

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2015 to APRIL 30, 2015

I. APPEALS

A. *Koenig v. Public Protection Cabinet, Kentucky*

[2013-CA-001404](#) 04/17/2015 2015 WL 1746241 DR Pending

Opinion and Order dismissing by Judge Dixon; Judges Jones and VanMeter concurred. The Court of Appeals dismissed the subject appeal after concluding that the administrator of the estate of a deceased former employee of the state horse racing commission failed to revive, within one year of the employee's death, the employee's action challenging the constitutionality of a regulation allowing a private racetrack to permanently ban her from its premises. Even though the Court had earlier entered an order substituting the administrator as a party to the appeal, the administrator did not file any trial court pleadings under the statute governing revival (KRS 395.278) or the rule of civil procedure governing substitution of deceased parties (CR 25.01). The notice of substitution filed in the Court of Appeals also did not reference the statute or rule. The Court further held that even if appellant somehow satisfied the revival requirement, dismissal would nevertheless be warranted as there remained no justiciable controversy following the employee's death.

II. CHILD SUPPORT

A. *Cagata v. Cagata*

[2014-CA-000654](#) 04/24/2015 2015 WL 1869482

Opinion by Judge J. Lambert; Judges Combs and Stumbo concurred. The Court of Appeals affirmed the rulings of the Jefferson Family Court ordering a father to pay his children's parochial high school tuition and association costs pursuant to the terms of an agreed order adopted by the family court in a dissolution action. The Court held that the provision was not an undefined declaration of intent but contained reasonably certain terms regarding the payment of the tuition and costs, conditioned on whether the father had extraordinary financial circumstances that excused his agreement to pay. The Court also held that the father had failed to establish any extraordinary financial circumstances, noting that he earned in the range of \$400,000.00 per year as a doctor, that he no longer paid maintenance or child care costs, and that his financial circumstances were similar to what they were in 2007 when he and his former wife entered into the agreed order.

B. Moskowitz v. Moskowitz

[2013-CA-000137](#) 04/10/2015 2015 WL 1611762 Released for Publication

Opinion by Judge Jones; Chief Judge Acree and Judge Maze concurred. Appellant appealed the circuit court's denial of his motion to modify his child support obligation on the ground that he could not be present in court for a hearing. Appellant, a resident of Venezuela, argued that the circuit court abused its discretion because he is unable to legally enter the United States. The Court of Appeals reversed and remanded, holding that the circuit court abused its discretion by failing to consider or apply the child support guidelines in this case. After the parties' oldest child was emancipated, the circuit court was under an affirmative obligation to review appellant's child support obligation and enter a new permanent support order based on the current facts and circumstances of the parties and the child support guidelines currently in force. The Court determined that the circuit court failed to conduct an appropriate review of appellant's modification motion by denying it without making findings or conducting a hearing, but instead basing its denial solely on appellant's lack of physical presence in court. The Court noted that the child support modification statutes do not mandate a party's physical presence in court as a condition precedent to obtaining relief. The Court concluded that to deny appellant's motion because he was not physically present before the court, especially since he is unable to legally enter the United States at this time, was an abuse of discretion. On remand, the Court directed the circuit court to conduct an appropriate review of the motion to modify and to grant or deny the motion based upon the facts and circumstances of this case in conjunction with the child support guidelines.

III. COURTS

A. *Administrative Office of Courts v. Vidaud*

[2013-CA-001881](#) 04/03/2015 2015 WL 1539954 Rehearing Denied

Opinion by Judge Clayton; Judge Jones concurred; Judge Kramer concurred via separate opinion. Appellee's employment was terminated with the Administrative Office of the Courts (AOC) after allegations of sexual harassment were lodged against him. Appellee was not afforded a preliminary hearing, but was terminated by the Court of Justice (COJ) Harassment Complaint Panel. Appellee appealed the decision to the Dismissal Appeal Board, which recommended the termination be upheld based upon the General Code of Conduct in the COJ Personnel Policy. Appellee then appealed his termination to the Franklin Circuit Court, which held that he had not received due process when he was not afforded a termination hearing prior to his dismissal. The circuit court also determined that the COJ Personnel Policies were facially unconstitutional. On appeal, the Court of Appeals affirmed the circuit court's decision in part with respect to appellee's due process rights, but reversed the circuit court in part as to the issue of the constitutionality of the COJ Personnel Policies. As to the latter decision, the Court held that the issue of the constitutionality of the COJ Personnel Policy was not properly before the circuit court. The AOC, which was ultimately responsible for the decision to terminate appellee, was the head of the judicial branch and its administrative division, meaning only the Supreme Court had the authority to determine the *per se* constitutionality of its personnel policies once enacted.

IV. CRIMINAL LAW

A. *King v. Commonwealth*

[2013-CA-001840](#) 04/03/2015 2015 WL 1537611 Rehearing Pending

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred. Appellant sought review of a judgment following a jury verdict convicting him and his co-defendant of trafficking in a controlled substance. The Court of Appeals affirmed. First, the Court held that appellant was not denied the right to a unanimous verdict when the trial court sent the jury to deliberate further when, upon polling the jury, one juror indicated that she was uncertain in her verdict. The Court explained that the trial court acted in accordance with KRS 29A.320(3), and there was no indication that the initial verdict was given involuntarily or that the indecisive juror was subsequently coerced in any way. Second, the Court found no palpable error in the trial court's refusal to strike for cause a juror who was a uniformed police officer. The issue was inadequately preserved because appellant failed to identify the juror he would have stricken with the peremptory challenge he used to strike the police officer; thus, appellant received the jury he wanted. Third, the uniformed police officer's responses to questioning during voir dire were not palpable error because they did not constitute testimony, did not require the jurors to commit in advance to a particular view of the evidence, and did not bias the remaining jurors. Finally, the Court held that the closing argument made by co-defendant's counsel drew reasonable inferences from the evidence, and consequently the trial court did not abuse its discretion in denying appellant's objection to the remarks.

V. CUSTODY

A. Robison v. Theele

[2013-CA-001077](#) 04/24/2015 2015 WL 1869486 Released for Publication

Opinion by Judge Combs; Chief Judge Acree and Judge Maze concurred. After the death of a divorced mother with primary residential custody of two minor children, the children's maternal grandparents filed a petition to be designated the *de facto* custodians of the children and a motion for an order maintaining the visitation schedule previously followed. The circuit court entered orders maintaining the visitation schedule, granting grandparents *de facto* custodian status, and holding father in contempt, among other things. Father appealed and moved for a stay, which was granted. The Court of Appeals vacated and remanded, holding that the circuit court could not grant the *ex parte* motion to maintain the visitation schedule and that Father could not be held in contempt of the *ex parte* order granting the motion. The Court further held that the grandparents' petition to be designated the *de facto* custodians of the children was premature and that the circuit court could not award grandparent visitation absent findings supporting a conclusion that visitation was in the children's best interest.

B. W.R.L. v. A.H.

[2014-CA-001240](#) 04/17/2015 2015 WL 1746240 DR Pending

Opinion by Chief Judge Acree; Judge D. Lambert concurred; Judge Maze concurred by separate opinion in which Chief Judge Acree joined. The Court of Appeals reversed a family court order in an adoption proceeding that granted intervention to a non-custodian, non-parent of a child who was the subject of a stepparent adoption petition and dismissed the case. The family court had held that the intervening party had standing in the adoption action based on *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). However, the Court of Appeals held that the basis for standing to pursue custody identified in *Mullins*, found in KRS 403.800(13) and KRS 403.822, was made expressly inapplicable to adoption proceedings by KRS 403.802. Furthermore, the intervening party had not obtained a custody order under *Mullins* before seeking intervention, nor had the party either alleged facts or presented evidence in the adoption proceeding that would have satisfied the physical custody requirement of KRS 403.800(13)(a) for “a person acting as a parent” to permit standing under *Mullins* to pursue custody in a separate proceeding. The Court could find no alternative basis for affirming the family court and, therefore, reversed and remanded the case with instructions to reinstate the stepparent adoption petition.

VI. DAMAGES

A. *Service Financial Company v. Ware*

[2013-CA-002121](#) 04/10/2015 2015 WL 1611798 Rehearing Pending

Opinion by Chief Judge Acree; Judges Stumbo and Taylor concurred. The Court of Appeals granted discretionary review to address appellant's appeal of an opinion by the Franklin Circuit Court affirming a Franklin District Court order of default judgment that limited post-judgment interest on a retail installment contract to 12% per annum. Appellant is the assignee of a retail installment contract executed by appellee. Appellee defaulted, and appellant filed suit to collect on the contract. After appellee failed to respond to the lawsuit, appellant moved for default judgment and, citing KRS 360.040 - which allows a court to deviate from the statutory post-judgment interest rate of 12% when a party has agreed to accruing interest on a written obligation - requested post-judgment interest at the rate of 15% per annum, the purported interest rate contained in the contract. The district court denied the claim of 15% post-judgment interest and allowed only 12% post-judgment interest. The circuit court affirmed, finding the damage claim to be an unliquidated sum. The Court of Appeals granted discretionary review and affirmed on the alternative ground that the contract sued upon was a retail installment contract in which appellee agreed to pay the cash price of the vehicle plus a time price differential (finance charge), but did not agree to the accrual of interest at any rate, much less a rate in excess of that stated in KRS 360.040. Because the contract bore no interest, appellant was only entitled to post-judgment interest at the statutory rate of 12% per annum.

VII. FRAUD

A. Norwich v. Norwich

[2014-CA-000216](#) 04/17/2015 2015 WL 1746347 Released for Publication

Opinion by Judge J. Lambert; Judges Stumbo and Taylor concurred. The cohabitant of 4.87 acres of land brought suit against the holder of a deed, his brother, alleging fraudulent conveyance of his one-half undivided interest in the property. The deed holder counterclaimed, alleging trespass. Following a bench trial, the circuit court entered judgment in favor of the cohabitant, ordering the deed holder to execute a quitclaim deed transferring the cohabitant's half-interest in the property back to him. The Court of Appeals affirmed, holding that the evidence supported the circuit court's conclusion that the holder committed fraud in inducing his brother to sign the deed transferring full ownership of the property to him. The Court concluded that the evidence supported the circuit court's findings that appellant's version of events was not plausible and that fraud had been committed, despite the court's finding that the deed had not been altered, when considered in conjunction with the familial relationship and their past business dealings related to the property.

VIII. IMMUNITY

A. *Kentucky River Foothills Development Council, Inc. v. Phirman*

[2013-CA-001858](#) 04/17/2015 2015 WL 1746483 DR Pending

Opinion by Judge Jones; Judge Clayton concurred; Judge VanMeter dissented via separate opinion. The estate and minor children of an individual who committed suicide after leaving a substance abuse treatment program brought a wrongful death action against the private nonprofit corporation that operated the program pursuant to a contract with the Department of Corrections. The corporation moved for summary judgment, arguing that its designation as the community action agency to combat poverty in several counties entitled it to governmental immunity. The circuit court denied the motion and the Court of Appeals affirmed, holding - as a matter of first impression - that the corporation was not entitled to governmental immunity. Even if providing services to the poor at the county level was an integral government function, the corporation was not created by or at the behest of the state or any county, but by private citizens. Moreover, the corporation's designation as a community action agency did not transform it into an entity created by the county, despite subjecting the corporation to additional oversight, but merely allowed it to receive and disburse federal grant funds. The corporation remained free to, and did, offer services and programs outside the scope of its designation.

IX. JUVENILES

A. *T.J. v. Bell*

[2013-CA-001664](#) 04/10/2015 2015 WL 1640426 DR Pending

Opinion by Judge Kramer; Chief Judge Acree concurred; Judge Thompson dissented via separate opinion. Appellant was charged with murder and first-degree robbery, and the offenses were alleged to have occurred when he was sixteen years old. Appellant moved for a competency hearing in district court. The Commonwealth objected on the grounds that, *inter alia*, it had moved for appellant to be proceeded against as a youthful offender pursuant to the mandatory transfer provision in KRS 635.020(4), and it had requested a hearing on that motion. Following a hearing on the Commonwealth's objection, the district court concluded that it did not have jurisdiction to hold a competency hearing before the Commonwealth's KRS 635.020(4) motion was decided regarding whether the district court was mandated to transfer the case to circuit court. Appellant filed a petition for a writ of mandamus in the circuit court asking it to direct the district court to hold a competency hearing prior to conducting the transfer hearing. The circuit court denied appellant's petition, reasoning that because the Commonwealth intended to proceed against appellant as a youthful offender under KRS 635.020(4), if the district court found probable cause of appellant's age and commission of a felony involving a firearm existed, then it was mandatory for the district court to transfer the case to circuit court; the district court had no other jurisdiction to act in the case. The circuit court also found that appellant did not sufficiently show that there was no adequate remedy on appeal or that he would suffer irreparable harm if the court did not grant the writ of mandamus. The Court of Appeals affirmed the circuit court's decision. The Court reasoned that pursuant to KRS 635.020(4), the district court's only jurisdiction initially was to determine if probable cause existed that appellant used a firearm in the commission of a felony when appellant was fourteen years of age or older. If the district court so found, then it was required under that statute to transfer the case to the circuit court without additional proceedings. The Court noted that it is fully within the power of the General Assembly to limit the jurisdiction of the district court. Therefore, the Court determined that appellant's petition for a writ of mandamus was properly denied. In dissent, Judge Thompson opined that the KRS 635.020(4) transfer hearing was a critical stage of the proceedings. Accordingly, he concluded that appellant was entitled to a competency hearing to determine if he could participate and meaningfully assist counsel in a probable cause hearing.

X. PROPERTY

A. *KL & JL Investments, Inc. v. Lynch*

[2012-CA-001652](#) 04/17/2015 2015 WL 1451025 DR Pending

Opinion by Judge Jones; Chief Judge Acree and Judge VanMeter concurred. The appeal concerned a property dispute between appellant and several other landowners in close proximity to appellant's tract of land. The circuit court ruled that the landowners could enforce a restrictive covenant limiting appellant's development of the tract to a single-family residence. The Court of Appeals affirmed, holding that the landowners presented the circuit court with substantial evidence to support its conclusions that: 1) privity of estate existed; 2) the restrictions touched and concerned the land; and 3) the original grantor included the restrictions as part of a general plan or scheme of development. Accordingly, the Court found no error on the part of the circuit court in concluding that the restrictions ran with the land and were enforceable by the landowners, and that the original grantor's attempt to release the restrictions was ineffective. Finally, the Court concluded that there was insufficient evidence of a change in condition sufficient to void the restrictions contained in appellant's deed.

XI. WORKERS' COMPENSATION

A. *Ervin Cable Construction, LLC v. Lay*

[2014-CA-001047](#) 04/03/2015 2015 WL 1537619 Released for Publication

Opinion by Judge VanMeter; Judges Clayton and Nickell concurred. The injured employee of a subcontractor brought a negligence action against the contractor. The circuit court denied the contractor's motion for summary judgment, but the Court of Appeals reversed and remanded, holding that the contractor was entitled to "up-the-ladder" immunity from tort liability as to the employee. The Court noted that even if there was no written agreement between the contractor and the subcontractor; the record reflected that the employee suffered the injury in the course and scope of his employment with the subcontractor and was receiving workers' compensation benefits from the subcontractor for his injury. Moreover, a written agreement between the contractor and subcontractor was not necessarily required, since the facts clearly established the contractor/subcontractor arrangement.