**PUBLISHED OPINIONS**
**KENTUCKY SUPREME COURT**
**SEPTEMBER 2008**

## CRIMINAL LAW

**A. Melvin Lee Parrish v. Com.**
2006-SC-000592-MR 9/18/2008

Opinion by Justice Noble; all concurred; Justice Abramson not sitting. The Court affirmed a circuit court order denying Appellant relief under RCr 11.42. Court held that Appellant's claims that mental retardation makes him ineligible for death penalty under Eight Amendment, Atkins v. Virginia, 536 U.S. 304 (2002), and international treaties could have been brought on direct appeal and are therefore not proper for a RCr 11.42 motion. Court went on to note that substantial evidence supported trial court's finding that Appellant's IQ was at least 70, which is above the threshold for mental retardation in Kentucky. Appellant also claimed ineffective assistance of both trial and appellate counsel. The Court rejected both, noting that ineffective assistance of appellate counsel claims will only be heard where a convicted defendant's appeal was dismissed solely due to neglect of legal counsel. The Court emphasized that where a merits brief has been filed, ineffective assistance of appellate counsel is not a cognizable claim.

**B. Com. v. Merriman**
2006-SC-000330-DG 9/18/2008
2006-SC-000690-DG
**Com. v. Hickman**
2006-SC-000332-DG

Opinion by Justice Noble; all concurred; Justice Venters not sitting. The Supreme Court resolved a split between panels of the Court of Appeals by ruling that the Violent Offender Statute does not apply to youthful offenders. The Violent Offender Statute (KRS 439.3401) mandates persons convicted of a certain class of crimes are ineligible for probation and must serve at least 85% of their sentence. However KRS 640.030 mandates that youthful offenders be brought back in front of the court where the judge must decide to either a) grant probation or conditional discharge; b) transfer youthful offender to adult correctional facility; or c) return to Department of Juvenile Justice for five months of additional treatment before another hearing. The Court noted KRS 640.010(2)(c) provides that youthful offenders, once transferred to circuit court "shall be proceeded against…. as adult, *except as otherwise provided in this chapter*." In addition to statutory interpretation, the Court pointed out the

absurd result that would occur in a situation when a youthful offender whom has made excellent progress towards rehabilitation and has been recommended for probation or condition discharge by the Department of Juvenile Justice, would be forced to attend a sham hearing where a judge would have no alternative but to send the youthful offender to prison.

## FAMILY LAW

**A. Donald C. Cameron v. S. Lynea Cameron**
2007-SC-000105-DG 9/18/2008

Opinion by Justice Cunningham; all concurred. The Court affirmed trial court's decision that separation agreement was not rescinded or abrogated by reconciliation. Court held that reconciliation occurs "where, from all appearances and for a substantial period of time, it seems purely an oversight that the [separation] agreement has not been rescinded or the divorce action dismissed." Non-exhaustive factors listed by Court for determining whether reconciliation has occurred include 1) whether parties have resumed cohabitation; 2) the nature in which personal property, including bank accounts are held; 3) failure to carry out executory provisions of separation agreement; 4) activities of the parties in which normally only married couples participate; 5) whether parties attended marriage counseling. The Court also held that it was not clearly erroneous for the trial court to declare the separation agreement not unconscionable as against Appellant who had agreement drafted by his counsel and signed by Appellee, who was not represented by counsel.

## CIVIL PROCEDURE

**A. Helen H. Moorhead v. Carolyn A. Dodd (Co-Executrix of the Estate of J. William Manning, deceased), Et Al**
2006-SC-000251-DG 9/18/2008

Opinion by Justice Scott; all concurred; Justice Schroder not sitting. Reversing circuit court and Court of Appeals. Moorhead brought suit against Manning in circuit court for breach of contract and was awarded a judgment for damages. Manning appealed to the Court of Appeals, where the judgment was affirmed. Moorhead then moved the circuit court pursuant to the original contract for post-judgment and appellate attorney fees reflecting the amount Moorhead expended defending the appeal. The circuit court denied the motion, ruling its jurisdiction over the controversy had expired. Moorhead then filed a separate action in another division of the circuit court seeking attorney fees pursuant to the guaranty executed by Manning. The circuit court granted summary judgment in favor of Manning, ruling that *res judicata* prevented hearing Moorhead's claims since Moorhead could have reserved the issue of

appellate attorney fees in the original action. The Supreme Court ruled that *res judicata* did not bar an action for post-judgment and appellate attorney fees since the claim had not been addressed when the circuit court entered the judgment. Similarly, the rule against splitting causes of actions was inapplicable since the claims for appellate attorney fees did not accrue until after the circuit court entered its judgment. The Court noted a convenient and cost-efficient mechanism for future litigants would be a motion at the conclusion of the appeal to remand the case back to the trial court to determine appellate attorney fees.

**B. Cheyenne Resources Inc. and PC&H Construction, Inc. v. Elk Horn Coal Corporation**
2006-SC-000721-DG 9/18/2008

Opinion by Special Justice Monge; Chief Justice Minton, Special Justice Emberton, Justice Noble and Justice Schroder concurring. Justice Cunningham dissenting by Separate Opinion in which Special Justice McDonald joins. Justice Venters, Justice Abramson and Justice Scott not sitting. In 1998, Floyd Circuit Court rendered a judgment against Elk Horn Coal for $9.5 million. After the unsuccessful appeal ran its course, the circuit court entered an order enforcing the judgment and adding a 10% penalty ($950,000) pursuant to KRS 26A.300. The Supreme Court later declared the statutory penalty unconstitutional and Elk Horn Coal filed a Motion for Judgment of Restitution in the circuit court to recover its $950,000. The sole issue before the Supreme Court was whether the pre-judgment interest on the restitution award should be calculated from the date the penalty was declared unconstitutional (August 15, 2005) or from the date when Elk Horn Coal actually paid penalty (March 16, 2001). The Court noted that there was no dispute that the action before it was one of restitution, which involves not merely awarding damages, but putting the party back in the position they would have occupied but for the erroneous judgment. For Elk Horn Coal to be made whole, the Court ruled, the interest must be calculated from the time that Cheyenne first had use of the money. The dissent argues that the trial court did not abuse its discretion in determining the date when pre-judgment interest would begin to accrue, thus reversal by the Court of Appeals was not warranted. A second dissent argues that the Court of Appeals should have exercised equity in reaching its decision.

**C. Mammoth Medical, Inc. v. Hon. Kimberly Bunnell Et Al**
2008-SC-000048-MR 9/18/2008

Opinion by Justice Scott; C.J. Minton, Justices Cunningham, Schroder concur; Justice Abramson concurs by separate opinion, in which Justice Venters joins; Justice Noble not sitting. Law firm filed an action in Fayette Circuit court seeking declaratory judgment stating firm was not liable to

Appellant for damages resulting from alleged legal malpractice. Appellant filed for a writ of prohibition in the Court of Appeals seeking dismissal of the declaratory action. The Court of Appeals denied the writ. The Supreme Court noted, as a preliminary matter, that there are three types of writ cases in Kentucky: 1) where the lower court is about to proceed outside its jurisdiction; 2) where the lower court is about to act erroneously within its jurisdiction and there is no adequate remedy by appeal and irreparable injury will result or; 3) the so-called "special cases" exception where the lower court is acting erroneously within in its jurisdiction in a manner that will cause a substantial miscarriage of justice, the reviewing Court can consider a writ to promote the orderly administration of justice, even if an adequate remedy exists by appeal. The Court concluded that this matter fit into the third category, and held that the orderly administration of justice requires that an injured party should be allowed to decide "whether, when and where to bring an action." Supreme Court reversed the Court of Appeals' denial of the writ and remanded for an order dismissing the declaratory judgment action. The Court expressed its disapproval of potential defendants, other than insurance carriers, filing declaratory judgment actions to establish their non-liability. In her concurrence, Justice Abramson emphasized that this case is one of first impression in Kentucky.

## ZONING

**A. Sebastian-Voor Properties, LLC Et Al v. Lexington-Fayette Urban County Govt. Et Al.**
2006-SC-000732-DG 9/18/2008

Memorandum opinion of the Court; all concur; Justice Noble not sitting. Sebastian began developing Spindletop Estates in 1963. The predecessor to the Lexington-Fayette Urban County Planning Commission ("Lexington P&Z") approved 122 one-acre agricultural/residential lots on the Spindletop property between 1963 and 1966. Beginning in 1966, state and local zoning laws were revised in such a manner that the minimum acreage for the agricultural/residential lots increased from one to ten acres. Despite the change in law, Lexington P&Z approved an additional 17 one-acre lots on Spindletop over the next 29 years. In 2002, Sebastian applied to subdivide the remainder of the property into one-acre lots. This request was denied by Lexington P&Z in part because the proposed lots did not meet the minimum acreage requirement. Sebastian appealed to circuit court who denied Sebastian's motion for partial-summary judgment which argued that in light of years of erroneous prior approvals, Lexington P&Z was now equitably estopped from denying the proposal. The Supreme Court affirmed the Court of Appeals ruling that "the doctrine of

equitable estoppel may be invoked against a governmental entity under exceptional circumstances" that could not be found in this case. The Court noted that Sebastian could not establish detrimental reliance, a necessary element of equitable estoppel, where the slow pace of the development of Spindletop was attributable to Sebastian's own inaction.

**B. Alice South Hume, Et Al. v. Franklin County Fiscal Court, Et Al.**
2006-SC-000499-DG
**Lewis Bizzack, Et Al. v. Alice South Hume, Et Al.**
2007-SC-000091-DG 9/18/2008

Opinion by Justice Schroder; Justices Cunningham, Noble, Scott and Venters concur; Justice Abramson concurs in result only; Chief Justice Minton not sitting. While an appeal of a zoning map amendment was working its way through the appellate process, the property owners filed a second zoning change request for the same property. When the second proposal was granted by the Fiscal Court, the neighboring landowners appealed, arguing that *res judicata* prevented the same case from being heard in two different tribunals at the same time. The Court of Appeals, ruled *res judicata* could be applied to administrative zoning matters so long as the requests were not the same. The Supreme Court reversed holding that *res judicata* is a judicial concept that has no application to a zoning map amendment, which is a legislative function. The Court also noted that placing time limitations on zoning amendment applications is within the authority of the legislative bodies, which had elected not to do so.

## ATTORNEY DISCIPLINE

**A. Paul Henry Riley, Jr. v. Kentucky Bar Association**
2008-SC-000554-KB 9/30/2008
Court orders a public reprimand for failing to keep divorce client reasonably informed about status of case and for failing to protect his client's interests upon termination of representation.

**B. Joseph L. Anderson v. KBA**
2008-SC-000546-KB 9/30/2008

Court orders suspension of license to practice law for 30 days probated on the condition attorney make published apologies, obey rules on lawyer advertising and not receive further disciplinary charges for year. Movant admitted to various violations arising of his solicitation of clients on the internet. Movant admitted that he solicited families of the victims of a Comair plane crash in Lexington in a manner contrary in violation of SCR 3.130-7.09(4) which sets a 30-day no-contact period following mass

disasters. Movant further admitted to not properly supervising his paralegal.

**C. Thomas McAdam III v. KBA**
2008-SC-000521-KB 9/30/2008

Court orders a public reprimand for failure to file pre-hearing statement with Court of Appeals, ignoring subsequent show cause orders from Court of Appeals, and failing to protect his client's interests.

**D. KBA vs. Richard Kip Cameron**
2008-SC-000316-KB 9/30/08

Court orders permanent disbarment of attorney found to have converted over $13,000 from a Conservatorship and improperly handled a criminal appeal. The Court noted previous disciplinary actions against the Respondent and his failure to respond to the charges.