PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MARCH 1, 2020 to MARCH 31, 2020

I. CHILD CUSTODY AND RESIDENCY

A. ***Garvin v. Krieger***

2015-CA-001819 03/13/2020 2020 WL 1224161

Opinion by Judge Jones; Judge Acree concurred by separate opinion with which Judge Jones joined; Judge Taylor dissented without separate opinion.

This case was on remand from the Supreme Court of Kentucky via an opinion rendered in *Krieger v. Garvin*, 584 S.W.3d 727 (Ky. 2019). The Court of Appeals had concluded that an unmarried couple (a maternal grandfather and his girlfriend) could not qualify as a child's *de facto* custodian or custodians under KRS 403.270(1). The Supreme Court reversed and held that the statutory language of KRS 403.270 is broad enough to simultaneously confer upon unmarried cohabitants the status of *de facto* custodian or custodians. On remand, the Court of Appeals was tasked with addressing whether the couple had demonstrated by clear and convincing evidence that they otherwise qualified as *de facto* custodians. The Court of Appeals concluded that the six-month period set forth in KRS 403.270(1)(a) had not been satisfied, and that the couple had not demonstrated that they were being solely relied upon for support. After Ashley Garvin gave birth to a daughter, the Cabinet for Health and Family Services instituted DNA proceedings, and the family court granted temporary custody to the couple. A few months later, the maternal grandmother filed a petition seeking custody or grandparent visitation. Ashley responded and requested grandmother be granted custody over the unmarried couple. However, the family court found the couple qualified as *de facto* custodians. The Court of Appeals held that Ashley had tolled the running of the six-month period by asserting her right to custody less than five months into the action. The Court also held that the family court had erroneously allowed aggregation of separate time periods to satisfy the residency requirement, in violation of Kentucky jurisprudence and *Meinders v. Middleton*, 572 S.W.3d 52 (Ky. 2019). Here, the family court demarcated the end of a tolling period as the date the family court denied a custody motion, which is a non-final and interlocutory order. Because the family court's orders denying Ashley's separate motions for

custody were non-final interlocutory orders, there never was an end to the tolling. Therefore, the Court of Appeals reversed the order of the family court. In his concurring opinion, Judge Acree implored the Supreme Court to reconsider its decision in *Krieger*, believing it vulnerable to several criticisms: (1) it is inconsistent with the rationale applied in *Meinders*; (2) it violates the Supreme Court's jurisprudence for interpreting statutes; (3) it builds upon an erroneous reference in an unpublished Court of Appeals case; (4) it ascribes to cohabitation an equivalency to marriage in this context; and (5) granting a nonparent the rights of a parent based on a child's best interests easily can be shown to constitute undue state interfere with the actual parent's constitutional right to raise her child, a child whose custody she is actively pursuing.

II. CONVERSION

A. ***C&H Manufacturing, LLC v. Harlan County Industrial Development Authority, Inc.***

2018-CA-001222 03/13/2020 2020 WL 1224155

Opinion by Judge Jones; Judges Combs and L. Thompson concurred.

C&H, a manufacturer of metal parts, defaulted on its loan to Cumberland Valley Area Development District. C&H began negotiating the sale of its facility and equipment to Hurberries, a commercial competitor of C&H. C&H abandoned its lease of the property, and Harlan County Industrial Development Authority, Inc. (HCIDA) assumed control and continued negotiations with Hurberries as successor-in-interest. Eventually, C&H initiated this claim against HCIDA and Hurberries alleging conversion of manufacturing equipment, in an attempt to recoup rental payments. C&H claimed HCIDA, the lessor, converted the equipment by leasing the facility and the equipment contained therein to Hurberries. At no point did C&H make a demand for the return of the equipment. C&H initiated the action against Hurberries and HCIDA on several claims of conversion. The circuit court entered summary judgment for Hurberries and HCIDA finding C&H had abandoned the equipment on the premises leased by Hurberries from HCIDA. The Court of Appeals affirmed, noting that the doctrine of abandonment precludes any claim for conversion and recognizing the presumption of abandonment when a commercial tenant turns over its lease to another commercial tenant in the same business and leaves behind equipment or personal property. The Court agreed with the circuit court that C&H had abandoned its equipment, invalidating its conversion claims. There was nothing about C&H's behavior to suggest that it did not intend to abandon its equipment. The Court also noted that a lessor such as HCIDA does not assert an ownership interest in property left behind at a leased premises when reletting the premises. HCIDA had neither possession nor the right to interfere with Hurberries' possession of C&H's abandoned equipment, and to hold otherwise would prevent lessors from leasing facilities in fear of ensuing litigation.

III. CORRECTIONS

A. ***Woods v. Commonwealth***

2019-CA-001042 03/20/2020 2020 WL 1313823

Opinion dismissing by Judge Goodwine; Judges Jones and Kramer concurred.

Appellant challenged an order denying his motion for jail time credit pursuant to KRS 532.120(9). Because appellant failed to name either the warden or the Department of Corrections as an indispensable party, the Court of Appeals dismissed the appeal pursuant to *Watkins v. Fannin*, 278 S.W.3d 637 (Ky. App. 2009). In reaching this decision, the Court concluded that the decisions of the Supreme Court of Kentucky in *Lassiter v. American Exp. Travel Related Services Co., Inc.*, 308 S.W.3d 714 (Ky. 2010) and the Court of Appeals in Thrasher v. Commonwealth, 386 S.W.3d 132 (Ky. App. 2012) did not compel a different result. The Court noted that unlike Thrasher, the appellant here did not name the warden or the Department of Corrections in the underlying circuit court action. He did not name either in his notice of appeal, nor did he serve either with notice, making it difficult to determine which department or cabinet was affected by the appeal. The Court further noted that Lassiter named the Department of Treasury and Thrasher served legal counsel for the Department of Corrections with notice. Finally, the Court concluded that *Lassiter* does not create a rule that naming the Commonwealth only is acceptable as a substitute for naming on appeal all of the numerous state agencies which are the actual indispensable parties without some notification to the specific agency.

IV. CRIMINAL LAW

A. ***Fisher v. Commonwealth***

2019-CA-001353 03/20/2020 2020 WL 1313822

Opinion by Judge Kramer; Judge Combs concurred; Judge K. Thompson concurred in result only.

Appellant pled guilty to three counts of trafficking marijuana, eight ounces or less, first offense (KRS 218A.1421(2)(a)). Over five years later, he petitioned the circuit court to have his convictions expunged pursuant to KRS 431.078. In a well-reasoned order, the circuit court denied his petition after determining his offenses were ineligible for expungement. The Court of Appeals affirmed, explaining that the language of KRS 431.078(4)(d) is unambiguous and precludes expungement of any offense that is subject to enhancement, where the time limit for enhancement has not expired. Because an offense in violation of KRS 218A.1421(2)(a) is indeed subject to enhancement for a second or subsequent offense, and because KRS 218A.010(48) does not limit the time for which such a prior offense can be used to enhance the punishment for a later offense, a conviction for KRS 218A.1421(2)(a) accordingly cannot be expunged. The Court also noted that to the extent appellant had asserted a due process right to an expungement, he was incorrect. Expungement is not a right but a statutory privilege which the General Assembly has no obligation to provide at all and which it may therefore provide subject to conditions that our Courts are not at liberty to ignore.

V. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Hall v. Smith***

2019-CA-000772 03/13/2020 2020 WL 1223235

Opinion by Judge Caldwell; Chief Judge Clayton and Judge Combs concurred.

Appellant challenged the denial of her petition for a domestic violence order she sought against her former spouse. She alleged that the circuit court erred in not granting the DVO, by failing to enter adequate findings after so determining, and by not holding a proper hearing. The Court of Appeals vacated and remanded for further findings. While the Court agreed that there was insufficient evidence to support entry of a DVO, the Court noted that the circuit court had failed to make any findings in writing, including even checking the appropriate box in AOC Form 275.3 (Kentucky's standardized form for orders in DVO actions) indicating that insufficient proof had been provided. The Court held that while specific written findings of insufficient evidence may not be necessary, there must at least be a written finding stating that the evidence was insufficient. Therefore, the case was remanded for entry of a written finding to support the denial of the petition.

VI. ESTATES

A. ***Boone v. Hoskins***

2018-CA-000850 03/06/2020 2020 WL 1070967

Opinion by Judge Maze; Chief Judge Clayton and Judge Lambert concurred.

Appellant Boone challenged a summary judgment upholding the validity of her mother's will and codicil against Boone's claims of incapacity and undue influence. In 2012, the 81-year-old testatrix asked an attorney who was her neighbor to assist her in drafting a new will to replace her 1981 will, which had divided her estate equally among her four children. The new will, which she executed at the attorney's office, differed from the earlier will in that: substantial personalty was to be distributed in accordance with a handwritten memorandum; her residence was to be bequeathed to two of her granddaughters; appellee Alyce Hoskins was to be appointed executrix; and it included a no-contest clause. Approximately a year later, the testatrix executed a codicil which replaced the clause concerning the handwritten memorandum by incorporating a list of specific bequests. Although Boone was omitted from the recipients of the specific bequests, she remained a residual beneficiary under the will. After the testatrix's death, Boone challenged the validity of the will, arguing that her mother lacked testamentary capacity and that the will and codicil were the product of Alyce's undue influence over their mother. Citing the strong presumption that the testatrix possessed testamentary capacity at the times she executed the will and codicil, the circuit court summarily dismissed Boone's complaint, concluding that she had failed to satisfy her burden of proving her claims of incapacity and/or undue influence at those times. The Court of Appeals affirmed, reiterating the strong presumption that a testator possesses the minimal degree of mental capacity requisite to make a will, which can be rebutted only by the strongest showing of incapacity. The Court also emphasized that only incapacity at the time of execution of the will is relevant. Holding that Boone had failed to offer evidence of any of the required "badges" of undue influence required to defeat the summary judgment motion, the Court concluded that there was no evidence that the will and codicil were unnatural in their provisions; that Boone was not entirely cut out of her mother's estate - she simply did not receive the personalty which she believed her mother had previously promised her; and that it was perfectly normal for a person to change his or her mind concerning the distribution of an estate. Finally, the Court held that it could not be seriously argued that Boone's litigation concerning the will and codicil did not violate the *in terrorem* clauses in those instruments.

VII. TERMINATION OF PARENTAL RIGHTS

A. ***P.S. v. Cabinet for Health and Family Services***

2019-CA-000627 02/14/2020 2020 WL 748179

Opinion by Chief Judge Clayton; Judges K. Thompson and L. Thompson concurred.

After receiving a referral that appellant's baby ("Child") tested positive at birth for a substance used to treat opioid dependency, the Cabinet for Health and Family Services filed a petition for emergency custody of Child. While the circuit court issued a summons to appellant in the underlying juvenile case, the sheriff's office was unable to locate appellant and the summons ultimately expired. During the pendency of the juvenile case, appellant never appeared at any hearings related to the child, although her attorney was present. Moreover, appellant never completed the items contained in her case plan and failed to consistently attend Cabinet-supervised visitation with Child. Additionally, from birth, Child had been placed in a foster family that was meeting all of Child's needs. The Cabinet ultimately filed a petition for termination of parental rights, with which appellant was served. Appellant was not physically present at the termination hearing, as she feared being arrested on an active bench warrant. While the circuit court denied appellant's request for a continuance of the termination hearing, appellant was provided the opportunity to testify via telephone and to otherwise participate fully in the proceedings. The circuit court ultimately terminated appellant's parental rights to Child. On appeal, appellant argued that: (1) she was not properly served in the underlying juvenile case; (2) due process required that the circuit court grant her motion to continue the termination hearing; (3) the Cabinet did not provide "reasonable efforts" to reunite appellant and Child under KRS 620.020(13); (4) a reasonable expectation of improvement in appellant's care of Child existed under KRS 625.090(2)(e) and (g); and (5) because Child could be placed with other available family members, the termination of appellant's parental rights was unnecessary. The Court of Appeals affirmed. First, the Court concluded that, while appellant may not have been properly served in the underlying juvenile action, she was correctly served in the termination action. Moreover, the allegations of abuse and neglect were fully litigated at the termination hearing, the circuit court's order was based on facts and conclusions drawn from the evidence at the termination hearing, and appellant was represented by counsel at every hearing in the underlying juvenile case, as well as at the termination hearing. Second, the Court held that the circuit court's decision not to continue the termination hearing and to have appellant testify telephonically did not infringe on appellant's due process rights, as appellant had a meaningful opportunity to participate in the proceedings, to confer with counsel, and to confront the evidence against her. Third, the Court held that the Cabinet had

provided appellant with numerous services, which constituted "reasonable efforts" under Kentucky law, and the Cabinet was not required to assist appellant in resolving her arrest warrant. Finally, the Court held that, while the Cabinet is required to consider any known and qualified relatives for placement, they are not mandated by statute to choose a relative for placement over other options in contravention of a child's best interests.

VIII. WORKERS' COMPENSATION

A. ***JSE, Inc. v. Ahart***

2018-CA-000069 03/13/2020 2020 WL 1223412

Opinion by Judge K. Thompson; Judges Acree and Jones concurred.

JSE, Inc. d/b/a Perma Staff II (Perma Staff) and its insurer, Kentucky Employers' Mutual Insurance (KEMI), filed petitions for review from an opinion and order of the Workers' Compensation Board affirming an order of the Administrative Law Judge (ALJ). The ALJ found that Patricia Ahart was an employee of Perma Staff and Whaler's Catch Restaurants of Paducah, LTD (Whaler's) at the time she sustained a work-related injury; KEMI was the at-risk insurer at the time of Ahart's injury; and Ahart's claim against Perma Staff was not barred by the statute of limitations. The Court of Appeals affirmed, holding that the provisions of the contract between Perma Staff, an employee leasing company under KRS 342.615(1), and Whaler's expressly provided that employees assigned to Whaler's were employees of Perma Staff. The Court noted that the contract authorized any Whaler's on-site supervisor to hire individuals without further authorization from any Perma Staff owner or officer. The Court also held that KEMI was the at-risk insurer on the date of Ahart's injury. The policy issued to Perma Staff listed Whaler's in an endorsement as one of the covered workplaces. Finally, the Court held that the claim against Perma Staff was not barred by the statute of limitations. Ahart timely filed her Form 101, and under 803 KAR 25:010, Perma Staff could be joined as a party after the expiration of the statute of limitations.