

**KENTUCKY SUPREME COURT
APRIL 2022**

CRIMINAL LAW:

Lawrence Richardson v. Commonwealth of Kentucky

[2020-SC-0300-DG](#)

April 28, 2022

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., concurs in part and dissents in part without separate opinion. Lawrence Richardson entered an *Alford* plea to two counts of criminal attempt to commit first-degree unlawful transaction with a minor and one count of third-degree terroristic threatening after his grandson reported various instances of Richardson’s sexual misconduct. Pursuant to the plea agreement, the Commonwealth recommended a ten-year prison sentence, which the trial court imposed. The trial court also ordered Richardson to complete the Sex Offender Treatment Program (SOTP) but determined that Richardson was not subject to post-incarceration supervision pursuant to Kentucky Revised Statute (KRS) 532.043. On appeal, the Court of Appeals upheld the SOTP requirement but concluded that the trial court wrongly determined that Richardson was not subject to post-incarceration supervision. Richardson petitioned this Court for discretionary review.

The Supreme Court held that the trial court did not abuse its discretion in holding that Richardson is an eligible offender for the SOTP. For its consideration of whether Richardson suffered an intellectual disability, which would render him ineligible for the SOTP, the trial court was presented with competing expert testimony as to Richardson’s mental capabilities and deficits. The trial court was free to believe the expert evaluation that concluded Richardson does not suffer from an intellectual disability and thereby conclude that he is eligible for the SOTP. Additionally, Richardson could address potential learning problems with the Department of Corrections, consistent with KRS 197.420(1). The trial court also did not err in determining that Richardson is not subject to post-incarceration supervision. KRS 532.043 does not explicitly state that attempt offenders are subject to post-incarceration supervision. Notably, another statute pertaining to sexual offenders, the Sex Offender Registration Act, expressly includes attempt crimes in its registration requirements. The omission of attempt crimes from the post-incarceration supervision statute must be viewed as purposeful legislative action. The Court affirmed in part, reversed in part, and remanded the case to the trial court.

Berry Hall v. Commonwealth of Kentucky

[2020-SC-0334-MR](#)

April 28, 2022

Opinion of the Court by Justice Keller. All sitting; all concur. Berry Hall was found guilty of two counts of intentional murder and four counts of wanton endangerment in the first degree. He was sentenced to life in prison without the possibility of parole. On appeal, he alleged multiple errors by the trial court including the erroneous admission of certain pieces of evidence, the erroneous denial of his motion for a directed verdict, improper closing argument by the Commonwealth, and the erroneous refusal of the trial court to instruct the jury on the shifting burden and standard of proof as to the

defense of insanity. The Supreme Court found no errors and affirmed Hall's convictions.

Specifically, the Court held that the trial court did not err in denying Hall's motion for a directed verdict because Hall's shooting with a scoped high-power deer rifle toward a home within which four young children were located put the children in substantial danger of death or serious physical injury. The Court also held that the trial court did not err in instructing the jury, as the instructions appropriately incorporated the preponderance of the evidence standard for the defense of insanity with the phrase "if you believe from the evidence," and because Hall's trial counsel was fully able to articulate the shifting burden and standard of proof to the jury.

DEPENDENCY, NEGLECT AND ABUSE:

Commonwealth of Kentucky, Cabinet for Health and Family Services v. Tammy Baker, et al.

2021-SC-0180-DGE

April 28, 2022

Opinion of the Court by Justice Hughes. All sitting; all concur. Civil Appeal, Discretionary Review Granted. The Cabinet for Health and Family Services (CHFS) filed dependency/neglect/abuse (DNA) petitions in June 2020 in the Bullitt County Family Court alleging, collectively, that three siblings were being abused or neglected by their mother. The CHFS, awarded temporary custody of the children, placed them with a paternal aunt. Although the CHFS had begun evaluating the father for placement, on July 1, 2020, the CHFS learned that the father, without permission, had taken the children to his residence in Florida; the children's mother also accompanied them. The CHFS began working to get the children back to Kentucky. On July 6, 2020, the CHFS communicated the children's status to the Bullitt County Family Court, the guardian ad litem (GAL), and the Bullitt County Attorney. At the emergency hearing that same day, held upon the GAL's motion, the Family Court ordered the CHFS to return the children to Kentucky within twenty-four hours. Under the supervision of CHFS employees, the children were returned within forty-eight hours and placed in foster care. The GAL then filed DNA petitions against the CHFS alleging that inaction by the CHFS placed the children at great risk of harm, however, the GAL did not petition to remove the children from the CHFS's temporary custody. The CHFS filed a motion to dismiss the petitions, claiming governmental immunity. The Family Court overruled the motion and the Court of Appeals, while recognizing DNA petitions against the CHFS are unusual, affirmed that decision. *Held:* The CHFS's governmental immunity claim was not properly before the Court. At the point the GAL filed the petitions, the GAL's concerns for the children's safety as a result of being with their parents, and criticisms of the CHFS's manner of effectuating their return from Florida without police involvement, even if deemed an appropriate basis for a DNA petition, were largely moot. If the CHFS was irresponsibly lax in reporting the children's absence or securing their return, if deferring to Florida Child Protective Services' judgment regarding the children's safety instead of involving Florida police or any other aspect of this incident was problematic, those issues were properly addressed in the existing DNA cases.

PATERNITY:

Commonwealth of Kentucky, Cabinet for Health and Family Services, ex rel. Child Support Enforcement v. B.N.T., et al.
2021-SC-0287-DGE

April 28, 2022

Opinion of the Court by Justice Lambert. All sitting; all concur. A married man, B.N.T., had an affair with K.S. K.S. became pregnant during their affair, and B.N.T. sought to establish the paternity of the child. At B.N.T.'s request, the Cabinet filed a paternity complaint asserting that B.N.T. was the child's father. In response, K.S. alleged that her fiancé was the father, though she never disclosed the identity of her fiancé. B.N.T. and K.S. entered into an agreed order which stated that B.N.T. was not the child's father, that K.S.'s anonymous fiancé was the father, and that both parties waived any genetic testing to determine the child's paternity. Nearly three and a half years after the agreed order was entered, K.S. (who was receiving public benefits for the child) filed an application for Child Support Services alleging that B.N.T. was the child's father. The Cabinet then initiated child support and paternity actions against him. The Cabinet also filed a CR 60.02 motion to set aside the agreed order based on its belief that it was fraudulent. The family court found that the Cabinet's motion was untimely under CR 60.02 and denied it. The Cabinet appealed, and the Court of Appeals affirmed.

The Supreme Court reversed. It held that the family court lacked subject matter jurisdiction under KRS 406.021 to enter the agreed order and it was therefore void ab initio. The Court reasoned that KRS 406.021 allows the court to determine paternity, but that it does not allow for a determination of non-paternity without a corollary determination of actual paternity. Accordingly, because the agreed order established the non-paternity of B.N.T. without any further fact finding that affirmatively established the child's actual paternity, the family court lacked the inherent power to enter it. The Court vacated the order and remanded for further proceedings.

QUALIFIED IMMUNITY:

Ben Martin v. Durbin Wallace
2020-SC-0437-DG

April 28, 2022

Opinion of the Court by Justice Nickell. All sitting. Minton, C.J.; Conley, Hughes, Keller, and Lambert, JJ., concur. VanMeter, J., concurs in result only. Officer Ben Martin arrested Durbin Wallace for assault following an investigation of an incident involving a five-year-old passenger on Wallace's school bus. The charge was later amended to harassment and a jury found Wallace not guilty. Wallace filed a civil suit against Martin and the school superintendent alleging malicious prosecution, abuse of process, and defamation. Martin moved for summary judgment on grounds of qualified official immunity and, alternatively, failure of proof by Wallace on elements of his claims including malice or lack of probable cause. Two years after the suit began, summary judgment was entered after the trial court concluded Martin acted in good faith in the investigation, no evidence of malice or bad faith had been presented, and Martin was thus entitled to qualified official immunity.

The Court of Appeals reversed in part, finding good faith and malice to be mutually exclusive, intentional torts preclude acting in good faith, and relying on *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016), held qualified official immunity is inapplicable to

malicious prosecution claims. Further, because defamation claims require proof of malice, qualified official immunity is inapplicable to such claims. Finally, the Court of Appeals found the trial court correctly dismissed the abuse of process claim against Martin as the allegations regarding that claim applied only to the superintendent.

On discretionary review, the Supreme Court affirmed in part and reversed in part. First, it held the Court of Appeals correctly relied on Martin to conclude the trial court erroneously granted Martin immunity as a matter of law on the malicious prosecution and defamation claims. However, the Supreme Court concluded the trial court's grant of summary judgment was still proper as the record contained no evidence of malice or lack of probable cause by Martin. The failure of proof of essential elements of his claims was fatal to Wallace's allegations of malicious prosecution and defamation. Thus, the Court of Appeals' decision was erroneous and was therefore reversed in part. Finally, the Supreme Court held the Court of Appeals correctly determined Wallace failed to allege facts supporting a claim for abuse of process against Martin and affirmed as to that issue.

STANDING:

David M. Ward, et al. v. Secretary of State, ex rel. Michal G. Adams in his Official Capacity, et al.

AND

Senator Whitney Westerfield, in both his Official and Personal Capacities, et al. v. David Ward, et al.

[2020-SC-0520-I](#)

[2020-SC-0544-I](#)

April 28, 2022

Opinion of the Court by Chief Justice Minton. All sitting. Conley, Hughes, Keller, Lambert and Nickell, JJ., concur. VanMeter, J., concurs in result only by separate opinion. In 2020, the General Assembly proposed Marsy's Law, a constitutional amendment related to crime victims' rights. Appellants David M. Ward and Kentucky Association of Criminal Defense Lawyers, Inc. filed a complaint against the Secretary of State, the State Board of Elections, and the Chairperson of the State Board of Elections before the 2020 general election. The Complaint sought declaratory and injunctive relief. The Kentucky Attorney General, Marsy's Law for Kentucky, LLC, and Senator Whitney Westerfield intervened as Defendants. The trial court granted partial summary judgment in favor of the Intervening Defendants but withheld ruling on Appellant's facial challenges to the substantive provisions of Marsy's Law, finding that they were not ripe prior to the 2020 general election because the Marsy's Law constitutional amendment had not been ratified by Kentucky voters.

The parties filed cross appeals. The Court of Appeals recommended transfer, which the Supreme Court granted. While the appeals were pending, Kentucky voters ratified the Marsy's Law constitutional amendment.

On discretionary review, the Supreme Court vacated the judgment of the Franklin Circuit Court and remanded the matter with instruction to dismiss the action in its entirety without prejudice for lack of standing. The Court held that Appellants lacked constitutional standing because they had not met their burden of establishing that the

alleged injuries harmed them in a concrete and particularized manner. Instead, Appellants' claims represented nonjusticiable generalized grievances because the harms asserted were shared in equal measure by all citizens of the Commonwealth.

Additionally, the Court concluded that Appellants lacked taxpayer standing because Appellants did not have an interest that was sufficiently direct, pecuniary, and substantial to invoke taxpayer standing. The Court noted that Appellants had neither cited nor was the Court aware of any authority granting taxpayer standing in similar circumstances to those presented in this case. The issues of statutory and associational standing were neither implicated nor discussed in this decision.

Finally, the Court reaffirmed its prior holding in *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019) (hereinafter "*Ward I*"). The Court acknowledged similarities between *Ward I* and this case. Still, the Court explained that the issues of constitutional and taxpayer standing were neither challenged nor analyzed in *Ward I*. In *Ward I*, the Supreme Court reached a final, non-appealable judgment, which remains good law.

TRUST:

Estate of Phyllis T. Worrall by Executor James Worrall v. J.P. Morgan Bank, N.A., Trustee of the James P. Thompson Trust

[2021-SC-0166-DG](#)

April 28, 2022

Opinion of the Court by Justice VanMeter. All sitting; all concur. James Worrall, executor of the Estate of Phillis Worrall, appeals the decision of the Jefferson Circuit Court which affirmed the district court's order liquidating the assets of a trust valued at nearly \$900,000. In 1958, James Thompson's probated will established a testamentary trust for the benefit of his daughter, Phillis Worrall. That trust terminated with Phillis Worrall's death in June 2018. James Worrall became the executor of her estate and is the sole beneficiary of her probated will. In December 2018 Worrall also became the trustee of the estate. Beginning in 2019, J.P. Morgan Bank (the "Bank") filed several motions asserting its desire to liquidate the assets of the trust. The final motion for liquidation was filed in December 2019 and the Bank claimed doing so was necessitated by James Worrall's refusal to sign a receipt and release as required by the Bank to liquidate and transfer the assets. The district court held an exceedingly short hearing, focusing on Worrall's refusal to sign a release and indemnification document, thereby delaying distribution of the trust assets. Following the hearing, Worrall was ordered to sign the document and the Bank was directed to liquidate the trust's assets, pay all applicable fees and transfer the remaining proceeds to the Receiver of the Court. The Supreme Court found the district court's hearing in this case was "woefully inadequate to address Worrall's concerns" and further found that the Bank had violated its fiduciary and statutory obligations to the trust beneficiary. Specifically, the Court noted that the Bank's notice to Worrall did not inform him of his right to object to the distribution, nor provide him with required items, such as a trust accounting and the amount of any fees pursuant to KRS 386B.8-170 & 386B.8-180(1)(a), respectively. Further, the Court held that the Bank's actions violated KRS 386B.8-180(5) which states: "[n]o trustee [of a] trust shall request that any beneficiary indemnify the trustee against loss in exchange for the trustee forgoing a request to the court to approve its accounts at the time the trust terminates or at the time the trustee is removed or resigns" Additionally, the Court held that the Bank violated its fiduciary duty to administer the trust by liquidating the trust's

assets, against Thompson's direction to distribute the trust's assets in kind. The Court remanded the case to the district court with directions to require an accounting and to assess any appropriate remedy or damages against the Bank.

WORKERS' COMPENSATION:

Apple Valley Sanitation, Inc. v. Jon Stambaugh, et al.

2021-SC-0227-WC

April 28, 2022

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Workers' Compensation Appeal. Jon Stambaugh was awarded benefits by the Administrative Law Judge for two separate work-related injuries that occurred in the course and scope of his work for Apple Valley Sanitation. The ALJ applied the 3x multiplier from KRS 342.730(1)(c) to both Stambaugh's awards, finding that each injury individually precluded him from returning to the type of work he performed at the time of the injuries. Apple Valley appealed, arguing that the ALJ erred in applying the 3x multiplier to both awards because it reasoned that there was no change in Stambaugh's job duties between injuries and Stambaugh could not lose the same ability twice. Both the Workers' Compensation Board and the Court of Appeals affirmed the ALJ's decision.

The Kentucky Supreme Court held that the 3x multiplier was properly applied to Stambaugh's benefits awards because his injuries were assessed at the time of the benefits hearing, rather than at the time immediately following his injuries. Although Stambaugh returned to his job after his first injury, by the time of his benefits hearing, his injuries were both independently and individually severe enough to preclude him from returning to the type of work he performed at the time of his injuries. As such, the Court affirmed the Court of Appeals.

ATTORNEY DISCIPLINE:

Kentucky Bar Association v. Grace Ingrid Gardiner

2021-SC-0468-KB

April 28, 2022

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association moved to suspend Gardiner's license to practice law in Kentucky as reciprocal discipline for that imposed by the Tennessee Supreme Court. The discipline against Gardiner arose after the Bankruptcy Court for the Eastern District of Tennessee entered an agreed order suspending Gardiner from practicing law in the Bankruptcy Court for the Eastern District of Tennessee for five years. Following this sanction, the Disciplinary counsel for the Tennessee Board of Professional Responsibility filed a Petition for Discipline. After investigation and a hearing, the Hearing Panel suspended Gardiner for three years, with four months to be served and the remainder probated.

Gardiner agreed to the KBA's motion for reciprocal discipline. The Court found that the Tennessee Rules of Professional Conduct violated by Gardiner were substantially similar to Kentucky's rules. Accordingly, under Supreme Court Rule 3.435, the Court suspended Gardiner from the practice of law in Kentucky for a period of three years, with four months to be served and the remainder to be probated, until such time as she is reinstated to the practice of law in Tennessee *and* until she is reinstated to the practice of law in Kentucky by Order of the Supreme Court under SCR 3.501.

Kentucky Bar Association v. Justin Jerome Marcum
[2022-SC-0002-KB](#)

April 28, 2022

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Appeals of West Virginia entered an order suspending Marcum from the practice of law in that state for two years with a stay of the suspension after six months and imposing a period of supervised probation. Thereafter, the Kentucky Bar Association (KBA) filed a petition asking the Kentucky Supreme Court to impose reciprocal discipline pursuant to Supreme Court Rule (SCR) 3.435.

The Court ordered Marcum to show cause why he should not be suspended but he did not respond. Accordingly, the Court suspended Marcum from the practice of law for two years with six months of that suspension to be served and the remainder to be probated until the completion of his contract with the West Virginia Judicial and Lawyer Assistance Program, as consistent with the order of the Supreme Court of Appeals of West Virginia.

Dawn Michelle Gentry v. Kentucky Bar Association
[2022-SC-0063-KB](#)

April 28, 2022

Opinion and Order of the Court. All sitting. Minton, C.J.; Keller and Nickell, JJ., concur. Hughes, J., concurs in result only by separate opinion. Lambert, J., dissents by separate opinion in which Conley and VanMeter, JJ., join. Gentry was charged by the Inquiry Commission with violating one count of SCR 3.130(8.2)(b) for failing to comply with the applicable provisions of the Judicial Code of Conduct in the course of an election, three counts of SCR 3.130(8.4)(c) for engaging in conduct involving dishonesty, one count of SCR 3.130(8.4)(b) for allegedly committing a criminal act that reflects adversely on a lawyer's honesty, and one count of SCR 3.130(3.4)(f) for initiating disciplinary proceedings to obtain an advantage in a civil matter. Gentry admitted to each count except for her alleged violation of SCR 3.130(8.4)(b), which the KBA agreed to dismiss. The charges arose from Gentry's conduct that ultimately led to her removal from the bench as a family court judge.

Gentry petitioned the Supreme Court under Supreme Court Rule (SCR) 3.480(2) to impose a sanction of a four-year suspension from the practice of law. The Kentucky Bar Association did not object to Gentry's request. In reviewing the negotiated sanction, the Court noted the circumstances of the case were unique and there were no cases on-point in Kentucky. Given the distinctive facts of this case and the fact that the KBA and Gentry agreed to the sanction, the Court agreed it was appropriate. Accordingly, the Court suspended Gentry from the practice of law in the Commonwealth for four years.

Traci Lee Tidball Peppers v. Kentucky Bar Association
[2022-SC-0106-KB](#)

April 28, 2022

Opinion and Order of the Court. All sitting. Minton, C.J.; Conley, Hughes, Keller, Lambert, and Nickell, JJ., concur. VanMeter, J., dissents by separate opinion. Peppers moved the Supreme Court for consensual discipline under Supreme Court Rules (SCR) 3.480(2) based on a negotiated sanction agreement with the Kentucky Bar Association (KBA). Peppers requested the Court enter an Order resolving the pending disciplinary

proceeding against her by imposing a five-year suspension from the practice of law for her admitted violations of SCR 3.130(1.15)(a) relating to safekeeping of client property and SCR 3.130(8.4)(c) relating to professional misconduct. The KBA did not object to Peppers' motion

The disciplinary proceeding arose from Peppers' admitted misappropriation or improper dealings with funds she held as conservator for the estate of a minor. Upon reviewing the facts of the case and relevant caselaw, and because Peppers and the KBA agreed on the sanction, the Court held that a five-year suspension was the appropriate discipline for Peppers' conduct. Accordingly, the motion was granted and Peppers was sanctioned accordingly.