

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2023 to SEPTEMBER 30, 2023**

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. ADMINISTRATIVE LAW

A. EDWARD WILSON v. KENTUCKY RETIREMENT SYSTEMS, ET AL.

[2022-CA-0808-MR](#)

9/01/2023

2023 WL 5657913

Opinion by TAYLOR, JEFF S.; COMBS, J. (CONCURS) AND McNEILL, J. (CONCURS)

Appellant challenged an order of the Franklin Circuit Court upholding the denial of his application for disability retirement benefits by the Board of Directors (the Board) of Kentucky Retirement Systems (KYRS). Appellant was formerly employed as an attorney for the Cabinet for Health and Family Services (CHFS) who terminated him. Before his termination, Appellant was on unpaid leave between April 19, 2012 to May 15, 2012. The termination was appealed to the Kentucky Personnel Board, but a settlement agreement was ultimately reached between Appellant and CHFS in September 2013 stipulating that Appellant agreed to voluntarily retire effective May 16, 2012. However, the settlement agreement did not identify Appellant's last day of paid employment. On May 16, 2014, Appellant applied for retirement benefits with KYRS indicating his last day of paid employment was on May 16, 2012. KYRS rejected the application on the basis Appellant's last day of paid employment was on April 19, 2012, and Appellant failed to file within two years of the last day of paid employment per Kentucky Revised Statute (KRS) 61.600(1)(c). Appellant requested and received an administrative hearing with the Board, which was held on April 29, 2016. Appellant's attorney, John Gray, represented him at the hearing and was also listed as a witness who would testify regarding the discussion surrounding Appellant's settlement agreement with CHFS. Gray was precluded from testifying due to the "complications and opportunities for prejudice" with him acting as both a witness and legal counsel.

On appeal, Appellant argued KYRS erroneously disallowed Gray from testifying at the administrative hearing, which resulted in the hearing officer relying on "misinformation regarding [Appellant's] last date of paid employment." The Court of Appeals affirmed the circuit court's order upholding the denial. At the outset, the Court noted that the video record of the administrative hearing was incomplete, and thus, the relevant omitted records were assumed to support the appealed decision. *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985). Citing Kentucky Supreme Court Rule 3.130(3.7), the Court held it was proper to preclude Gray's testimony and that none of the recognized exceptions applied to allow him to serve as legal counsel and testify as a witness. The Court stated that administrative proceedings before the KYRS were pending for two years before the administrative hearing, and Appellant had an opportunity to retain a substitute counsel which would have allowed Gray to testify. Additionally, Appellant was able to testify at the hearing regarding his understanding of the settlement agreement. Lastly, the record demonstrated Appellant's last day of

paid employment was on April 19, 2012, and the settlement agreement only designated a retirement date of May 16, 2012. In accordance with KRS 61.510(32), Appellant's last date of paid employment was held to be the proper date for KYRS to calculate the two-year filing limitation under KRS 61.600(1)(c) to apply for disability retirement.

II. DOMESTIC VIOLENCE

A. JOSEPH ALLEN HAMILTON, SR. v. MICHAELNE BRITNEY MILBRY

[2023-CA-0307-ME](#)

9/22/2023

2023 WL 6165482

Opinion by CETRULO, SUSANNE M.; COMBS (CONCURS) AND THOMPSON, C.J. (CONCURS)

This is an appeal from a Domestic Violence Order (“DVO”) granted against Appellant for one year. The petition filed by Appellee sought protection for herself and the parties’ minor child. The Scott County Family Court conducted a hearing and made specific findings that domestic violence had occurred and may occur again. The family court restrained Appellant from going within a specified distance of Appellee’s residence and the minor child’s school and also restricted his visitation with the child. The Court of Appeals found that the family court fully complied with the statute and case precedent in regard to the entry of the DVO protecting the Appellee and that there was sufficient evidence to support the findings. However, in the recent opinion of *Smith v. Doe*, 627 S.W.3d 903 (Ky. 2021), the Kentucky Supreme Court ordered that an unrepresented minor who is a party must have a guardian *ad litem* appointed in an interpersonal protection order (IPO) proceeding. The Court held that the record did not indicate that such an appointment occurred, and that IPO and DVO proceedings have been recognized by the state’s appellate courts as being nearly identical. Upon the authority of *Smith*, the Court reversed the granting of the DVO to the extent that it pertained to the minor child and remanded the matter for appointment of a guardian on behalf of the minor and further proceedings consistent with *Smith*.

III. FAMILY LAW

A. D.B. v. T.C.W., A MINOR CHILD, ET AL.

[2022-CA-1281-ME](#)

9/01/2023

2023 WL 5809930

Opinion by ACREE, GLENN E.; GOODWINE, J. (CONCURS) AND LAMBERT, J. (DISSENTS AND DOES NOT FILE SEPARATE OPINION)

The Cabinet for Health and Families Services (the Cabinet) took custody of T.C.W. (Child) immediately after being born. Both parents were incarcerated at that time. Initially, the Cabinet offered placement with Child’s biological grandmother, D.B. (Grandmother). She declined custody. With the approval of Child’s mother and Grandmother, the Cabinet placed Child with foster parents. Grandmother obtained an order for grandparent visitation, and the foster parents moved to adopt Child. Grandmother sought to intervene in the adoption proceeding via Kentucky Rule of Civil Procedure (CR) 24.01, arguing she needed to protect her visitation rights in the adoption proceeding. The Mercer Circuit Court denied her motion, and this appeal followed. On appeal, Grandmother argued the circuit court committed three errors. First, the circuit court errantly determined

Grandmother's CR 24.01 motion was untimely. Second, the circuit court errantly concluded Grandmother failed to present a substantial interest that could not be adequately protected. Lastly, the circuit court errantly found Grandmother failed to meet the requirements of CR 24.03. The Court of Appeals determined Grandmother brought her motion four months after she learned about the adoption proceeding. This delay, given the circumstances in this case, caused the motion to be untimely. On the second argument, Grandmother contended that the facts in the case *sub judice* resembled the unique facts of *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). The Court rejected this argument because, unlike the family members in *Baker* who the Cabinet ignored when considering placement, the Cabinet in this case timely offered placement of Child with Grandmother. This critical fact was the crux of the errors committed by the Cabinet in *Baker*, and it was absent in this case. To support her third argument that the pleading requirement of CR 24.03 is inapplicable in adoption proceedings, Grandmother relied on Justice James Keller's dissent in *Baker*. The Court concluded neither *Baker* nor Keller's dissent states such a rule. Finding no error, the Court affirmed.

B. TRAVIS SHELTON, ET AL. v. RICHIE ATKINSON, ET AL.

[2022-CA-1140-MR](#)

9/15/2023

2023 WL 5987854

Opinion by McNEILL, J. CHRISTOPHER; COMBS, J. (CONCURS) AND TAYLOR, J. (CONCURS)

After the Appellant parents' relationship with the Appellee maternal grandparents deteriorated, the parents forbade the maternal grandparents from seeing their children which prompted the grandparents to file a petition seeking visitation. The Wayne Family Court granted the maternal grandparents hourly monthly visits, but that order was previously reversed by the Court of Appeals in *Shelton v. Atkinson*, No. 2021-CA-0397-MR, 2022 WL 2280225 (Ky. App. Jun. 24, 2022) because "the family court failed to give due consideration to the most relevant factor in this matter – the potential detriments and benefits to the children from granting visitation." The Court remanded for further proceedings during which the family court again awarded the grandparents visitation resulting in this appeal. On appeal, the Court affirmed on the basis "[t]he family court issued an eleven-page judgment addressing the concerns raised in *Shelton*, including – without limitation – the potential detriments and benefits to the children from granting visitation."

IV. PROPERTY LAW

A. GERALD MCCAHERN v. MATRIX FINANCIAL SERVICE CORPORATION, ET AL.

[2021-CA-1518-MR](#)

9/22/2023

2023 WL 6165341

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

In a case of competing claims of lien priority relative to Fayette County real property, Appellant claimed an equitable or vendor's lien dating from July 27, 2011, based on a Contract for Deed to a separate, Bourbon County property. Appellee claimed its lien relative to the Fayette County property based on a mortgage recorded on October 6, 2016. The Court of Appeals concluded Appellant's equitable lien was limited to the Bourbon County property based on *Ford v. Ford's Ex'r*, 26 S.W.2d 551, 552 (Ky. 1930), which holds "the vendor's lien for purchase money extended only to the

particular estate or interest conveyed and for which the price was to be paid[.]” The Court thus affirmed the Fayette Circuit Court’s summary judgment recognizing Appellee’s lien as superior.

V. WILLS, TRUSTS, AND ESTATES

A. LINDA DAY, AS EXECUTRIX OF THE ESTATE OF ELTA RENFROW v. LORETTA FILIP, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JOSEPH RANDALL RENFROW

[2023-CA-0664-MR](#)

9/29/2023

2023 WL 6322258

Opinion by LAMBERT, JAMES H.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellant filed a notice of appeal from an opinion and order of the Grayson Circuit Court dismissing an appeal from the Grayson District Court’s order granting the final settlement of an estate and denying Appellant’s claim against the estate. The Court of Appeals dismissed the appeal for failure to file a motion for discretionary review pursuant to Kentucky Rule of Appellate Procedure 44. The Court noted that it exercised discretionary jurisdiction over cases originating in district court and appealed to circuit court. Quoting *Beard v. Commonwealth ex rel Shaw*, 891 S.W.2d 382, 383 (Ky. 1994), the Court stated, “Because the filing of a motion for discretionary review is jurisdictional, ‘a notice of appeal may not serve to transfer jurisdiction to an appellate court, when a motion for discretionary review is called for by the [Rules of Appellate Procedure].’” The Court reasoned that because the defect was jurisdictional, the doctrine of substantial compliance could not be applied. Further quoting *Beard*, 891 S.W.2d at 383, the Court explained that notices of appeal and motions for discretionary review serve different functions: “A notice of appeal gives notice that a litigant seeks an appeal as a matter of right whereas a motion for discretionary review requests an appellate court to exercise its appellate jurisdiction as a matter of judicial discretion.”