

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**SEPTEMBER 1, 2017 to SEPTEMBER 30, 2017**

**I. ADOPTION**

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

[2016-CA-001924](#) 09/22/2017 2017 WL 4183240

Opinion by Judge Maze; Judges Acree and Nickell concurred.

A step-mother filed a petition seeking the voluntary termination of the biological mother's parental rights and the step-mother's adoption of two children. The circuit court denied the mother's motion to appoint counsel, concluding that the provisions for appointment of counsel only apply to proceedings under KRS Chapter 625 and not to step-parent adoption under KRS Chapter 199, and granted the petition. The Court of Appeals vacated and remanded, holding that the circuit court had the authority to appoint counsel for the mother. The Court noted that an adoption without the consent of a living biological parent is a proceeding to involuntarily terminate that parent's parental rights. Indeed, KRS 199.500(4) refers to the provisions of KRS 625.090 for an involuntary termination of parental rights. Consequently, the Court concluded that the provisions of KRS Chapter 625 apply to step-parent adoption proceedings under KRS Chapter 199. The Court further noted that KRS 625.080(3) specifically grants parents the right to legal representation in involuntary termination actions. In addition, KRS 625.0405 authorizes the appointment of counsel to represent an indigent parent in a voluntary termination action for purposes of adoption. Given this authority, the Court set aside the termination and adoption orders, and directed the circuit court to appoint counsel for the mother.

## II. APPEALS

### A. *Nunley v. Neuling*

[2015-CA-001707](#) 09/01/2017 2017 WL 3811144

Opinion and order dismissing by Judge Taylor; Judges Acree and Dixon concurred.

The Court of Appeals dismissed this appeal as being untimely filed pursuant to CR 73.02. The action originated in 2012 as a petition for grandparent visitation. The Court held that a November 17, 2014, agreed order adjudicated the grandparent visitation issue in its entirety and, thus, was final and appealable pursuant to CR 54.01 upon entry. No appeal was taken from that order. Instead, appellants relied upon CR 54.02 in asserting that their latter - ultimately untimely - appeal was appropriate. Because the November 2014 order resolved the visitation issue, however, the Court held that CR 54.02 did not apply in this situation.

### III. ARBITRATION

#### A. *Genesis Healthcare, LLC v. Stevens*

[2015-CA-000166](#) 09/22/2017 2017 WL 4182977

Opinion by Judge Maze; Chief Judge Kramer and Judge Stumbo concurred.

Genesis Healthcare, LLC and affiliated entities (Genesis) appealed from an order denying its motion to compel arbitration of personal injury claims brought by Mable Stevens, as executrix of the estate of Reba Kathryn Price. Genesis argued that the circuit court erred in finding the arbitration agreement to be unenforceable due to the unavailability of the designated arbitrator. The Court of Appeals held that the circuit court erred by addressing this issue without first considering whether Stevens had the authority to execute the arbitration agreement on Price's behalf. The Court further concluded that the power-of-attorney (POA) at issue did not authorize Stevens to execute an arbitration agreement. Citing to *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), the Court held that the POA only authorized Stevens to act on Price's behalf in matters involving financial and healthcare decisions. Thus, since there was no valid arbitration agreement, the circuit court properly denied Genesis's motion to compel arbitration. Therefore, the Court affirmed the circuit court's order and remanded for additional proceedings on the merits of the case.

**B. Preferred Care Partners Management Group, L.P. v. Alexander**

[2015-CA-000563](#) 09/22/2017 2017 WL 4182973

Opinion by Judge Taylor; Chief Judge Kramer and Judge Thompson concurred.

Appellants challenged an order denying in part their motion to compel arbitration in a wrongful death action. At issue was whether a wrongful death claim could be litigated by the estate of a nursing home resident and his beneficiaries against the nursing home where the decedent entered into a valid arbitration agreement during his residency. The Court of Appeals affirmed, holding that the U.S. Supreme Court's decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) did not overturn the precedent set forth in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) and *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) with respect to the derivative claims asserted by wrongful death beneficiaries under KRS 411.130. The Court further held that *Ping* was not preempted by the Federal Arbitration Act.

**C. WellCare Health Insurance Co. of Kentucky, Inc. v. Trigg County Hospital, Inc.**

[2016-CA-001954](#) 09/29/2017 2017 WL 4320641

Opinion by Judge J. Lambert; Judge Jones concurred; Judge Stumbo dissented.

WellCare challenged an order denying its motion to dismiss in relation to the enforcement of an arbitration agreement. The Court of Appeals reversed and remanded, holding that WellCare did not waive its right to invoke or enforce the arbitration provisions in its Participating Provider Agreement with Trigg County Hospital, Inc. by its litigation conduct. The Court noted that WellCare had repeatedly sought to exercise its arbitration rights in both an earlier federal action involving the parties and in the present action. That it also sought dispositive rulings in its motions to dismiss in both actions did not mean that it waived its right to seek arbitration.

#### IV. CIVIL PROCEDURE

##### A. *Nebraska Alliance Realty Company v. Brewer*

[2017-CA-000062](#) 09/15/2017 2017 WL 4078980

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

Nebraska Realty Company (NARC) filed an interlocutory appeal from an order granting a class action certification. NARC argued that the circuit court erred when it failed to make all of the required findings pursuant to CR 23. The Court of Appeals agreed, and it vacated and remanded for the circuit court to make the requisite findings. Appellees, who had their delinquent tax bills purchased by NARC, claimed that NARC overcharged for pre-litigation attorneys' fees during collection efforts and charged interest not permitted by statute. The Court first noted that pursuant to CR 23.01, a party seeking class certification has the burden of proving four prerequisites: numerosity, commonality, typicality, and adequacy. There was no dispute regarding numerosity, and the circuit court made findings regarding commonality and typicality. However, the circuit court did not make factual findings regarding adequacy, did not appoint class counsel, and did not define the class defenses as required by CR 23.03. The Court noted that, on remand, any findings about adequacy would have to address the competency of class counsel and conflicts of interests. NARC also argued that the circuit court erred when it determined that the certified class was ascertainable for purposes of CR 23. The Court noted that there is nothing within CR 23 that requires this finding, but other courts have determined that ascertainability is implicit in Rule 23. No Kentucky authority was found on this point. The Court held that if, on remand, the circuit court determined that ascertainability was implicit in the CR 23 analysis, it must then determine whether ascertainability should be "weak" or "heightened." The Court of Appeals further noted that the future of the use of ascertainability in the federal system seemed to be questionable.

**B. United Propane Gas, Inc. v. Purcell**

[2016-CA-001037](#) 09/15/2017 2017 WL 4078994

Opinion by Judge Jones; Judges Acree and D. Lambert concurred.

United Propane Gas, Inc. brought an interlocutory appeal challenging an order that certified a class action. United Propane asserted that the circuit court's class certification was deficient under CR 23.01, CR 23.02, and CR 23.03. The Court of Appeals agreed, holding that the circuit court had failed to make the requisite findings to certify a class and that the order certifying the class was non-compliant with CR 23.03. The Court's opinion set forth a detailed review of the analysis a circuit court must undertake when determining whether class certification is appropriate. Concluding that the circuit court's order certifying the class lacked the requisite "rigorous analysis" required for certifying a class, the Court vacated and remanded to the circuit court with instructions that, should the circuit court determine that class certification was appropriate, it should enter an order in which it conducts the proper analysis under CR 23.01 and CR 23.02 and complies with CR 23.03.

## V. CONTRACTS

### A. Callihan v. Callihan

[2016-CA-000830](#) 09/15/2017 2017 WL 4078999

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

This matter involved a post-divorce motion regarding the responsibility for a debt divided during the divorce and a request for attorneys' fees. Appellant, co-owner of a HVAC company, obtained a revolving loan from PNC Bank in 2002. The note was signed by appellant and his business partner as principals, but appellee and the other partner's wife signed the loan as guarantors. Upon default, appellant filed bankruptcy, and the business partner and his wife settled with the bank to resolve their liability on the debt. PNC Bank then sued appellee to collect the remainder of the money owed on the loan. Under the parties' settlement agreement, appellant agreed to "hold harmless and indemnify [appellee] for any debts or obligations concerning his business." Appellee tendered proof that the statement of assets, liabilities, and equity filed by appellant in the divorce listed the PNC debt as a liability of his HVAC company. In response, appellant argued that he had no further liability for the debt because he had discharged his responsibility in his bankruptcy and that appellee had agreed in the parties' settlement agreement to be responsible for any debt for which she was personally liable. The circuit court ruled in appellee's favor and sustained her request for \$1,500.00 in attorneys' fees for having to litigate the matter. On appeal, appellant argued that the PNC Bank debt should fall on appellee's shoulders because of her personal guarantee on the note and her agreement in the parties' settlement agreement to be responsible for debts that were in her individual name. The Court of Appeals disagreed and affirmed, holding that the circuit court's findings were supported by substantial evidence. The Court further noted that appellant contested the award of attorneys' fees in his prehearing statement but then never broached the topic in his appellant's brief. Thus, the Court declined to consider this issue pursuant to *Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979) and CR 76.12(8)(b).

## VI. CRIMINAL LAW

### A. *Commonwealth v. Tackett*

[2016-CA-001022](#) 09/01/2017 2017 WL 3798488 DR Pending

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Acree dissented and filed a separate opinion.

The Commonwealth challenged an order granting appellee post-conviction relief pursuant to RCr 11.42. Appellee was convicted of murder, but he claimed that both his trial attorney and his appellate attorney were ineffective because he did not receive a jury instruction on the lesser-included offense of second-degree manslaughter. Relying on *Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000), appellee argued that a criminal defendant who raises voluntary intoxication as a defense to intentional murder - and receives a jury instruction for that defense - is also entitled to an instruction on second-degree manslaughter. By a 2-1 vote, the Court of Appeals agreed and affirmed, holding that under *Fields* it was prejudicial error for the trial court to give the jury a voluntary intoxication instruction as a defense to intentional murder and not give an instruction on the lesser-included offense of second-degree manslaughter.

### B. *Culver v. Commonwealth*

[2015-CA-001206](#) 09/22/2017 2017 WL 4183243

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

Appellant was convicted of second-degree wanton endangerment, theft by unlawful taking, fleeing and evading police in the first degree, and being a persistent felony offender. The Court of Appeals affirmed in part, vacated in part, and remanded, holding that appellant's convictions for wanton endangerment and fleeing or evading police violated double jeopardy. Citing to *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009), the Court noted that second-degree wanton endangerment requires proof of no fact beyond first-degree fleeing or evading police. Therefore, appellant's conviction for the lesser offense of wanton endangerment had to be vacated.

C. **Jackson v. Commonwealth**

[2016-CA-001429](#) 09/22/2017 2017 WL 4183241

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

Appellant challenged his conviction of driving on a DUI-suspended license pursuant to KRS 189A.090(2). Appellant argued in his motion to dismiss and on appeal that because he was driving on private property belonging to his mother at the time of the accident leading to the charges, he could not be convicted under that statute. He specifically asserted that because he was not driving on a public highway, he was not required to have a valid license to operate a motor vehicle on private property, citing KRS 186.620(2). The Court of Appeals affirmed, holding that based upon the unambiguous language the General Assembly used in KRS 189A.090, it did not choose to narrow the application of the statute to offenses on public highways, but intended it to apply to both public highways and private property.

D. **Jones v. Commonwealth**

[2016-CA-000671](#) 09/08/2017 2017 WL 3927056 DR Pending

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

Appellant challenged an order voiding his pretrial diversion. The Court of Appeals reversed and remanded for a new pretrial diversion revocation hearing because the circuit court committed palpable error in denying appellant his due process rights during the hearing. The Court held that the circuit court did not give appellant the opportunity to present witnesses and documentary evidence on his own behalf or to cross-examine adverse witnesses at the revocation hearing. Consequently, the hearing did not comport with the minimal due process requirements discussed in *Commonwealth v. Goff*, 472 S.W.3d 181 (Ky. App. 2015). The Court further held that the circuit court's error in failing to conduct appellant's revocation hearing in a manner complying with the minimal requirements of due process was palpable and merited reversal.

E. *Kamphaus v. Commonwealth*

[2015-CA-001489](#) 09/08/2017 2017 WL 3927200

Opinion by Judge Thompson; Judges Acree and Jones concurred.

The Court of Appeals affirmed appellant's conviction of using electronic communications for the purpose of procuring or promoting a minor to engage in sexual activities in violation of KRS 510.155. In affirming, the Court first determined that police erred by searching the data on appellant's cell phone incident to arrest because *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), prohibited such an action and applied retroactively to all cases pending on direct review. Additionally, the good faith exception did not apply here because previous United States Supreme Court and Kentucky Supreme Court precedent did not support searching cell phone data incident to arrest. The Court next noted that while a warrant was obtained for appellant's cell phone data, the warrant affidavit included tainted evidence from the prior search of the cell phone data incident to arrest. Despite this, the Court held that the exclusionary rule did not require suppression of the cell phone data obtained pursuant to the search warrant because there was sufficient evidence to establish probable cause for the warrant without relying on the tainted evidence. The Court next held that the circuit court erred in using the language "other prohibited activity" in its jury instructions because this language was only used in the heading to KRS 510.155. However, this unpreserved error was not palpable because the instruction as a whole fairly and properly expressed the law applicable to the case, where "other prohibited activity" was defined as "an activity in violation of KRS 510.110[,]" which tracked the statutory language. The Court further held: (1) that the circuit court did not err in failing to define the terms "procuring" and "promoting" in the jury instructions, as these terms had ordinary meanings; (2) that appellant's speech for purposes of arranging to meet a minor for oral sex was not protected free speech; and (3) that the circuit court properly denied appellant's motion for a directed verdict because it was within the jury's purview to resolve the factual dispute of how old the victim was when appellant arranged to meet her.

F. *McCargo v. Commonwealth*

[2015-CA-001837](#) 09/08/2017 2017 WL 3927058

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

Appellant was convicted of first-degree assault and other offenses after he seriously injured a pedestrian while attempting to parallel park under the influence of alcohol. On appeal, he argued that he was entitled to a directed verdict on the assault charge because there was insufficient evidence to support a finding that he acted under circumstances manifesting extreme indifference to the value of human life, as required under KRS 508.010(1)(b). The Court of Appeals affirmed, holding that even though appellant was not speeding when his automobile struck the pedestrian, the evidence indicated that appellant was intoxicated, had taken the wheel from a designated driver, and was attempting to parallel park his automobile on a busy street crowded with pedestrians and patrons sitting at a sidewalk table. Under this set of facts, the trial court did not abuse its discretion in instructing the jury on first-degree assault, nor did it err in denying the motion for a directed verdict on that charge.

G. *Sheets v. Commonwealth*

[2016-CA-001518](#) 09/15/2017 2017 WL 4079067

Opinion by Judge J. Lambert; Judges Maze and Nickell concurred.

Appellant was found guilty of possession of a firearm by a convicted felon pursuant to KRS 527.040 and 500.080(14). On appeal, appellant argued that the circuit court's jury instructions should not have included an instruction for constructive possession of the handgun because the firearm was found in a closet and appellant insisted that he did not know it was there. The Court of Appeals affirmed, holding that it was not improper for the circuit court to instruct the jury that guilt of possession could be found if the Commonwealth proved that appellant was aware of the gun's presence in his home. The loaded gun was found in a closet that contained numerous other items belonging to appellant, and he admitted that the gun was owned by him.

H. *Simms v. Commonwealth*

[2015-CA-001737](#) 09/15/2017 2017 WL 4078843

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

Appellant was convicted of first-degree sexual abuse. On appeal, he argued that the circuit court erred in not suppressing statements made to the police during an interview at a police station without a *Miranda* warning. The Court of Appeals affirmed, holding that appellant was not in custody during the interview and that the alleged use of improper interrogation techniques was irrelevant because appellant was not in custody. In affirming, the Court determined that the interview was not converted into a custodial interrogation merely because appellant was a suspect in a rape investigation or because the questioning was initiated by police. While the location of the interview raised a presumption of custodial interrogation, the detectives told appellant that he was not under arrest and was free to leave at any time. Moreover, appellant consented to questioning and was able to leave the interrogation room and to answer questions outside while smoking in his vehicle. The record also reflected that the detectives were calm and non-threatening. The Court further explained that the detectives' alleged use of improper interrogation techniques, including the "question first" and "Reid" techniques, did not warrant suppression of appellant's statements because he was not in custody during the interview, and the use of those techniques only raised constitutional concerns with respect to custodial interrogations.

I. *Sturgill v. Commonwealth*

[2015-CA-000191](#) 09/15/2017 2017 WL 4079006

Opinion by Judge Jones; Judges Acree and Dixon concurred.

Appellant brought consolidated appeals challenging the denial of his motion to withdraw pleas of guilty on multiple charges under two separate indictments. The Court of Appeals vacated the judgment and remanded to the circuit court. On appeal, appellant argued that his defense counsel was conflicted because the motion to withdraw his pleas pitted defense counsel's interest against appellant's interest. Additionally, appellant argued that the record demonstrated that the conflict manifested itself inasmuch as counsel failed to offer any argument or support to encourage the circuit court to rule in appellant's favor and to allow him to withdraw his guilty pleas. Following a review of the record, the Court of Appeals concluded that appellant was denied effective representation at the withdrawal hearing. The Court noted that it was clear that appellant's counsel adamantly opposed appellant's desire to withdraw the pleas that counsel had negotiated with the Commonwealth, as counsel even went so far as to argue against granting appellant's motion. While appellant had failed to properly preserve his asserted error for appeal, the Court held that the error was palpable as it created a manifest injustice. Thus, the Court concluded that the appropriate remedy was to vacate the judgment, but not the guilty pleas, and to allow appellant to again seek withdrawal of his guilty pleas on remand with proper assistance of counsel.

## VII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

### A. Halloway v. Simmons

[2017-CA-000019](#) 09/29/2017 2017 WL 4320348

Opinion by Judge Maze; Judges Stumbo and Taylor concurred.

This appeal arose from an interpersonal protective order (IPO) entered against appellant for stalking appellee. Appellee alleged that following their breakup, appellant went into two restaurants in which she knew appellee was present (due to his easily identifiable limo being parked in front of the restaurants). Appellant sought and was granted a domestic violence order (DVO) because of an incident that occurred at the first restaurant. Appellee subsequently sought and was granted the IPO after expressing concern that appellant would intentionally come to a location he was at to cause him to violate the DVO. The Court of Appeals reversed the circuit court's issuance of the IPO. The Court explained that for an individual to be granted an IPO for stalking, he or she must, at a minimum, prove by a preponderance of the evidence that the alleged stalker intentionally engaged in two or more acts directed at the victim that seriously alarmed, annoyed, intimidated, or harassed the victim, that served no legitimate purpose, and that would have caused a reasonable person to suffer substantial mental distress. The individual must further establish that these acts may occur again. KRS 508.130 & KRS 456.060. Additionally, the individual must prove that there was an implicit or explicit threat by the perpetrator that put the victim in reasonable fear of sexual contact, physical injury, or death. KRS 508.150. The Court determined that the facts in this case did not meet the elements of stalking and that fear of being charged with violating a DVO is not "fear of sexual contact, physical injury, or death" as required by the stalking statute.

## VIII. EMINENT DOMAIN

### A. *Moore v. Lexington-Fayette Urban County Government*

[2016-CA-000187](#) 09/15/2017 2017 WL 4078842

Opinion by Judge Dixon; Judges Combs and Nickell concurred.

The Court of Appeals reversed an interlocutory judgment ruling that the Lexington-Fayette Urban County Government (LFUCG) had the right to condemn a portion of appellant's property, thereby creating a permanent easement for the construction of a large box culvert and drainage system. The Court noted that while it is undisputed that the LFUCG has the authority to condemn property through the Commonwealth's sovereign power of eminent domain, such power is carefully circumscribed by the constitutional restrictions that the taking be for "public use" and the condemnee receive "just compensation." A court may block a taking where the property interest sought to be taken is so disproportionate to the purported need and proposed use as to be arbitrary. Relying on the rationale set forth in *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109 (Ky. 2010), the Court concluded that the LFUCG's proposed easement was neither in proportion to the 95% utility it would take from the property nor consistent with the "pass through" function of an easement. The LFUCG sought to burden appellant's property with a box culvert, apron, and rock drainage system. Further, the property would not be used as merely a pass through to allow the LFUCG to provide maintenance because the structures would be erected on the property and would be owned by the LFUCG. The Court determined that the planned use of the subject property, and the resulting divestment of appellant's ability to control such, was much greater than that associated with an easement. Accordingly, to take less than a fee simple interest in the property was arbitrary and in excess of the LFUCG's authority under the Eminent Domain Act.

## IX. FAMILY LAW

### A. *Giese v. Giese (Hamilton)*

[2015-CA-001629](#) 09/01/2017 2017 WL 3811146

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

Appellant challenged an order denying his motion to modify support and maintenance obligations established in 2006 in dissolution proceedings initiated in a Tennessee court. The Court of Appeals reversed and remanded, holding that the circuit court was barred from ruling on the merits of appellant's motion to modify spousal maintenance under Kentucky and Tennessee statutory law. Citing to KRS 407.5211(1) & (2) and Tenn. Code Ann. § 36-5-2211(a) & (b), the Court concluded that because the parties' divorce occurred in a Tennessee court, which applied Tennessee law, appellant's attempt to modify the Tennessee court's order must occur in a Tennessee court. Kentucky courts have no authority or subject-matter jurisdiction to modify a Tennessee court's spousal maintenance order. The Court further held that the circuit court retained the authority and duty to enforce the Tennessee court's spousal maintenance order.

**B. Lewis v. Fulkerson**

[2015-CA-001293](#) 09/29/2017 2017 WL 4320666

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

This appeal and cross-appeal was taken from a family court's judgment regarding property division and child support in the parties' dissolution action. On appeal, Wife argued that the family court erred by determining that the proceeds from the sale of Husband's business were his non-marital property because the business appreciated during the marriage due, in part, to her contributions. Husband argued that the family court erred by awarding Wife the property in a certain trust as a gift from him primarily because the family court denied him the opportunity to elicit testimony from the parties' estate planning attorney on attorney-client privilege grounds. Wife further argued that the family court erred in not awarding her child support in light of Husband's superior income. The Court of Appeals affirmed in part, vacated in part, and remanded the case for further proceedings. Regarding the dispute over the business proceeds, the Court held that Wife's contributions to the business were minimal, at best, and because Husband started the business long before the parties were married, the proceeds (and any appreciation in value) were his non-marital property. Regarding the gift determination, the Court held that the family court erred by not allowing the testimony of the parties' estate planning attorney. First, KRE 503(d)(5), the joint-client exception to the attorney-client privilege, applied to the facts of this case and the family court abused its discretion in not allowing the attorney's testimony. Further, even if the joint-client exception did not apply, Husband only asked for the attorney's testimony regarding his trust, which was created years before the trust at issue in this case. Therefore, the family court committed reversible error. Lastly, because the family court based its decision to not award child support due, in part, to Wife receiving a large sum of money via the gift determination, the Court determined this issue would have to be revisited upon remand.

C. *Miranda v. Miranda*

[2015-CA-001483](#) 09/29/2017 2017 WL 4320659

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

Two appeals were brought from orders denying Wife's motion to force the sale of the parties' marital residence and denying Wife's motion for a hearing on visitation with the parties' children. The Court of Appeals affirmed in the first appeal, holding that the circuit court properly denied Wife's motion to compel the sale of the marital residence. The parties' settlement agreement spoke to the issue and provided for Husband to refinance the house and then pay Wife her share of the proceeds. The Court noted that Husband demonstrated that Wife was partially responsible for the delay in refinancing; moreover, Wife accepted the payment and should not now complain about the extension of time granted Husband. As to the second appeal, the Court vacated and remanded the circuit court's order denying the motion for a hearing on visitation with the parties' children. Although the parties had agreed to abide by the appointed psychologist's recommendations, Wife was entitled to a hearing on the issue of whether visitation with her would be in the best interests of the children. KRS 403.320(3); *Humphrey v. Humphrey*, 326 S.W.3d 460 (Ky. App. 2010).

**D. R.S. v. Cabinet for Health and Family Services**

[2016-CA-001763](#) 09/29/2017 2017 WL 4320648

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

As an adult, in two separate counties in 2007, R.S. pled guilty to third-degree sodomy and first-degree sexual abuse. His younger half-brother, first at age 12 and again at age 15, was the victim of both sex acts. R.S. was probated on both convictions, placed on the sex offender registry for life, and permitted only supervised contact with minors. He pled guilty to one probation violation; completed the first of three phases of the sex offender treatment program (SOTP); and was finally discharged from SOTP when his probation formally ended in 2011. R.S. subsequently married and became the biological father of two young sons. The Cabinet filed DNA petitions on behalf of both boys alleging that they were neglected by their parents solely because R.S., a convicted sex offender required to register for life, lived in the home. The Cabinet requested that all contact between R.S. and his sons be supervised. No proof was ever introduced in the case; instead the evidence was based entirely on 25 joint stipulations, most of which recounted past acts - many for which R.S. had already been punished. The circuit court granted the Cabinet's request upon determining that while R.S. was categorized as a "low risk" sex offender, this meant that there was still "some risk" of re-offending. Therefore, the Court allowed only supervised visitation. In a case of first impression, the Court of Appeals reversed and remanded because the Cabinet did not prove its case by a preponderance of evidence. There was no showing that harm, or risk thereof, would befall the children (who were both less than five years of age), particularly where nothing had happened to them even during the 18 months the family had been under Cabinet scrutiny. The Court noted that the DNA petitions were flawed from the start and required more for a finding of neglect than a parent being a convicted sex offender required to register for life.

## X. IMMUNITY

### A. *University of Kentucky v. Davis*

[2015-CA-001493](#) 09/15/2017 2017 WL 4079000 Rehearing Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred.

In separate cases, the Franklin Circuit Court denied the University of Kentucky's motions to dismiss actions filed by former employees after they were denied long-term disability (LTD) benefits. UK contended that any claim by the employees for declaratory and injunctive relief was precluded by governmental immunity. The circuit court denied the request for immunity, and the Court of Appeals affirmed, holding that at this point in the litigation when no discovery had taken place, dismissal based on immunity was not appropriate. Although the Supreme Court of Kentucky held in *Furtula v. University of Kentucky*, 438 S.W.3d 303 (Ky. 2014), that the LTD program did not create a contract between UK and its employees, the Court of Appeals held that the former employees had a property interest in the program as beneficiaries of the LTD trust. Therefore, whatever immunity UK has as a state agency did not preclude a declaratory judgment action based on allegations that UK violated Section 2 of the Kentucky Constitution when it denied benefits. The Court further held that whether the former employees could seek relief compelling UK to direct the trustee to grant benefits under the LTD program depended on whether the funds to pay the benefits were public or private. Because no discovery had occurred and the circuit court did not make findings on the issue, the issue was prematurely presented.

## XI. JUVENILES

### A. *J.S. v. Commonwealth*

[2016-CA-001598](#) 09/15/2017 2017 WL 4078992

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

Appellant entered a conditional guilty plea to the status offense of being beyond the control of school while under the age of 18. On appeal, he argued that the circuit court improperly exercised subject matter jurisdiction in his case due to a failure of the court designated worker (CDW) to follow pre-trial procedure for status offenses. The Court of Appeals agreed and vacated the order finding appellant to be a status offender. The Court noted that the purpose of the statutes allowing CDWs to enter into diversion agreements with juveniles charged with eligible status offenses, authorizing CDWs to impose graduated sanctions in response to a violation of the terms of such agreements, and mandating referral of juveniles to the Family Accountability, Intervention, and Response (FAIR) Team in the event of a failure to complete a diversion agreement is to create two layers of assistance before bringing the weight of the criminal justice system to bear on children for status offenses. The Court held that the CDW here was not required to impose graduated sanctions before terminating appellant's diversion. However, the CDW failed to carry out a mandatory duty to refer the matter to the FAIR Team prior to referring the case to the county attorney for prosecution. This failure deprived appellant of the benefit of any services available to assist him and the circuit court of subject matter jurisdiction.

## XII. NEGLIGENCE

### A. *Breedlove v. Smith Custom Homes, Inc.*

[2016-CA-000173](#) 09/22/2017 2017 WL 4182960

Opinion by Judge J. Lambert; Judge Jones concurred; Judge Maze concurred in result only.

Appellant challenged a summary judgment dismissing her claim for personal injury arising from her fall from the front porch of her residence. Appellant alleged that the owners of the home were negligent in maintaining the home, which caused the front entrance to be in an unsafe condition, and alleged that the builder was negligent in designing and/or constructing the home. Appellant also alleged negligence *per se* based upon an alleged building code violation in constructing the porch. The Court of Appeals affirmed the dismissal of the complaint. First, the five-year statute of limitations set forth in KRS 413.120(13) barred the action as the house was built in 2002 (when the cause of action was deemed to have accrued pursuant to the statute) and the injury happened in 2014. The Court rejected appellant's argument that *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) extended the limitation period because the defect was latent, not non-latent as in *Saylor*, and declined to address the constitutionality of the statute because appellant failed to notify the Attorney General. The Court further held that appellant's negligence *per se* claim for a building code violation was also barred by the statute of limitations as set forth in KRS 198B.130(2). Finally, the Court determined that appellant's claims against the homeowners were properly dismissed because they did not breach their duty of care to her.