

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2014 to APRIL 30, 2014

I. ARBITRATION

A. *LP Pikeville, LLC v. Wright*

[2013-CA-000959](#) 04/04/2014 2014 WL 1345293 DR Pending

Opinion by Judge Maze; Judges Jones and Moore concurred. The guardian of a nursing-home resident brought an action against the nursing home for negligence, medical negligence, corporate negligence, and violations of statutory duties, asserting that the resident was injured while at the nursing home. The circuit court denied the nursing home's motion to compel arbitration, but the Court of Appeals reversed and remanded upon holding that the guardian had the authority to execute a binding arbitration agreement with the nursing home on behalf of her ward. The Court noted that the scope of the authority granted to a court-appointed guardian is much broader than that of a traditional power of attorney, even one intended to survive disability. KRS 387.590(10) generally authorizes the guardian to enter into contractual relationships on behalf of her ward, and the specific powers granted to a guardian under KRS 387.660 are construed broadly to allow the guardian to make any decision which the ward might make for herself if competent. Accordingly, as a statutorily-appointed guardian has the broadest possible agency relationship to her ward, the guardian has the authority to enter into collateral agreements which may affect the jural rights of the ward.

II. CONSTITUTIONAL LAW

A. Wilson v. Haney

[2012-CA-001790](#) 04/18/2014 2014 WL 1512450

Opinion by Judge Lambert; Judges Caperton and Moore concurred. In two prison disciplinary appeals, the Court of Appeals held that the circuit court did not err in dismissing appellants' declaratory judgment actions. Regarding the first appeal, the Court held that the circuit court properly dismissed the action because appellant had not demonstrated a due process violation and the evidence supported the disciplinary determination. The Court noted that in declaratory judgment actions, strict rules of pleading are not followed; therefore, appellees were not required to show excusable neglect for waiting 42 days beyond the applicable deadline to respond to appellant's allegations. As to the second appeal, the Court held that some evidence supported the disciplinary determination; therefore, there was no error in this regard.

III. CRIMINAL LAW

A. *Martin v. Commonwealth*

[2012-CA-001172](#) 04/04/2014 2014 WL 1345281 DR Pending

Opinion by Judge Combs; Judges Caperton and Thompson concurred. Appellants all pleaded guilty to sex offenses. After their pleas had been entered and they had been sentenced, the conditional discharge statute (KRS 532.043) was amended to place revocation decisions within the exclusive purview of the Parole Board, which conducts the revocation proceedings according to the mandates of 501 KAR 1:070. In their post-conviction appeals from orders denying their motions to amend their sentences, appellants argued that they had been denied due process by being subjected to the amended revocation procedures. However, the Court of Appeals examined the new procedures and held that they actually afford offenders more due process than did the previous proceedings. The Court further noted that while it was true that when they pled guilty appellants were not able to anticipate the changes to the revocation procedures, their punishment had not become stricter and their right to due process had not been diminished. Therefore, being subject to the new procedures did not deprive them of due process as no violation of the law against imposition of punishment *ex post facto* had occurred.

B. Patton v. Commonwealth

[2012-CA-001977](#) 04/25/2014 2014 WL 1661284

Opinion by Judge Jones; Judges Lambert and Stumbo concurred. The Court of Appeals affirmed the denial of appellant's motion to suppress evidence relating to drug charges. The Court held that the circuit court did not err as a matter of law in finding that the warrantless search of a pill bottle, located on appellant's person, was incident to a lawful arrest. Specifically, the Court held that the events leading up to appellant's arrest, including an informant's statements and the observations of the police, were sufficient to lead an objectively reasonable police officer to believe that appellant had committed a felony even prior to the discovery of the pills. The Court noted that the police were acting on the information of a known and identifiable informant; the informant told police that appellant had been trying to sell him drugs; the informant's automobile, carrying appellant, stopped at the house of an individual that an identified neighbor had complained to police was the site of narcotics trafficking; appellant entered the house and then left after a short time, suggesting that the pre-planned purchase of drugs had occurred; police stopped the car immediately after it left the residence; and the informant told police that appellant had taken the purchase money, had gone inside the house to purchase narcotics, and still had the narcotics on his person. Based on this information, the Court concluded that police had sufficient probable cause to arrest appellant before searching the contents of the pill bottle.

C. *Winkle v. Commonwealth*

[2012-CA-000500](#) 04/04/2014 2014 WL 1345275 DR Pending

Opinion by Judge Nickell; Judges Clayton and Moore concurred. Appellant was convicted on a guilty plea of complicity to commit burglary and complicity to commit criminal mischief in December 2011, and was subsequently ordered in March 2012 to pay \$29,681.00 in restitution at 12% interest per annum. On appeal, appellant claimed that the amount of restitution ordered should have been calculated by a jury under KRS 431.200, rather than by a judge under KRS 533.030(3). The Commonwealth responded that by accepting its offer, appellant agreed that restitution would be set under KRS 533.030(3), which generally applies to criminal restitution. The Court of Appeals held that KRS 533.030(3) was properly applied because the Commonwealth had conditioned its plea offer on appellant making full restitution under that statute. The Court also rejected appellant's argument that the trial court had lost jurisdiction over the case prior to setting a restitution amount. Because appellant was to remain on probation until full restitution had been paid, the trial court retained jurisdiction over her and was authorized to modify the terms of probation so long as probation remained in effect. Thus, the Court retained jurisdiction to set a restitution amount more than 90 days after sentencing. The Court further noted that appellant knew that the amount of restitution she would be ordered to pay would be calculated at a future time - either she and the Commonwealth would agree on the amount, or the trial court would convene a hearing and decide the amount. By not requesting that restitution be determined before sentence was imposed, appellant ran the risk of the restitution amount increasing as more items were discovered missing.

IV. CUSTODY

A. Curry v. Curry

[2013-CA-001266](#) 04/25/2014 2014 WL 1661287

Opinion by Judge Jones; Judges Lambert and Stumbo concurred. The Court of Appeals vacated and remanded the trial court's order dismissing appellant's motion for modification of a child custody order for lack of jurisdiction. The Court held that the trial court erred when it determined that it lacked jurisdiction without considering and applying the statutory factors discussed in *Biggs v. Biggs*, 301 S.W.3d 32 (Ky. App. 2009). The Court further held that the trial court improperly considered the county of residence in assessing whether it had continuing jurisdiction under the UCCJEA and KRS 403.824(1), and that it was improper for the trial court to dismiss appellant's claim without affording her the opportunity to move to transfer the claim to a more appropriate venue.

V. EDUCATION

A. *Western Kentucky University v. Esters*

[2013-CA-000261](#) 04/11/2014 2014 WL 1400093 DR Pending

Opinion by Judge Lambert; Judges Caperton and Moore concurred. The Court of Appeals affirmed the orders of the Franklin Circuit Court concluding that appellee had been constructively discharged from her 36-year tenure at Western Kentucky University while she had been working under a lawfully-authorized written contract. The Court first held that WKU was not required to immediately appeal the circuit court's earlier order related to sovereign immunity pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), because the issue did not relate to whether WKU was immune from suit, but instead addressed whether appellee was working under a lawfully-authorized written contract and, therefore, whether the immunity waiver in KRS 45A.245(1) applied. The Court also held that whether appellee was an at-will employee was not at issue because the WKU Board did not terminate her employment; rather, the issue was whether her resignation was voluntary. Additionally, the Court held that the WKU Board minutes appointing appellee as Secretary for a one-year term constituted a lawfully-authorized written contract pursuant to *Mills v. McGaffee*, 254 S.W.2d 716 (Ky. 1953). Therefore, the circuit court did not err in concluding that WKU was not entitled to immunity by operation of KRS 45A.245(1). Finally, the Court declined to review the issue of whether appellee was constructively discharged because WKU failed to preserve this issue for review by listing it as an issue in its prehearing statement or by moving to include it as an additional issue pursuant to CR 76.03(8).

VI. JUDGMENT

A. *University Medical Center, Inc. v. Beglin*

[2012-CA-001208](#) 04/25/2014 2014 WL 1661269

Opinion by Judge Combs; Judge Nickell concurred; Judge Maze concurred via separate opinion. The Court of Appeals affirmed an order of the circuit court denying a motion to reduce the post-judgment interest rate of 12% set forth in KRS 360.040. The Court held that the law-of-the-case doctrine bound the circuit court to its initial decision not to reduce the post-judgment interest rate. The Court also held that the historic drop in interest rates occasioned by United States Federal Reserve Board actions did not render prospective application of the judgment inequitable under the provisions of CR 60.02. Finally, the Court held that the circuit court did not err by concluding that interest began to accrue the day the judgment was originally entered rather than the following day since KRS 360.040 provides that a judgment shall bear interest “annually from its date.”

VII. MORTGAGES

A. *McEwan v. EiA Properties, LLC*

[2012-CA-000804](#) 04/04/2014 2014 WL 1345280 Released for Publication

Opinion by Judge Taylor; Judges Lambert and VanMeter concurred. In an appeal from a judgment in a foreclosure action, the Court of Appeals concluded that the foreclosure on a mortgage lien on certain real property terminated a subsequently-executed lease related to that same property. The mortgage was recorded more than 11 years before the lease was executed. The Court first noted the general rule that where a subsequent lease is subordinate to a prior and properly recorded mortgage, the lease *ipso facto* terminates in the event of foreclosure and sale of the mortgaged property, whereupon the mortgagor/lessee's right of possession is also terminated at the time of the sale. The Court then held that an assignment of the mortgage following the execution of the lease did not affect the mortgage's priority in relation to the lease - the mortgage's status is determined or fixed upon its initial recording. A mortgage's priority continues as long as the mortgage is not released, and an assignment of the mortgage or the failure to record that assignment does not affect the priority of the mortgage. Therefore, an assignee of a mortgage generally succeeds to the priority or inferiority of the originally filed mortgage.

VIII. ZONING

A. *Hampson v. Boone Co. Planning Com'n*

[2011-CA-001559](#) 04/11/2014 2014 WL 1400092 Rehearing Pending

Opinion by Judge Maze; Judge VanMeter concurred; Judge Caperton dissented via separate opinion. Neighboring property owners sought judicial review of the decision of the county planning commission to grant an application for the construction of a 305-foot cellular antenna tower with proposed height, structure, and landscape waivers. In affirming, the Court of Appeals held that the commission's approval of an alternative location for the tower did not violate appellants' due process rights. Appellants were given the opportunity at a meeting to be heard on the matter of the location and re-location of the tower in question, and the possibility of moving the tower was raised at several points during the meeting, including during the public comment period and prior to appellants' attorney's opportunity to speak. The Court further held that the applicant was not required to provide notice to landowners whose land rested miles from the proposed cell tower and that the evidence was sufficient to support granting the application.