3d 638 (2006); *Hatfield v. Miller*, 2009 Ark. App. 832, 373 S.W.3d 366; *Harris v. Harris*, 2010 Ark. App. 160, 379 S.W.3d 8; *Ullrich v. Walsh*, 2010 Ark. App. 290; *Shields v. Kimble*, 2010 Ark. App. 479, 375 S.W.3d 738; *Casas-Cordero v. Mira*, 2012 Ark. App. 457.

Jurisdiction Declined Because of Conduct

Except as otherwise provided in § 9-19-204 or by other Arkansas law, if an Arkansas Court has jurisdiction under the UCCJEA because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

A court of the state otherwise having jurisdiction under §§ 9-19-201–9-19-203 determines that Arkansas is a more appropriate forum under § 9-19-207; or

No court of any other state would have jurisdiction under the criteria specified in §§ 9-19-201–9-19-203.

If an Arkansas court declines to exercise its jurisdiction because of unjustifiable conduct by a person seeking to invoke its jurisdiction, the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under §§ 9-19-201–9-19-203.

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction because of the unjustifiable conduct of the person seeking to invoke its jurisdiction, it shall assess against that party necessary and reasonable expenses including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against Arkansas unless authorized by law other than the UCCJEA.

Ark. Code Ann. § 9-19-208; Blosser v. Blosser, 2 Ark. App. 37, 617 S.W.2d 29 (1981).

Information to be Submitted to the Court

Ark. Code Ann. § 9-19-209

Enforcement

Courts shall enforce other states’ child-custody determinations entered pursuant to the UCCJEA and PKPA, unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under this Act.

Ark. Code Ann. §9-19-313.

Emergency jurisdiction still exists even though a child custody order entitled to enforcement is in effect. If emergency jurisdiction is exercised, court communication is required to resolve the emergency, protect the safety of the parties and the child(ren), and determine the period of duration of the order.

Ark. Code Ann. §9-19-204.

Registration of Out-of-State Order

Ark. Code Ann. §9-19-305; Ark. Dep’t of Human Servs. v. Cox, 349 Ark. 205 (2002).

Enforcement Hearing

Ark. Code Ann. § 9-19-310;

Ark. Dep’t of Human Servs. v. Cox, 349 Ark. 205 (2002)(Florida court order at issue was not a “child-custody determination” that was enforceable pursuant to the UCCJEA. It was an ex parte order; the required notice and opportunity to be heard were not provided in the Florida ex parte proceedings).

Warrant to Take Physical Custody of Child

Ark. Code Ann. § 9-19-311.

Appeals

Ark. Code Ann. §9-19-314.

Enforcement under Hague Convention

Ark. Code Ann. § 9-19-302.

Role of Prosecutor or Public Official

Ark. Code Ann. § 9-19-315.

Law Enforcement

Ark. Code Ann. § 9-19-316.

Costs and Expenses

Ark. Code Ann. § 9-19-317.

XIII. Paternity**Jurisdiction**

An action to establish paternity shall be brought and shall proceed under the Arkansas Rules of Civil Procedure applicable in circuit court. Ark. Code Ann. § 9-10-102.

Limitation Periods & Venue

Actions brought in the State of Arkansas to establish paternity may be brought at any time.

Venue of paternity actions shall be in the county in which the plaintiff resides or, in cases involving a juvenile, in the county in which the juvenile resides.

Ark. Code Ann. § 9-10-102.

Transfer Between Local Jurisdictions

The court where the final decree of paternity is rendered shall retain jurisdiction of all matters following the entry of the decree.

If more than six (6) months subsequent to the final adjudication, however, each of the parties to the action has established a residence in a county of another judicial district within the state, one (1) or both of the parties may petition the court that entered the final adjudication to request that the case be transferred to another county.

The case shall not be transferred absent a showing that the best interest of the parties justifies the transfer.

If a justification for transfer of the case has been made, there shall be an initial presumption for transfer of the case to the county of residence of the physical custodian of the child.

If the court that entered the final adjudication agrees to transfer the case to another judicial district, upon proper motion and affidavit and notice and payment of a refiling fee, the court shall enter an order transferring the case and the refiling fee and charging the clerk of the court to transmit forthwith certified copies of all records pertaining to the case to the clerk of the court in the county where the case is being transferred.

An affidavit shall accompany the motion to transfer and recite that the parent or parents, the physical custodian, and the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration, as appropriate, have been notified in writing that a request has been made to transfer the case.

Notification pursuant to this section must inform each recipient that any objection must be filed within twenty (20) days from the date of receipt of the affidavit and motion for transfer.

The clerk receiving a transferred case shall within fourteen (14) days of receipt set up a case file, docket the case, and afford the case full faith and credit as if the case had originated in that judicial district.

Ark. Code Ann. § 9-10-102.

Standing & Burdens of Proof

Petitions for paternity establishment may be filed by:

- (1) A biological mother;
- (2) A putative father;
- (3) A person for whom paternity is not presumed or established by court order, including a parent or grandparent of a deceased putative father; or
- (4) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration.

Ark. Code Ann. § 9-10-104.

A “putative father” is defined throughout the Arkansas Code as any man not legally presumed or adjudicated to be the biological father of a child, but who claims or is alleged to be the biological father of the child. *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

See also:

McAdams v. McAdams, 353 Ark. 494, 109 S.W.3d 649 (2003)(adoptive father who had been adjudicated to be the biological father of child was not a “putative father” who had standing to request paternity testing);

State Office of Child Support Enforcement v. Willis, 347 Ark. 6, 59 S.W.3d 438 (2001)(prior action for divorce between husband and wife was neither an adjudication nor a voluntary acknowledgement of paternity, and, thus, subsequent order declaring that husband was not child's biological father was result of an original action to establish paternity, rather than an action to modify to which statute of limitations for filing such action would apply);

R.N. v. J.M., 347 Ark. 203, 61 S.W.3d 149 (2001)(putative father, who had a sexual relationship with a married woman, had standing under paternity statute to petition to determine the paternity of minor child, even though statute applied to suits to determine paternity of an “illegitimate child,” and child was presumed legitimate because she was born during marriage); and

Hall v. Freeman, 327 Ark. 148, 936 S.W.2d 761 (1997)(child who was conceived and born during mother's marriage to person other than putative father was presumed to be child of marital partners and, thus, did not have standing to bring paternity action against putative father pursuant to statute permitting persons for whom paternity is not presumed or established by court order to bring petition for paternity establishment).

A rebuttable presumption arises that a child conceived, but not born, during the marriage is a legitimate child. Only upon clear and convincing evidence may the court find this presumption overcome.

The presumption of legitimacy of a child born during a marriage is a presumption to protect the child whose interests should be considered first and foremost. And while this presumption is rebuttable according to law, the challenging party must first show that rebutting that presumption is in the best interest of a child.

See Ark. Code Ann. § 16-43-901 regarding competent witnesses as to paternity.

Name Change

The only relevant inquiry in determining whether to change the surname of a minor child is what is in that child's best interest.

The burden of proof is on the moving party to demonstrate that the change is in the best interest of the child.

The court must make the determination on a case-by-case basis through “thoughtful and careful consideration” of the following six factors:

- (1) the child's preference;
- (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent;
- (3) the length of time the child has borne a given name;
- (4) the degree of community respect associated with the present and proposed surnames;
- (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and
- (6) the existence of any parental misconduct or neglect.

Huffman v. Fisher, 343 Ark. 737, 38 S.W.3d 327 (2001).

See also Matthews v. Smith, 80 Ark. App. 396, 97 S.W.3d 418 (2003)(trial court adequately applied all factors when it determined whether change of child's surname was in the child's best interest; trial court acknowledged that the primary consideration was the best interest of the child, that father bore the burden of proof, and it considered the child's age and possible confusion to the child due to the name change);

Carter v. Reddell, 75 Ark. App. 8, 52 S.W.3d 506 (2001)(evidence of time that child had borne her given name, effect of name change on her relationship with each of her parents, and the difficulties she may experience from bearing present or proposed surname was sufficient to support finding that changing child's surname to that of father was in child's best interest; child was four years old, each parent had established bond with child unlikely to be altered by name change, stigma of name change minimal where she was just starting school, mother had married and her surname was different from child's surname, and mother had no plans to change child's surname to that of mother's husband);

Putt v. Suttles, 2011 Ark. App. 688, 386 S.W.3d 623 (2011)(the trial court is given discretion in divorce cases on whether to order paternity testing and is instructed to consider the child's best interest before ordering a test that could forever change a child's life merely because the adults who caused such a tumultuous situation are curious to know the results of their infidelity);

Bell v. Wardell, 72 Ark. App. 94, 34 S.W.3d 745 (2000)(chancery court's decision that it was in seven-month-old child's best interest to change her surname from mother's surname to

that of father was not clearly erroneous, in paternity proceeding; father filed paternity action only 19 days after child's birth, father offered to pay child support and child's medical expenses, and father and his mother had sought visitation with child); and

Moon v. Marquez, 65 Ark. App. 78, 986 S.W.2d 103 (1999)(father's petition to modify paternity order, requesting that child's surname be changed to the same as his, was not barred by res judicata; although the order was final in that it could be appealed, in custody cases, the order could later be modified upon a showing of sufficient change in circumstances to justify modification).

Temporary Orders

If the child is not born when the accused appears before the circuit court, the court may hear evidence and may make temporary orders and findings pending the birth of the child.

In all cases brought pursuant to Title IV-D of the Social Security Act, OCSE shall issue an administrative order for paternity testing. OCSE bears initial cost, to be assessed against the putative father if paternity is established or the applicant if the putative father is excluded.

Any paternity testing results obtained pursuant to an administrative order for paternity testing shall be admissible into evidence in any circuit court for the purpose of adjudicating paternity, as provided by § 9-10-108.

Upon motion by a party, the court shall issue a temporary child support order in accordance with § 9-10-102 et seq., the guidelines for child support, and the family support chart, when paternity is disputed and a judicial or administrative determination of paternity is pending, if there is clear and convincing genetic evidence of paternity.

If the mother should die before the final order, the action may be revived in the name of the child, and the mother's testimony at the temporary hearing may be introduced in the final hearing.

If the results of paternity testing exclude an alleged parent from being the biological parent of the child, the office shall issue an administrative determination that declares that the excluded person is not a parent of the child.

Ark. Code Ann. § 9-10-103.

Paternity Test

Upon motion of either party in a paternity action, the trial court shall order that the putative father, mother, and child submit to scientific testing for paternity, which may include deoxyribonucleic acid testing, to determine whether or not the putative father can be excluded as being the biological father of the child and to establish the probability of paternity if the testing does not exclude the putative father.

If the results of the paternity tests establish a ninety-five percent (95%) or more probability of inclusion that the putative father is the biological father of the child, after corroborating testimony concerning the conception, birth, and history of the child, this shall constitute a prima facie case of establishment of paternity, and the burden of proof shall shift to the putative father to rebut that proof.

Whenever the court orders scientific testing for paternity and one (1) of the parties refuses to submit to the testing, that fact shall be disclosed upon the trial and may be considered civil contempt of court.

Ark. Code Ann. § 9-10-108.

An order for a blood test is not a final order and therefore, is not appealable. *Helton v. Arkansas Dep't of Human Servs.*, 309 Ark. 268, 828 S.W.2d 842 (1992).

Putative fathers do not have a guaranteed right to counsel in paternity actions when their physical liberty is not in jeopardy. *Burrell v. Arkansas Dep't of Human Servs.*, 41 Ark. App. 140, 850 S.W.2d 8 (1993).

Similarly, Sixth Amendment right to confrontation does not apply as paternity is not a criminal matter. *Davis v. Child Support Enforcement Unit*, 326 Ark. 677, 933 S.W.2d 798 (1996).

See *State, Child Support Enforcement Unit v. Rogers*, 50 Ark. App. 108, 902 S.W.2d 243 (1995)(in uniform reciprocal support action, putative father sufficiently rebutted any presumption of paternity arising out of blood test results setting probability of his paternity at 99.99%, where three witnesses testified that putative father had vasectomy prior to conception of child, lab report prepared eight years after birth of child indicated putative father had zero sperm count, and mother swore in affidavit that she had sexual intercourse only with man other than putative father within thirty-day period of date child was conceived).

See also *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990)(proper foundation was not laid for admission in paternity proceeding of laboratory report on blood tests where there was nothing to show that person who signed the report and stated that he was the laboratory director was the person who performed the test, or that he was a qualified expert).

Lying-In Expenses

If it is found by the court that the accused is the father of the child, the court shall render judgment against him for the lying-in expenses in favor of the mother, person, or agency incurring the lying-in expenses, if claimed.

If the lying-in expenses are not paid upon the rendition of the judgment, together with all costs that may be adjudged against him in the case, then the court shall have the power to commit the accused person to jail until the lying-in expenses are paid, with all costs.

Bills and invoices for pregnancy and childbirth expenses and paternity testing are admissible as evidence in the circuit court or juvenile division of circuit court without third-party foundation testimony if such bills or invoices are regular on their face.

Such bills or invoices shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

Ark. Code Ann. § 9-10-110.

Custody & Visitation in Paternity Cases

2021 Legislative Update: In an action concerning an original child custody determination in a divorce or paternity matter, there is a rebuttable presumption that joint custody is in the best interest of the child.

The presumption that joint custody is in the best interest of the child may be rebutted:

- (1) If the court finds by clear and convincing evidence that joint custody is not in the best interest of the child;
 - (2) If the parties have reached an agreement on all issues related to custody of the child;
 - (3) If one (1) of the parties does not request sole, primary, or joint custody;
- or
- (4) If a rebuttable presumption described in subsection (c) or subsection (d) of this section is established by the evidence (Note: see domestic violence and sex offenders section on following page).

Ark. Code Ann. § 9-13-101(a)(1)(A)(iv).

Also see Ark. Code Ann. § 9-10-113:

When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party.

A biological father, provided he has established paternity in a court of competent jurisdiction, may petition the circuit court in the county where the child resides for custody of the child.

The court may award custody to the biological father upon a showing that:

- (1) He is a fit parent to raise the child;

(2) He has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and

(3) It is in the best interest of the child to award custody to the biological father.

When in the best interest of a child, visitation shall be awarded in a way that assures the frequent and continuing contact of the child with the mother and the biological father.

See also Ark. Code Ann. § 9-10-109(subsequent to the execution of an acknowledgment or finding of paternity by the father and mother of a child, the court shall follow the same guidelines, procedures, and requirements as set forth in the laws of this state applicable to child support orders and judgments entered by the circuit court as if it were a case involving a child born of a marriage in awarding custody, visitation, setting amounts of support, costs, and attorney's fees).

Modification of Orders or Judgments

The circuit court may at any time enlarge, diminish, or vacate any order or judgment except in regard to the issue of paternity as justice may require and on such notice to the defendant as the court may prescribe.

The court shall not set aside, alter, or modify any final decree, order, or judgment of paternity in which paternity blood testing, genetic testing, or other scientific evidence was used to determine the adjudicated father as the biological father.

Ark. Code Ann. § 9-10-115.

Either party may rescind a voluntary acknowledgment by completing a form to be filed with the Division of Vital Records before hearing date or within 60 days of executing a voluntary acknowledgment, whichever date comes first.

Beyond sixty days, acknowledgment may be set aside only upon a filing of a petition and a finding of fraud, duress, or material mistake of fact.

The burden of proof shall be upon the person challenging the establishment of paternity.

When any man has been adjudicated to be the father of a child or is deemed to be the father of a child pursuant to an acknowledgment of paternity without the benefit of scientific testing for paternity and as a result was ordered to pay child support, he shall be entitled to one (1) paternity test, pursuant to § 9-10-108, at any time during the period of time that he is required to pay child support upon the filing of a motion challenging the adjudication or acknowledgment of paternity in a court of competent jurisdiction.

The duty to pay child support and other legal obligations shall not be suspended while the motion is pending except for good cause shown.

If the test excludes the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity as the biological father of the child and the court so finds, the court shall:

- (A) Set aside the previous finding or establishment of paternity;
- (B) Find that there is no future obligation of support;
- (C) Order that any unpaid support owed under the previous order is vacated; and
- (D) Order that any support previously paid is not subject to refund.

If the name of the adjudicated father or man deemed to be the father pursuant to an acknowledgment of paternity appears on the birth certificate of the child, the court shall issue an order requiring the birth certificate to be amended to delete the name of the father.

Ark. Code Ann. § 9-10-115.

Also see *Rivers v. DeBoer*, 2019 Ark. App. 132

Circuit court's paternity judgment, which gave "woman giving birth" legal custody of child born outside of marriage until subsequent court order placed him in custody of another person, or he turned 18, pursuant to statute governing custody of child born outside marriage, was initial custody order placing custody of child with biological mother, as necessary to require biological father to prove material change in circumstances to obtain change in custody, even though judgment did not assign visitation rights, where biological father had not asked for visitation or custody, and had not appeared before court for any other related reason before it assigned paternity judgment. Ark. Code Ann. § 9-10-113.

Res Judicata

Res Judicata does not apply to bar a name change petition subsequent to the initial paternity determination proceeding.

Moon v. Marquez, 65 Ark. App. 78, 986 S.W.2d 103 (1999).

Res judicata does not apply when two actions do not involve the same parties or their privies.

State Office of Child Support Enforcement v. Willis, 347 Ark. 6, 59 S.W.3d 438 (2001)(court defined res judicata and collateral estoppel and adopted the principle of collateral estoppel for the first time; collateral estoppel does not apply where the issue of paternity was not litigated in the parties' first divorce).

Acknowledgment of Paternity

A man is the father of a child for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child pursuant to § 20-18-408 or § 20-18-409, or a similar acknowledgment executed during the child's minority.

Acknowledgments of paternity shall by operation of law constitute a conclusive finding of paternity, subject to the modification of orders or judgments under § 9-10-115, and shall be recognized by the chancery courts and juvenile divisions thereof as creating a parent and child relationship between father and child.

Such acknowledgments of paternity shall also be recognized as forming the basis for establishment and enforcement of a child support or visitation order without a further proceeding to establish paternity.

The Department of Health shall offer voluntary paternity establishment services in all of its offices throughout the state. The Department of Health shall coordinate such services with the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration. Upon submission of the acknowledgment of paternity to the Division of Vital Records of the Department of Health, the State Registrar of Vital Records shall accordingly establish a new or amended certificate of birth reflecting the name of the father as recited in the acknowledgment of paternity.

Ark. Code Ann. § 9-10-120.

XIV. Domestic Abuse

General Provisions

Petitions. The petition shall be filed in the county where the petitioner resides, where the alleged incident of abuse occurred, or where the respondent may be served. Ark. Code Ann. § 9-15-201.

“County where the petitioner resides” means the county in which the petitioner physically resides at the time the petition is filed and may include a county where the petitioner is located for a short-term stay in a domestic violence shelter. Ark. Code Ann. § 9-15-103.

A petition may be filed by:

- (1) Any adult family or household member on behalf of himself or herself;
- (2) Any adult family or household member on behalf of another family or household member who is a minor, including a married minor;

(3) Any adult family or household member on behalf of another family or household member who has been adjudicated an incompetent; or

(4) An employee or volunteer of a domestic-violence shelter or program on behalf of a minor, including a married minor.

Ark. Code Ann. § 9-15-201.

A petition for relief shall:

(A) Allege the existence of domestic abuse;

(B) Disclose the existence of any pending litigation between the parties; and

(C) Disclose any prior filings of a petition for an order of protection under this chapter.

The petition shall be accompanied by an affidavit made under oath that states the specific facts and circumstances of the domestic abuse and the specific relief sought.

Ark. Code Ann. § 9-15-201.

When a petition alleges an immediate and present danger of domestic abuse or that the respondent is scheduled to be released from incarceration within thirty (30) days and upon the respondent's release there will be an immediate and present danger of domestic abuse, the court shall grant a temporary order of protection pending a full hearing if the court finds sufficient evidence to support the petition. Ark. Code Ann. § 9-15-206.

Persons. Persons covered by the act include spouses, former spouses, parents and children, persons related by blood within fourth degree of consanguinity (generally through great-great-grandparents, great-great grandchildren, etc.), in-laws, any children residing in the household, persons who presently or in the past have resided or cohabited together, persons who have or have had a child in common, and persons who presently have or in the past have had a dating relationship.

“Dating relationship” means a romantic or intimate social relationship between two individuals that shall be determined after examining the length and type of the relationship and the frequency of interaction between the two people involved.

“Dating relationship” does not mean a casual relationship or ordinary fraternization in a business or social context.

Ark. Code Ann. § 9-15-103.

See *Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006)(parties' dating relationship of a couple of months, which appellant characterized as "serious," came within the definition of the applicable statute).

Also see *Kankey v. Quimby*, 2020 Ark. App. 471(Child's exposure to domestic abuse against mother by her boyfriend did not constitute domestic abuse, and thus trial court erred in extending order of protection to child, given that mother did not allege in petition for order of protection, accompanying affidavit, or at hearing that boyfriend perpetrated acts of violence against child.) Also see *Morales v. Garcia*, 2021 Ark. App. 438 with same facts.

Fees & Costs. The court, clerks of the court, and law enforcement agencies shall not require any initial filing fees or service costs and the abused shall not bear the cost associated with filing. Ark. Code Ann. § 9-15-202.

This subsection does not prohibit a judge from assessing costs against a petitioner if the allegations of abuse are determined after a hearing to be false.

Also, in 2017, an additional court cost of twenty-five dollars (\$25.00) is to be assessed and remitted to the Administration of Justice Funds Section by the court clerk for deposit as special revenues into the Domestic Violence Shelter Fund if a person is the respondent on a permanent order of protection entered by a court under this chapter.

Time. The circuit court shall not deny a petitioner relief solely because the act of domestic or family violence and the filing of the petition did not occur within one hundred twenty (120) days. Ark. Code Ann. § 9-15-214.

Incarceration. Incarceration or imprisonment of the abusing party shall not bar the court from issuing an ex parte temporary order of protection. Ark. Code Ann. § 9-15-206.

Relief. An ex parte **temporary** order of protection may provide the following relief:

- (1) Include any of the orders provided in §§ 9-15-203 and 9-15-205; and
- (2) Provide the following relief:
 - (A) Exclude the abusing party from the dwelling that the parties share or from the residence of the petitioner or victim;
 - (B) Exclude the abusing party from the place of business or employment, school, or other location of the petitioner or victim;
 - (C) Award temporary custody or establish temporary visitation rights with regard to minor children of the parties;

(D) Order temporary support for minor children or a spouse, with such support to be enforced in the manner prescribed by law for other child support and alimony awards;

(E) Prohibit the abusing party directly or through an agent from contacting the petitioner or victim except under specific conditions named in the order; and

(F) Order such other relief as the court considers necessary or appropriate for the protection of a family or household member.

The relief may include without limitation enjoining and restraining the abusing party from doing, attempting to do, or threatening to do an act injuring, mistreating, molesting, or harassing the petitioner.

Ark. Code Ann. § 9-15-206.

A **final** order of protection may provide the following relief:

(1) Exclude the abusing party from the dwelling that the parties share or from the residence of the petitioner or victim;

(2) Exclude the abusing party from the place of business or employment, school, or other location of the petitioner or victim;

(3) Award temporary custody or establish temporary visitation rights with regard to minor children of the parties;

If a previous child custody or visitation determination has been made by another court with continuing jurisdiction with regard to the minor children of the parties, a temporary child custody or visitation determination may be made. The order shall remain in effect until the court with original jurisdiction enters a subsequent order regarding the children.

(4) Order temporary support for minor children or a spouse, with such support to be enforced in the manner prescribed by law for other child support and alimony awards;

(5) Allow the prevailing party a reasonable attorney's fee as part of the costs;

(6) Prohibit the abusing party directly or through an agent from contacting the petitioner or victim except under specific conditions named in the order;

(7) Direct the care, custody, or control of any pet owned, possessed, leased, kept, or held by either party residing in the household; and

(8) Order other relief as the court deems necessary or appropriate for the protection of a family or household member.

The relief may include, but not be limited to, enjoining and restraining the abusing party from doing, attempting to do, or threatening to do any act injuring, mistreating, molesting, or harassing the petitioner.

Ark. Code Ann. § 9-15-205.

Time Limit. An order of protection shall be for a fixed period of time not less than ninety (90) days nor more than ten (10) years in duration, in the discretion of the court, and may be renewed at a subsequent hearing upon proof and a finding by the court that the threat of domestic abuse still exists. Ark. Code Ann. § 9-15-205.

Home Address. In the final order of protection, the petitioner's home or business address may be excluded from notice to the respondent.

A court shall also order that the petitioner's copy of the order of protection be excluded from any address where the respondent happens to reside.

Ark. Code Ann. § 9-15-207.

A petitioner may omit his or her home address or business address from all documents filed with the court. If a petitioner omits his or her home address, the petitioner shall provide the court with a mailing address. If disclosure of a petitioner's home address is necessary to determine jurisdiction or consider venue, the court may order the disclosure of the petitioner's home address:

- (A) After receiving the petitioner's consent;
- (B) Orally and in chambers, out of the presence of the respondent, and a sealed record to be made; or
- (C) After a hearing, if the court takes into consideration the safety of the petitioner and finds the disclosure in the interest of justice.

Ark. Code Ann. § 9-15-203.

Time Frames

When a petition is filed pursuant to this chapter, the court shall order a hearing to be held on the petition for the order of protection not later than thirty (30) days from the date on which the petition is filed or at the next court date, whichever is later.

An ex parte temporary order of protection is effective until the date of the hearing on the petition for the order of protection.

A denial of an ex parte temporary order of relief does not deny the petitioner the right to a full hearing on the merits.

Ark. Code Ann. § 9-15-204.

An order of protection shall be for a fixed period of time not less than ninety (90) days nor more than ten (10) years in duration, in the discretion of the court, and may be renewed at a subsequent hearing upon proof and a finding by the court that the threat of domestic abuse still exists. Ark. Code Ann. § 9-15-205.

Service

Service of a copy of the petition, the ex parte temporary order of protection, if issued, and notice of the date and place set for the hearing shall be made upon the respondent:

(A) At least five (5) days before the date of the hearing; and

(B) In accordance with the applicable rules of service under the Arkansas Rules of Civil Procedure.

If service cannot be made on the respondent, the court may set a new date for the hearing.

Ark. Code Ann. § 9-15-204.

Duties of the Clerk of the Court

The circuit clerk shall provide simplified forms and clerical assistance to help petitioners with the writing and filing of a petition under this chapter if the petitioner is not represented by counsel. Ark. Code Ann. § 9-15-203.

A sample Ex Parte Order of Protection and Final Order of Protection form can be found at courts.arkansas.gov

Filing and service fees cannot be assessed against the petitioner at the time of filing, but court may assess costs at the full hearing and may assess costs if the allegations of abuse in the petition are found to be false. Ark. Code Ann. § 9-15-202.

Duties of Law Enforcement

Any order of protection is enforceable by a law enforcement agency with proper jurisdiction. Ark. Code Ann. § 9-15-207.

The circuit court may order a law enforcement officer with jurisdiction to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence or to otherwise assist in execution or service of the order of protection.

The court may also order a law enforcement officer to assist the petitioner in returning to the residence and getting personal effects. Ark. Code Ann. § 9-15-208.

A law enforcement officer may file an affidavit alleging a violation of an order of protection, after which a court may issue an order to respondent to appear and show cause why he or she should not be held in contempt. Ark. Code Ann. § 9-15-210.

A law enforcement officer shall not arrest a petitioner for the violation of an order of protection issued against a respondent.

However, when a law enforcement officer has probable cause to believe that a respondent has violated an order of protection and has been presented verification of the existence of the order of protection, the officer may arrest the respondent without a warrant whether or not the violation occurred in the presence of the officer if the order of protection was obtained according to this chapter and the Arkansas Rules of Criminal Procedure.

An order of protection issued by a court of competent jurisdiction in any county of this state is enforceable in every county of this state by any court or law enforcement officer.

An order of protection shall include either:

(1) A finding that the respondent presents a credible threat to the physical safety of a person named in an order of protection as a family or household member, a child of the family or household member, or a child of the respondent or enjoined party; or

(2) An explicit prohibition against the use, attempted use, or threatened use of physical force against the person named in the order of protection as a family or household member, a child of the family or household member, or a child of the respondent or enjoined party which would reasonably be expected to cause bodily injury.

Ark. Code Ann. § 9-15-207.

A law enforcement officer may make a warrantless arrest for domestic abuse, upon probable cause that an act constituting domestic abuse was committed within the preceding 4 hours or the preceding 12 hours when physical injury is involved, even if the incident did not take place in the officer's presence.

When officer receives conflicting accounts of domestic violence, he or she shall evaluate each account separately to determine if one party was the predominant aggressor. When making determination, officer shall consider the following, based upon his or her observation:

statements from parties of domestic violence and from other witnesses;

extent of personal injuries of parties;

evidence of self-defense;

prior complaints of domestic abuse if history is reasonably ascertainable;

any other relevant factors.

When officer has probable cause to believe that a party to an act of domestic abuse is the predominant aggressor, the officer shall arrest that person with or without a warrant, under the circumstances set out in the provision.

An officer acting in good faith and exercising due care in making an arrest for domestic abuse is immune from civil liability.

Ark. Code Ann. § 16-81-113.

Full Faith & Credit

Any order of protection issued by a court of another state, a federally recognized Indian tribe, or a territory shall be afforded full faith and credit by the courts of this state and shall be enforced by law enforcement as if it were issued in this state if:

The court had jurisdiction over the parties and matters under the laws of the other state, the federally recognized Indian tribe, or the territory; and

Reasonable notice and opportunity to be heard was given to the person against whom the order was sought sufficient to protect that person's right to due process.

In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by the laws or rules of the other state, the federally recognized Indian tribe, or the territory and, in any event, within a reasonable time after the order is issued sufficient to protect the due process rights of the party against whom the order is enforced.

An order of protection issued against both the petitioner and the respondent by a court of another state, a federally recognized Indian tribe, or a territory shall not be enforceable against the petitioner unless:

- (1) The respondent filed a cross or counter petition, complaint, or other written pleading seeking an order of protection;
- (2) The issuing court made specific findings against both the petitioner and the respondent; and
- (3) The issuing court determined that each party was entitled to an order.

A person seeking recognition and enforcement of an out-of-state order of protection under this section may present a copy of the order of protection to the local law enforcement office in the city or county where enforcement of the order may be necessary. After

receiving a copy of the order of protection, the local law enforcement office shall enter the order into the Arkansas Crime Information Center's protection order registry file. There shall be no fee for entering the out-of-state order of protection. The law enforcement office shall not notify the party against whom the order has been issued that an out-of-state order of protection has been entered in this state. Entry of the out-of-state order of protection into the center's protection order registry file shall not be required for enforcement of the order of protection in this state.

When enforcing an out-of-state order of protection, a law enforcement officer shall determine if there is probable cause to believe that an out-of-state order of protection exists. A law enforcement officer may rely upon:

An out-of-state order of protection that has been provided to the officer by any source; or

The statement of any person protected by an out-of-state order of protection that the order exists; and verification by the clerk of the court of the other state, the federally recognized Indian tribe, or the territory in writing, by telephone, or by facsimile transmission or other electronic transmission.

When enforcing an out-of-state order of protection, a law enforcement officer shall determine if there is probable cause to believe that the terms of the order have been violated. The law enforcement officer may rely upon:

(i) Any events he or she witnessed;

(ii) The statement of any person who claims to be a witness; or

(iii) Any other evidence.

A law enforcement officer shall not refuse to enforce the terms of the order of protection on the grounds that the order has not been filed with the local law enforcement office or entered into the center's protection order registry file unless the law enforcement officer has a reasonable belief that the order is not authentic on its face.

Ark. Code Ann. § 9-15-302.

Violation of an Order of Protection

An order of protection shall include a notice to the respondent or party restrained that:

(1) A violation of the order of protection is a Class A misdemeanor carrying a maximum penalty of one (1) year imprisonment in the county jail or a fine of up to one thousand dollars (\$1,000), or both;

(2) A violation of an order of protection under this section within five (5) years of a previous conviction for violation of an order of protection is a Class D felony;

(3) It is unlawful for an individual who is subject to an order of protection or convicted of a misdemeanor of domestic violence to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9) as it existed on January 1, 2007; and

(4) A conviction of violation of an order of protection under this section within five (5) years of a previous conviction for violation of an order of protection is a Class D felony.

For respondents eighteen (18) years of age or older or emancipated minors, jurisdiction for the criminal offense of violating the terms of an order of protection is with the circuit court or other courts having jurisdiction over criminal matters.

Ark. Code Ann. § 9-15-207.

A person who is charged with violating an order of protection (ex parte or final) may be ordered as a condition of his or her release from custody to be placed under electronic surveillance at his or her expense until the charge is adjudicated.

“Electronic surveillance” is a defined term in the statute.

A person who is found guilty of violating an order of protection may be placed under electronic surveillance at his or her expense as part of his or her sentence for a minimum of four (4) months but not to exceed one (1) year.

Ark. Code Ann. § 9-15-217.

Cell Phone Order

Commencing July 1, 2017, to ensure that the petitioner may maintain his or her existing wireless telephone number and the wireless numbers of minor children in the petitioner's care, the court may issue an order directing a wireless telephone service provider to transfer the billing responsibility for and rights to the wireless telephone number or numbers to the petitioner if the petitioner: (1) Is not the account holder; and (2) Proves by a preponderance of the evidence that the petitioner and any minor children in the petitioner's care are the primary users of the wireless telephone numbers that will be ordered transferred by a court under this subsection.

An order transferring the billing responsibility for and rights to the wireless telephone number or numbers to a petitioner under subsection (a) of this section shall be a separate order that is directed to the wireless telephone service provider. The order shall list:

(A) The name and billing telephone number of the account holder;

(B) The name and contact information of the petitioner to whom the telephone number or numbers will be transferred; and

(C) Each telephone number to be transferred to the petitioner.

(3) The court shall ensure that the petitioner's contact information is not provided to the account holder in proceedings held under this subchapter.

(4) The order shall be served on the wireless telephone service provider's agent for service of process listed with the Secretary of State.

(5) The wireless service provider shall notify the requesting party if the wireless telephone service provider cannot operationally or technically effectuate the order due to certain circumstances, including when:

(A) The account holder has already terminated the account;

(B) Differences in network technology prevent the functionality of a device on the network; or

(C) There are geographic or other limitations on network or service availability.

Upon a wireless telephone service provider's transfer of billing responsibility for and rights to a wireless telephone number or numbers to a petitioner under subsection (b) of this section, the petitioner shall assume:

(A) Financial responsibility for the transferred wireless telephone number or numbers;

(B) Monthly service costs; and

(C) Costs for any mobile device associated with the wireless telephone number or numbers.

Ark. Code Ann. § 9-15-218.

Course of Control- 2021 Legislation

A court may enter an ex parte order enjoining a party from engaging in course of control or disturbing the peace, including without limitation through one (1) or more of the following acts:

(1) Molesting the other party;

(2) Attacking the other party;

(3) Striking the other party;

(4) Stalking the other party;

(5) Threatening the other party;

(6) Sexually assaulting the other party;

(7) Battering the other party;

(8) Credibly impersonating the other party;

(9) Falsely impersonating the other party;

- (10) Harassing the other party;
- (11) Telephoning the other party with the intent to harass the other party;
- (12) Destroying the personal property of the other party;
- (13) Directly or indirectly contacting the other party with the intent to harass the other party;
- (14) Coming within a specified distance of the other party;
- (15) Disturbing the peace of the other party;
- (16) Disturbing the peace of a family member or household member of the other party; or
- (17) Any other act that the court determines should be enjoined.

“Course of control” means a pattern of behavior that in purpose or effect unreasonably interferes with the free will and personal liberty of a person.

(B) “Course of control” includes without limitation the following:

- (i) Unreasonably isolating a person from his or her friends, relatives, or other sources of support;
- (ii) Unreasonably depriving a person of basic necessities;
- (iii) Unreasonably controlling, regulating, or monitoring a person's movements, communications, daily behavior, finances, economic resources, or access to resources; and
- (iv) Unreasonably compelling a person by intimidation, force, threat of force, or threat based on actual or suspected immigration status to engage in conduct from which the person has a right to abstain or to abstain from conduct in which the person has a right to engage; and

(2)(A) “Disturbing the peace” means a pattern of behavior that unreasonably destroys the mental or emotional calm of a family or household member based on the totality of the circumstances.

(B) “Disturbing the peace” includes without limitation course of control.

Ark. Code Ann. 9-15-219

Animals of Victims- 2021 Legislation

Upon a showing of good cause, an order of protection may include an order granting the petitioner the exclusive care, possession, or control of an animal owned, possessed, leased, kept, or held by:

- (A) The petitioner;
- (B) The respondent; or
- (C) A minor residing in the residence or household of either the petitioner or respondent.

The court may order the respondent to refrain from:

- (A) Coming into contact with the animal; or
- (B) Taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

This section does not limit any other remedy available to a petitioner by another provision of law.

Ark. Code Ann. 9-15-219

Case Law – Orders of Protection

Claver v. Wilbur, 102 Ark. App. 53 (2008)(the Court of Appeals reversed the trial court's entry of a protective order as erroneous and unsupported by the evidence. The Court found no statutory reason for issuing an order. The appellee's 16-year-old daughter and the 20-year old appellant were dating. The Court said the only proof showed that appellant continued to see the teenager after her parents prohibited contact between them and that the appellant had given the teenager a morning-after pill. No finding was made of sexual conduct that would constitute a crime. No evidence was presented about physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault. Simply maintaining contact with a boyfriend or girlfriend without parental consent does not rise to the level of domestic abuse).

Chiolak v. Chiolak, 99 Ark. App. 277 (2007)(the trial court did not err in deciding the issue of visitation in a protective order case even though the parties had just divorced in another division of the same circuit. In ordering that visitation would cease, the trial court made it clear that the protective order was subject to modification by the division that had granted the divorce. Visitation was discontinued only until the divorce court could conduct a hearing and rule in light of the child's allegations of abuse against the father. *Res judicata* did not bar issues raised by the order of protection, according to the Court, which said that custody and visitation orders are always subject to modification for changed circumstances and the best interest of the child).

Simmons v. Dixon, 96 Ark. App. 260 (2006)(trial court's granting of an order of protection based upon appellee's petition based upon allegations that appellant threatened her and her dog was affirmed. The Court of Appeals found that the evidence was sufficient to show that appellant sent threatening text messages to appellee and that appellee claimed she was afraid after receiving the messages. That was sufficient to show the infliction of fear of "imminent" physical harm under the domestic abuse statutes).

Pablo v. Crowder, 95 Ark. App. 268 (2006)(parties' dating relationship of a couple of months, which appellant characterized as "serious," was long enough to bring it within the definition of the Domestic Abuse Act).

Stahl v. Smith, 2017 Ark. App. 603 (the appellate court found error in the circuit court's entering a final order of protection based on a finding that Appellant had committed domestic abuse against the parties' child. A petition for order of protection shall allege, among other things, the existence of domestic abuse. Because there is no evidence on the record of harm or injury by Appellant, the circuit court must have relied on the second

portion of the domestic abuse definition, i.e. that Appellant inflicted fear of imminent physical harm. The only evidence to arguably support such a finding was that Appellant failed to protect the child from alleged abuse, that Appellant thought the child was lying about the abuse, that Appellant became aggressive and angry when speaking to the child about the allegations, and that Appellant continued to allow the child around the alleged abuser. The appellate court found that this evidence, even if assuming all of Appellee's testimony is true, is insufficient to support the domestic abuse filing.)

XV. Premarital Agreements

The Arkansas Premarital Agreement Act - Ark. Code Ann. § 9-11-401 et seq.

Requirements

“Premarital agreement” means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

“Property” means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

Ark. Code Ann. § 9-11-401.

A premarital agreement must be in writing and signed and acknowledged by both parties. It is enforceable without consideration.

“Acknowledged” means:

- (1) A formal declaration or admission before an authorized public officer by the parties who execute the premarital agreement providing that the premarital agreement is the act and deed of the parties;
- (2) A sworn affirmation by the respective attorneys of each party that the party represented by the attorney understands and consents to the legal effect of the premarital agreement;
- (3) An agreement signed by the parties that is witnessed by a notary and includes a statement that the parties:
 - (A) Have consulted with their respective attorneys regarding the premarital agreement;
 - (B) Have read and understand the premarital agreement; and
 - (C) Freely entered into the premarital agreement without coercion or undue influence; or

(4) An execution of the premarital agreement by both parties that is witnessed by two (2) individuals who are disinterested parties to the premarital agreement.

Ark. Code Ann. § 9-11-402.

Parties to a premarital agreement may contract with respect to:

- (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
- (4) the modification or elimination of spousal support;
- (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
- (7) the choice of law governing the construction of the agreement; and
- (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

The right of a child to support may not be adversely affected by a premarital agreement.

Ark. Code Ann. § 9-11-403.

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

Ark. Code Ann. § 9-11-405.

Enforcement

A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- (1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive after consulting with legal counsel, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one (1) party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

Ark. Code Ann. § 9-11-406.

Case law.

Prenuptial agreement statutes only apply to agreements made prior to marriage. *Stewart v. Combs*, 368 Ark. 121, 243 S.W.3d 294 (2006).

See *Woods v. Woods*, 2020 Ark. App. 469 (Circuit court's award of exclusive use and control of marital home to wife until minor child reached age of majority was in error in divorce proceeding; parties' premarital agreement clearly contemplated that in the event of divorce, any property held by parties as tenants in common would be sold and proceeds divided equally, and award was not equitable or just, given that in addition to her nonmarital assets valued at \$1.5 million, wife would receive approximately \$1,000,000 as her share from sales of marital home and lake house from which she could use to establish new home.)

See also *Rogers v. Rogers*, 90 Ark. App. 321, 205 S.W.3d 856 (2005)(the rule of evidence that governed the admissibility of compromises and offers to compromise did not apply to preclude admission of two partial stipulated property agreements executed by husband and wife, in divorce proceeding; the partial stipulated agreements were fully executed agreements, and they were offered for enforcement and were not offered for the purpose of "proving liability for, invalidity of, or amount of the claim.").

XVI. Reconciliation Agreements

Reconciliation agreements are an exception to the marital property law. See Ark. Code Ann. § 9-12-315.

Reconciliation agreements are not against public policy since the law encourages the resumption of marital relations. See *Schichtel v. Schichtel*, 3 Ark. App. 36, 621 S.W.2d 504 (1981)(the law encourages the resumption of marital relations. Since the purpose of a reconciliation agreement is to restore marital relations, it harmonizes with public policy and will be upheld. The Court held that a contract between husband and wife, made when they were separated for just cause, whereby the husband agrees to pay his wife a specified sum if she will resume marital relations, rests upon a valuable consideration and is enforceable);

Grover v. Grover, 101 Ark. App. 346, 276 S.W.3d 740 (2008)(circuit court's finding that wife signed the reconciliation agreement under duress, which was grounds for setting aside the agreement under Florida law, was not clearly erroneous; husband had not fully disclosed the nature of his military benefits, the parties had ended the divorce litigation and resumed their fiduciary relationship, wife signed the agreement without the benefit of legal counsel, and wife had returned to Florida with the parties' minor child to begin reconciliation efforts);

Arnold v. Arnold, 261 Ark. 734, 747, 553 S.W.2d 251, 258 (1977)(concerning the question of whether a separation agreement survives a reconciliation; the court held that it depends on the intention of the parties. But, when there is a property settlement, it is generally held to be a final and binding contract between the parties which can only be voided by mutual agreement. Reconciliation alone does not terminate the settlement. Therefore the settlement survives the reconciliation unless the court can find an intention or an express agreement that it shall not survive); and

Ducharme v. Ducharme, 316 Ark. 482, 872 S.W.2d 392 (1994)(Louisiana law, rather than Arkansas law, applied to determine legal efficacy of act of donation whereby wife gave up her usufruct for her husband's life in certain notes receivable and real property located in Louisiana, considering that Louisiana was place of contracting, and was location of real property specified in agreement).

XVII. Mediation and Alternative Dispute Resolution

Duty & Authority of Courts

It is the duty of each trial and appellate court of this state and each court is hereby vested with the authority to encourage the settlement of cases and controversies pending before it by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties.

On motion of all the parties, the court must make such an order of reference and continue the case or controversy pending the outcome of the selected dispute resolution process.

In addition, each circuit and appellate court of this state is vested with the authority to order any civil, juvenile, probate, or domestic relations case or controversy pending before it to mediation.

If a case or controversy is ordered to mediation, the parties may:

(1) Choose an appropriate mediator from a roster provided by the Arkansas Alternative Dispute Resolution Commission of those mediators who meet the commission's requirement guidelines for that type of case; or

(2) Select a mediator not on the commission's roster, if approved by the court.

A party may move to dispense with the order to mediate for good cause shown.

“Good cause shown” shall include, but not be limited to, a party's inability to pay the costs of mediation.

Each court is further granted the discretionary authority to make at the request of a party appropriate orders to confirm and enforce the results produced by the dispute resolution process.

Ark. Code Ann. § 16-7-202.

Confidentiality

Except as provided below, a communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.

Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process

requiring disclosure or production of information or data relating to or arising out of the matter in dispute.

If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine in camera whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

Ark. Code Ann. § 16-7-206.

See *Smyth vs. Smyth*, 2019 Ark. App. 12 (The requirement of confidentiality set out in Ark. Code Ann. § 16-7-206 does not prevent the court from knowing the subject matter of the mediation.)

Also see *Wynne-Ark, Inc. D/B/A Kelleys' Restaurant vs. Richard Baugh Construction*, 2020 Ark. App. 140, which addresses discoverability of confidential mediated settlement agreement.

Immunity

No impartial third party administering or participating in a dispute resolution process shall be held liable for civil damages for any statement or decision made in connection with or arising out of the conduct of a dispute resolution process unless the person acted in a manner exhibiting willful or wanton misconduct.

Ark. Code Ann. § 16-7-207.

Options Available to Courts

When the parties to a divorce action have minor children residing with one (1) or both parents, the court, prior to or after entering a decree of divorce, may require the parties to:

- (1) Complete at least two (2) hours of classes concerning parenting issues faced by divorced parents; or
- (2) Submit to mediation in regard to addressing parenting, custody, and visitation issues.

Each party shall be responsible for his or her cost of attending classes or mediation.

The parties may:

- (1) Choose a mediator from a list provided by the judge of those mediators who have met the Arkansas Alternative Dispute Resolution Commission's requirement guidelines for inclusion on a court-connected mediation roster; or
- (2) Select a mediator not on the roster, if approved by the judge.

A party may move to dispense with the referral to mediation for good cause shown.

Ark. Code Ann. § 9-12-322.

Selection of Mediator

When a case is ordered to mediation pursuant to Ark. Code Ann. §16-7-202 or §9-12-322 the parties may:

- (1) Choose an appropriate mediator from a roster provided by the Arkansas Alternative Dispute Resolution Commission of those mediators who meet the Commission's requirement guidelines for that type of case; or
- (2) Select a mediator not on the Commission's roster, if approved by the court

Access and Visitation Program

<http://www.araccess.org/>

The Arkansas Access and Visitation Program is a statewide mediation program serving residents of the state who would like to mediate issues of custody, visitation, and child support for their minor children. Mediation services are provided to participants at a reduced rate based on the participant's income.

The Access and Visitation Program was created in 1997 and is funded by a federal grant from the U.S. Department of Health and Human Services, Office of Child Support Enforcement. The purpose of the grant is to support and facilitate noncustodial parents' access to and visitation with their children.

The program provides up to 6 hours of free or reduced cost mediation services to Arkansas residents with qualifying issues. Qualifying issues are custody, visitation or child support. The cost that each party pays is determined by their income and number of dependents. The program serves all parents, regardless of marital status. They may be in the process of divorcing, already divorced and seeking to change the custody, visitation, or support arrangement, or never married. A court order is not necessary to be eligible for the program.

Regulation of Mediators

The Arkansas Alternative Dispute Resolution Commission is responsible for the regulation of mediators who are eligible to mediate court ordered cases. If the parties use a mediator who is not on the Commission' roster, that mediator is not bound by ethical rules or subject to discipline by the ADR Commission.

The ADR Commission is housed and staffed within the Administrative Office of the Courts. See Ark. Code Ann. §16-7-201 et. seq. for information on the Commission's establishment, and powers and duties.

The Commission's rules for certification are set out in the Requirements for the Certification of Mediators for Circuit Courts.

All certified mediators must adhere to ethical rules set out in the Requirements for the Conduct of Mediation and Mediators.

Pursuant to Standard 7 of the ethical rules for mediators, the mediator is prohibited from providing an assessment, evaluation, recommendation, finding, or other communication regarding the mediation to the court.

The mediator may file a mediator's report with the court stating:

- 1) whether or not the mediation occurred or has terminated;
- 2) whether a settlement was reached; and
- 3) who attended the mediation.

XVIII. Name Change for a Child

Best Interest & Factors

The controlling consideration is whether the name change is in the child's best interest. *Poindexter v. Poindexter*, 360 Ark. 538, 203 S.W.3d 84 (2005)(the rule was applied to middle names as well as to surnames).

In determining the child's best interest, the controlling consideration, the trial court should consider at least the following factors:

- (1) the child's preference;
- (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent;
- (3) the length of time the child has borne a given name;
- (4) the degree of community respect associated with the present and proposed surnames;
- (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and
- (6) the existence of any parental misconduct or neglect.

Huffman v. Fisher, 337 Ark. 58, 987 S.W.2d 269 (1999)(where the factors were first enumerated; "norm in the locale," as to how children receive surnames, is not one of the factors to be considered in determining the child's best interest, although

such evidence may be relevant in determining whether the child may experience difficulties, harassment, or embarrassment from bearing a particular surname).

Where a full inquiry is made by the trial court regarding the implication of Huffman factors governing requests to change a child's name and a determination is made with due regard to the best interest of the child, the trial court's decision regarding change of surname will be upheld where it is not clearly erroneous.

The burden of proof is on the party seeking change of child's surname to demonstrate that the name change is in the best interest of the child.

Gangi v. Edmonds, 93 Ark. App. 217, 218 S.W.3d 339 (2005)(trial court's finding that, if child continued to bear his mother's surname, everyone would know that his parents had not been married and this would cause child embarrassment was not supported by any evidence; the marriage of a child's mother and her consequent assumption of her husband's surname, as is customary in the state, should not provide a basis for changing the child's surname to that of his father, where no such consequence may be triggered by the father's marriage; evidence in connection with unwed father's petition to change the surname of parties' minor child from that of mother to father indicated that father exhibited such parental misconduct and neglect as to weigh heavily against changing child's surname to that of his father).

See also *Boudreaux v. Mauterstock*, 88 Ark. App. 389, 199 S.W.3d 120 (2004)(child's adjudicated father failed to carry his burden, in proceedings on his petition for change of child's surname, of demonstrating that change was in child's best interest, where father presented no evidence other than what could be gleaned from testimony regarding his petition for change of custody, and mere fact that child would have last name different from that of her father in absence of change did not establish that it was in child's best interest that her surname be changed);

Sheppard v. Speir, 85 Ark. App. 481, 157 S.W.3d 583 (2004)(following change of custody of illegitimate child from mother to father, change of child's name from "Weather'By Dot Com Chanel Fourcast Sheppard" to "Samuel Charles Speir" was in child's best interests; child was of a very tender age and could show no preference, mother had been married multiple times and her other children had different surnames, father shared surname with his wife and other children, mother's surname was associated in the community with her numerous arrests, no disrespect was associated with father's surname, and child's unusual birth name, as argued by father and implicitly recognized by mother, would subject child to difficulties, harassment, and embarrassment); and

Walker v. Burton, 2011 Ark. App. 439, 384 S.W.3d 605 (2011)(evidence was sufficient to establish that child's best interests would be served by granting maternal stepgrandfather's petition to change child's surname to that of stepgrandfather's; child wanted to assume the

last name of his stepgrandfather who had been awarded custody of child shortly before death of child's mother and maternal grandmother, child's father, who objected to stepgrandfather's name-change petition, had been incarcerated for committing offense related to mother's death, and evidence tended to show that changing child's name would have little effect on the preservation and development of child's relationship with his father since there was hardly a relationship there to begin with, father having been incarcerated for half of child's life).