**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**

**JUNE 1, 2017 to JUNE 30, 2017**

## I. CHILD CUSTODY AND RESIDENCY

### A. ***Baize v. Peak***

2016-CA-001462 06/30/2017 2017 WL 2822484

Opinion by Judge J. Lambert; Judges Combs and Johnson concurred.

Mother challenged an order granting primary physical custody of the parties' child to Father. The Court of Appeals affirmed, holding that the circuit court properly adopted the recommended findings of the domestic relations commissioner. In reaching this conclusion the Court noted that Mother failed to request the circuit court to make additional findings. CR 52.04; *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). The Court also held that there was sufficient evidence to support the findings of the commissioner, as adopted by the circuit court, that it was in the child's best interest to have Father as primary custodian. Not only was Mother's itinerant lifestyle detrimental to the child's well-being, but Father offered a more stable family life as well as a steady income. Finally, the Court held that the circuit court's decision comported with Kentucky statutory and case law. KRS 403.270; *Burton v. Burton*, 355 S.W.3d 489 (Ky. App. 2011).

## II. CONTEMPT

### A. ***Belt v. Commonwealth of Kentucky, Cabinet for Families and Children***

2016-CA-000838 06/02/2017 2017 WL 2391498

Opinion and order dismissing by Judge J. Lambert; Judges Jones and Maze concurred.

In a direct appeal from a finding of civil contempt, based upon a failure to pay ordered child support, the Court of Appeals dismissed the appeal as moot. Appellant argued that the family court erred by incarcerating him for contempt and setting a purge amount beyond his current ability to pay. The Court of Appeals did not consider appellant's argument on the merits because the cash bond required by the family court to purge contempt was paid by appellant's employer following entry of appellant's notice of appeal. Because contempt was purged, no actual case or controversy existed for the Court to consider.

## III. CRIMINAL LAW

### A. ***Johnson v. Commonwealth***

2016-CA-000903 06/16/2017 2017 WL 2605215

Opinion by Judge D. Lambert; Chief Judge Kramer and Judge Nickell concurred.

Following entry of a conditional guilty plea to two counts of trafficking in controlled substances in the first degree and one count of DUI, appellant challenged the propriety of the detention following the traffic stop leading to his arrest. After being pulled over and failing a number of field sobriety tests, appellant was placed under arrest for suspected DUI, and a K-9 unit was called in to assist in searching the vehicle. The K-9 unit arrived as the arresting officer was still in the process of arresting appellant. The drug dog indicated the presence of controlled substances in the rear of the vehicle, and a search of the rear bumper revealed methamphetamine and heroin. A search of appellant's person revealed $3,455 in cash. On appeal, appellant argued: (1) that the actions of the police in extending the traffic stop violated the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution; and (2) that the results of the drug sweep were invalid for lack of a current certification for the dog. The Court of Appeals rejected both arguments and affirmed. As to the first argument, the Court held that police had adequate cause to suspect criminal activity beyond the traffic violations, *i.e.*, driving under the influence. The further detention for the purpose of assessing the suspicion of appellant's intoxication was justified when appellant performed unsatisfactorily on the field sobriety tests. Moreover, those failed tests gave probable cause to arrest appellant for the offense of DUI. As to appellant's second argument, the Court noted: (1) that Kentucky does not require drug dogs to be certified; (2) that the Commonwealth presented evidence that the dog had been fully trained and had successfully assisted in numerous prior searches; (3) that the dog had been certified prior to the search and was subsequently re-certified, indicating his competence; (4) that the issue of requiring certification for drug dogs is one for the legislature to address, not the judiciary; (5) that the arresting officer was already in the process of arresting appellant by the time the K-9 unit had arrived; thus, appellant's contention that the extension of the traffic stop was a pretext for the purpose of delay until the dog arrived on scene failed because the search was conducted incident to his arrest; and (6) that even if the search of the vehicle was unlawful for the dog's lack of certification, the results of the search would still be admissible under the doctrine of inevitable discovery.

**B.** ***Schambon v. Commonwealth***

2015-CA-001668 06/09/2017 2017 WL 2491664

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred.

In a consolidated appeal from denial of relief under CR 60.02(f), the Court of Appeals affirmed the circuit court. In June 1990, appellants were convicted, *inter alia*, of multiple counts of sodomy and criminal abuse (which related to acts committed against their four children), as well as second-degree animal cruelty. Appellants first argued that the circuit court erred by finding their motions to have not been filed within a reasonable time. Second, as an alternative to their first argument, appellants argued that the circuit court should have allowed their claims as timely under the doctrine of equitable tolling. Third, appellants argued that the circuit court erred in finding the substance of their claims, which involved the recanting of victim testimony and expert testimony regarding the poor manner in which a victim's interview was conducted, to be without merit. With regard to appellants' first argument, the Court of Appeals held that the circuit court did not abuse its discretion in finding the motions for relief to have not been filed within a reasonable time, pursuant to CR 60.02(f) and *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). Second, the Court held that equitable tolling was not appropriate in this case because appellants failed to demonstrate an extraordinary circumstance that would warrant such consideration. Third, the Court held that the circuit court did not abuse its discretion in disregarding the victim recantations and the expert testimony.

## IV. ESTATES

### A. ***Wolfe v. Young***

2016-CA-000540 06/09/2017 2017 WL 2491661

Opinion by Judge Combs; Judges Clayton and Taylor concurred.

The Court of Appeals granted discretionary review in this probate case. The district court removed appellant as executor of his father's estate after protests by several beneficiaries concerning his discretionary decisions in the administration of the estate. The circuit court affirmed the order of removal. The Court of Appeals reversed, holding that removal of an executor named by a testator requires a heightened standard and a much more convincing showing of impropriety beyond what would be required to remove a court-appointed administrator. The mere dissatisfaction on the part of the beneficiaries in this case did not rise to the standard sufficient to warrant removal of the executor.

## V. FAMILY LAW

### A. ***Dotson v. Dotson***

2013-CA-001598 06/09/2017 2017 WL 2491671

Opinion by Judge Jones; Judges Dixon and J. Lambert concurred.

The parties filed an appeal and cross-appeal from an order classifying and dividing their assets following the dissolution of their marriage. Specifically at issue were the division and classification of Colette's Class A common UPS stock and the classification of Colette's unvested Restricted Performance Unit (RPU) stock. Colette argued that the circuit court erred in finding that only 647 shares of her Class A common stock were premarital property, as it should have considered a stock split that occurred subsequent to her acquiring that stock. However, the Court of Appeals declined to consider the stock split argument. The Court noted that during the parties' prehearing conference, the parties had reached an agreement settling all issues except those expressly reserved - which included only "miscellaneous personalty and reservation of UPS RPU stock." Therefore, the Court accepted Darren's argument that the stock split issue had not been reserved for appeal. Colette additionally argued that the circuit court erred in designating her unvested RPUs as marital property, as she had not yet earned - and might never earn - the stock the RPUs represented. The Court disagreed with Colette, noting that the RPU plan indicated that RPUs do have a quantifiable value when issued to employees, that RPUs represent a bonus earned by the employee, and that an employee has a right to enforce the RPU plan if it is not administered according to the company's agreement. Based on those factors, the Court held that the RPUs were, in fact, Colette's marital property. Accordingly, the Court affirmed.

## VI. FEES AND COSTS

### A. ***Garmer & Prather, PLLC v. Independence Bank***

2015-CA-001440 06/30/2017 2017 WL 2822485

Opinion by Judge Johnson; Judges Jones and Thompson concurred.

This appeal arose from a wrongful death case that was simultaneously prosecuted in separate federal and state court actions. After the state court case was settled, the federal case was dismissed. Appellants, the attorneys who litigated the federal case, argued that they were entitled to recover fees and expenses from Independence Bank, the administrator of the decedent's estate, on a *quantum meruit* basis. Appellants argued that the Estate knowingly and eagerly received and accepted their work product from the federal action, moved to incorporate it into its own case, and used that work product for its own benefit to move quickly to settlement. Appellants further argued that if it had not been for their efforts in the federal litigation, the Estate's claims in state court would have been barred by the statute of limitations. The circuit court rejected appellants' arguments and granted the Bank's motion for summary judgment. The Court of Appeals reversed and remanded, holding, as a matter of law, that the circuit court erred in not applying the four-pronged test for *quantum meruit* and in not considering whether the Estate had accepted or acquiesced in the services provided by appellants and had thereby made an implied promise to pay.

## VII. LIENS

### A. ***Forcht v. Forcht Bank, N.A.***

2013-CA-001433 06/23/2017 2017 WL 2705405

Opinion by Judge Nickell; Chief Judge Kramer and Judge Dixon concurred.

Appellant challenged the circuit court's grant of summary judgment in favor of Forcht Bank, N.A., on her claims for violations of KRS 382.365 and the tort of outrage. Her claims stemmed from the Bank's alleged willful failure to release a lien encumbering her residence. She also challenged several of the circuit court's evidentiary rulings. Appellant's ex-husband was on the Bank's Board of Directors and her ex-father-in-law was the Chairman of the Board and founder and primary shareholder of the Bank. Following appellant's divorce, she was to receive the residence and her ex-husband was to assume all outstanding liability for the mortgage encumbering the property. The ex-husband executed a quitclaim deed to appellant, subsequently making timely payments on the mortgage loans. The Bank and ex-husband then executed documents modifying and extending certain deadlines for final payments on the mortgage. Upon learning that the mortgage still encumbered her property some two years after the quitclaim deed had been recorded, appellant requested that the Bank release the mortgage. After several denials, appellant filed suit raising six claims. The circuit court ultimately granted summary judgment in favor of the Bank on all of appellant's claims. In affirming, the Court of Appeals concluded that appellant could not, as a matter of law, proceed with her claim for violations of KRS 382.365, as she was unable to show that the underlying mortgage debt had been satisfied. The Court discussed the differences between renewal notes and novations and concluded that the documents executed by the ex-husband and Bank constituted renewals, thereby not extinguishing the underlying indebtedness; thus, a mortgage release was not statutorily required. The Court then discussed the circuit court's evidentiary rulings and concluded that no abuse of discretion occurred. Specifically, the Court determined that the reasoning of *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012), which concerned negligent infliction of emotional distress claims, was equally applicable to intentional infliction of emotional distress claims, thereby requiring expert medical or scientific proof of a severe or serious emotional injury. Appellant's failure to produce such evidence was fatal to her outrage claim.

## VIII. LIMITATION OF ACTIONS

### A. ***Middleton v. Sampey***

2015-CA-001029 06/16/2017 2017 WL 2605224

Opinion by Judge Dixon; Judges Clayton and D. Lambert concurred.

The Court of Appeals affirmed a decision dismissing an action brought by the remaindermen beneficiaries of four trusts that held stock in Hardscuffle, Inc. The beneficiaries alleged that Sampey, a corporate officer and former trustee, along with Lampton, the corporation's chairman, engaged in self-dealing transactions detrimental to the interests of the trusts and the trust beneficiaries, which constituted a breach of trust by Sampey and breach of fiduciary duty by Lampton. The circuit court granted dismissal pursuant to CR 12.02(f). The Court of Appeals held that the claims of the beneficiaries were time-barred. The claims against Lampton and Sampey were both subject to a five-year limitations period; however, the alleged breach of duty occurred fifteen years before the complaint was filed. The Court also concluded that neither the discovery rule nor the continuing violation doctrine applied to toll the applicable statute of limitations.

## IX. NEGLIGENCE

### A. ***Brooks v. Seaton Place Homeowners Association, Inc.***

2016-CA-001112 06/16/2017 2017 WL 2605206

Opinion by Judge Combs; Judges D. Lambert and Thompson concurred.

This appeal stemmed from a personal injury case arising from the alleged negligence of homeowners in maintaining a sidewalk in front of their house. The homeowners were part of a community-wide yard sale. Appellant fell on the sidewalk in front of their home and subsequently sued both the homeowners and the homeowners association, alleging that they owed her a duty of care to maintain the sidewalk in good repair. In affirming the summary judgment of the circuit court finding no liability, the Court of Appeals held that the pertinent covenants regulating the homeowners association did not include the sidewalk at issue among the "common areas" for which the association was responsible. As to the homeowners, the Court held that mere participation in a yard sale was not the kind of affirmative conduct that created a duty of care on their part with respect to appellant.

**B.** ***Hayes v. D.C.I. Properties-DKY, LLC***

2016-CA-001189 06/16/2017 2017 WL 2605193

Opinion by Judge Combs; Judges D. Lambert and Nickell concurred.

This appeal arose from a personal injury case filed by the parents of a minor, who was more than sixteen years of age at the time of his accident. While inebriated, the young man boarded and started up a sheepsfoot roller - a piece of heavy equipment - at a residential construction site. He subsequently overturned the roller and injured his leg. The parents premised the lawsuit against the construction company on the attractive nuisance doctrine. The circuit court entered summary judgment in favor of the construction company, and the Court of Appeals affirmed. The Court noted that while it is true that the attractive nuisance doctrine may impose liability upon an owner of premises for the trespass of a child who is injured, if the child is fourteen years of age or more, the presumption is that he is beyond the protection afforded by the "tender-years" element of the doctrine. Even disregarding this presumption, the Court held that there was still no evidence to suggest that the minor, a licensed driver, could not appreciate the risk involved in his operation of heavy construction equipment. The presence of the roller on the construction site posed an unreasonable risk of harm that he should have been able to appreciate. In light of his age and status as a licensed driver, no reasonable argument could be made to the contrary.

## X. REAL ESTATE

### A. ***Shields v. University of Louisville Foundation, Inc.***

2015-CA-001679 06/23/2017 2017 WL 2705402 Rehearing Pending

Opinion by Judge Taylor; Judges Acree and Dixon concurred.

Appellant brought this appeal from an order adjudicating the legal status of a roadway created by two deeds executed in 1942. Both the University of Louisville Foundation, Inc. and Shields alleged that the other party impeded use of the subject roadway, and Shields claimed ownership in fee simple of the roadway. The Foundation filed a petition for declaratory relief and asserted that the roadway constituted an easement burdening its real property and that said easement was created by grant, as evidenced by its 1942 deed. Shields filed an answer and counterclaim alleging that he owned the roadway in fee simple. By summary judgment, the circuit court interpreted the 1942 deeds as granting a right-of-way easement in the roadway that burdened the Foundation's property for the benefit of the real property owned by Shields. The Court of Appeals affirmed. Notably, the Court discussed the confusion between, and intermingling of, the terms "except" and "reserve" in the language of deeds, and sought to determine whether the deeds intended to create an easement in the roadway or intended to exclude the roadway from the conveyance of the 22-acre tract owned by the Foundation. Considering the language of both 1942 deeds, the Court concluded that the parties plainly intended to grant a right-of-way easement in the roadway. The 1942 deed conveying the 22-acre tract specifically utilized the term "easement" and provided that a 15-foot easement for a roadway was excepted. The use of the term easement was plain and unambiguous, and it signaled the parties' intent to create a right-of-way easement in the "roadway." In this context, the parties' use of the term "except" was not in the technical sense, but rather was intended to merely indicate that the grantor created a right-of-way easement in the roadway. Moreover, the 1942 deed to the 43-acre tract owned by Shields further clarified such intent by providing that the easement for a roadway was "appurtenant" or inhered to said tract.

## XI. STATUTE/RULE INTERPRETATION

### A. ***American General Life Insurance Company v. DRB Capital, LLC***

2016-CA-000395 06/09/2017 2017 WL 2491662 DR Pending

Opinion by Judge D. Lambert; Judge Dixon concurred; Judge Clayton dissented and filed a separate opinion.

This appeal was taken from an order approving the transfer of payment rights in a workers' compensation structured settlement to appellee DRB Capital, LLC (DRB). Appellee Ray Thomas, Jr. settled a workers' compensation claim with his employer and its insurers. Under the settlement agreement, the parties agreed that Thomas would receive periodic payments through the purchase of an annuity. His employer's insurer assigned its obligation to make those payments to appellant American General Annuity Service Corporation (AGASC) via qualified assignment. AGASC then purchased the annuity from American General Life Insurance Company (AGLIC) to fulfill the obligation. Following these events, Thomas sought to transfer his rights in the periodic payments to DRB in exchange for one lump-sum payment. DRB in turn filed an application to approve the transaction, which AGASC and AGLIC (collectively "American General") contested. American General argued that the language of the settlement agreement, the qualified assignment to AGASC, and the annuity contract each proscribed an assignment of Thomas' payment rights. They also argued that the provisions of Kentucky's Structured Settlement Protection Act (SSPA), found at KRS 454.430 *et seq.*, do not apply to structured settlements resulting from workers' compensation claims. The circuit court ultimately approved Thomas' assignment to DRB, concluding that the SSPA applies to workers' compensation settlements and that the assignment was in Thomas' best interest. By a 2-1 vote, the Court of Appeals affirmed. The Court first noted that in *Kentucky Employers' Mut. Ins. v. Novation Capital, LLC*, 361 S.W.3d 320 (Ky. App. 2011), the Court held that KRS 454.435 conferred jurisdiction on circuit courts to approve the transfer of a workers' compensation award. The Court next considered whether the anti-assignment provisions provided in the contracts between the payee, the insurer, and the annuity issuer were enforceable. Citing to *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680 (Ky. 2012), the Court held that the anti-assignment provisions were void as a matter of public policy and, therefore, unenforceable. In a lengthy dissent, Judge Clayton set forth why she believed the anti-assignment provisions were enforceable.

## XII. TERMINATION OF PARENTAL RIGHTS

### A. ***M.P.R. v. Cabinet for Health and Family Services***

2016-CA-000659 06/02/2017 2017 WL 2391499 Released for Publication

Opinion by Judge Jones; Chief Judge Kramer and Judge Acree concurred.

Father challenged the involuntary termination of his parental rights over Child. On appeal, Father argued that the circuit court erred in finding that he had abandoned Child for a period of not less than 90 days, as he had been incarcerated for the past 90 days. Further, Father contended that the circuit court failed to give the appropriate weight to his fundamental parental rights. The Court of Appeals acknowledged that under *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661 (Ky. App. 1985), incarceration alone is insufficient to terminate parental rights. However, the Court noted that in this case, Father had testified to the fact that, before being incarcerated, he had failed to make any attempt to contact Child, to visit with Child, or to support Child. Accordingly, the Court held that the circuit court had not based its determination that Father had abandoned Child solely on the issue of Father's incarceration. Concerning Father's argument that the circuit court had not afforded proper weight to his fundamental parental rights, the Court determined that there was no indication in the record that the circuit court had done so. Rather, the record revealed that there was substantial evidence to support the circuit court's conclusion as to each factor considered. Accordingly, the Court of Appeals affirmed.

## XIII. TORTS

### A. ***Brown v. Fournier***

2015-CA-001429 06/02/2017 2017 WL 2391709 DR Pending

Opinion by Judge Acree; Judge Nickell concurred; Judge Clayton concurred and filed a separate opinion.

Appellant claimed battery and false imprisonment by a police officer. The jury returned a verdict of no liability. The Court of Appeals affirmed, finding that under the facts of the case the instructions satisfactorily stated the law regarding the degree of physical contact a police officer is permitted to use with a person, without arresting the person, while managing the scene of an automobile accident.

## XIV. WORKERS' COMPENSATION

### A. ***Cunningham v. Quad/Graphics, Inc.***

2016-CA-001485 06/16/2017 2017 WL 2605189

Opinion by Chief Judge Kramer; Judges D. Lambert and Nickell concurred.

A worker's compensation claimant who sustained a compensable injury to his right shoulder contended that the opinion of the independent medical evaluator who arrived at the impairment rating ultimately utilized by the Administrative Law Judge (ALJ) in calculating his award of benefits did not qualify as substantial evidence. The claimant pointed out that the evaluator utilized passive range of motion measurements rather than active range of motion measurements as part of her overall assessment of the impairment to his right shoulder. He argued that the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA Guides), required the evaluation of his right shoulder to be based only upon active range of motion measurements. Thus, he reasoned that the evaluator effectively disregarded the AMA Guides and, consequently, the ALJ had no right to rely upon her opinion in determining his award. The Workers' Compensation Board affirmed the ALJ, and the Court of Appeals likewise found no error. The Court held that the Guides themselves permitted the evaluating physician to discount the active range of motion measurements that she obtained from the claimant and to modify his impairment rating if she believed, in light of other medical evidence and in the exercise of her entire range of clinical skill and judgment, that the claimant's measurements were implausible, indicative of poor effort, and insufficient to verify that an impairment of a certain magnitude existed. Here, the evaluating physician testified that she did exactly that. The claimant did not challenge her testimony to that effect, nor did he challenge that the evaluator adequately explained and justified her reasons for modifying his impairment rating from what he would have otherwise received from only an assessment of his active motion measurements. The evaluating physician's use of medical evidence she gleaned through passive range of motion measurements as one of her several bases for modifying the claimant's impairment rating, as well as her understanding that the AMA Guides permitted it, did not reflect that she impermissibly disregarded the AMA Guides. Rather, it reflected her interpretation of the AMA Guides and her assessment of the claimant's impairment, both of which are medical questions.