

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**DECEMBER 1, 2019 to DECEMBER 31, 2019**

**I. CHILD CUSTODY AND RESIDENCY**

**A. *Childress v. Hart***

[2019-CA-000113](#) 12/20/2019 2019 WL 6974261

Opinion by Judge Goodwine; Chief Judge Clayton and Judge Dixon concurred.

Appellant challenged a family court order requiring her to relocate the parties' daughter to Hardin County and to re-enroll her at her previous elementary school there. On appeal, appellant argued that the family court erred by failing to issue specific, written findings of fact regarding whether relocation was in the child's best interest. The Court of Appeals: (1) vacated the order for a failure to make any specific findings, as required by CR 52.01, regarding whether relocation was in the child's best interest; and (2) remanded the case to the family court for specific findings of fact and separate conclusions of law.

## II. CORRECTIONS

### A. *Hopkins v. Smith*

[2018-CA-001237](#) 12/20/2019 2019 WL 6974263

Opinion by Judge Taylor; Chief Judge Clayton and Judge Acree concurred.

The Court of Appeals affirmed the dismissal of appellant's petition for a declaration of rights regarding the Department of Corrections' policies and procedures (CPP) governing inmates' finances. Appellant specifically challenged CPP 15.7, which prohibits an inmate from sending money outside the institution and limits an inmate from having access to more than \$1,000 in their institutional account. The Court held that CPP 15.7 did not act to "confiscate" appellant's funds. Instead, it temporarily restricted his access to some of his funds and there is a difference between the inmate's ownership rights in the property and the inmate's right to possess the property while in prison. The Court further held that CPP 15.7 did not present an atypical and significant hardship on prisoners and that the rule was rationally related to institutional security.

### III. CRIMINAL LAW

#### A. *Kirksey v. Commonwealth*

[2017-CA-000398](#) 12/20/2019 2019 WL 6974267

Opinion by Judge Lambert; Judges Maze and L. Thompson concurred.

Appellant pled guilty to manufacturing methamphetamine, first offense. Nearly four years later, after his probation was revoked, appellant filed a motion to vacate, set aside, or correct his conviction pursuant to CR 59.01(g) and CR 60.02(a)-(b). The motion was denied, and this appeal followed. On appeal, appellant attempted to raise an ineffective assistance of counsel claim. However, the Court of Appeals declined to consider the claim because he did not raise it before the circuit court; moreover, he had failed to file an RCr 11.42 motion within the three-year post-judgment time limit for filing such under RCr 11.42(10). The Court affirmed as to appellant's other claims, noting that his motion specified CR 60.02(a) and (b) as grounds for relief - meaning he was required to bring his motion "not more than one year" after judgment was entered against him on December 20, 2012. Here, appellant filed his CR 60.02 motion on July 20, 2016 - nearly four years post-judgment. Thus, the circuit court did not err in denying the motion. As for the denial of appellant's CR 59.01(g) motion, the Court held that appellant failed to establish that he could not have produced evidence of a witness's dishonesty through an exercise of reasonable diligence. Further, the timeframe for filing a CR 59.01(g) motion is ten days after entry of judgment under CR 59.02, and nearly four years had passed between appellant's conviction and when his CR 59.01(g) motion was filed.

#### IV. FAMILY LAW

##### A. *Blackaby v. Barnes*

[2019-CA-000292](#) 12/06/2019 2019 WL 6646463

Opinion by Judge Goodwine; Judge K. Thompson concurred; Judge Lambert concurred and filed a separate opinion.

Appellant challenged an order denying his petition for grandparent visitation. He argued that the circuit court erred in ruling that he did not have standing to pursue visitation after appellee, the child's maternal grandmother, adopted the child. Appellant is the child's paternal grandfather. The child's mother consented to the adoption and the father, who contested the adoption, died during the adoption proceedings. The Court of Appeals determined that the circuit court did not palpably err by denying visitation because appellant never preserved his right to have visitation with the child by pursuing same under KRS 405.021 prior to the father's death.

##### B. *Commonwealth v. H.K.*

[2019-CA-000775](#) 12/20/2019 2019 WL 6974150

Opinion by Judge K. Thompson; Judge Lambert concurred; Judge Nickell dissented and filed a separate opinion.

The Commonwealth appealed from a summary dismissal of a dependency, neglect, and abuse (DNA) petition filed due to excessive absenteeism from school by a kindergartener on the basis that the facts presented did not meet the statutory requirements for abuse or neglect. By a 2-1 vote, the Court of Appeals affirmed, holding that there can be no educational neglect of a five-year-old for excessive absenteeism pursuant to KRS 600.020(1)(a)8. because school attendance for a child of that age is optional rather than mandatory pursuant to KRS 158.030(2). In dissent, Judge Nickell noted that while he agreed with the majority that school enrollment for a five-year-old is discretionary, the majority's position ignored the plain statutory language of KRS 159.010(1)(a), which requires that parents of "any child who has entered the primary school program ... shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session." Judge Nickell opined that since Mother chose to enroll her five-year-old child in school, she was required to comply with the clear legislative mandate to ensure her child was present on each day school was in session.

## V. NEGLIGENCE

### A. *Coppage Construction Company, Inc. v. Sanitation District No. 1*

[2018-CA-000419](#) 12/13/2019 2019 WL 6795706

Opinion by Judge Spalding; Judges Combs and K. Thompson concurred.

The Court of Appeals affirmed in part and reversed in part the circuit court's grant of summary judgment in favor of Sanitation District No. 1. against the claims of Coppage Construction Company, Inc. The construction company was a subcontractor on a project of sewer improvement for Sanitation District No. 1. The Court held that the negligence *per se* doctrine, as codified by KRS 446.070, did not provide a private right of action to Coppage for alleged violations of KRS 220.290, which requires the posting of performance bonds on sanitation projects, or KRS 220.135(7)(a), which provides that a sanitation district is responsible for the construction and improvement of sewer and drainage facilities which it owns. The Court further held that summary judgment was appropriate on Coppage's claims that the Sanitation District could be responsible for damages to it for negligence in hiring the general contractor, that it failed to properly supervise or manage the general contractor, and that the general contractor was merely an agent of the Sanitation District. The Court did reverse and remand the circuit court's grant of summary judgment pursuant to KRS 362.225, partnership by estoppel, because Coppage's allegations that the Sanitation District made representations that it was partnering with the general contractor created a material issue of fact as to whether Coppage relied upon same to its loss. The Court held that Coppage made a cognizable claim as a matter of law and summary judgment was therefore improper on that issue.

## VI. PROPERTY

### A. *Miller v. Skiles*

[2018-CA-000935](#) 12/13/2019 2019 WL 6794402

Opinion by Judge Spalding; Judges Acree and L. Thompson concurred.

Appellant challenged the summary disposition of a dispute involving an easement to a garage. The Court of Appeals affirmed, agreeing with the circuit court's conclusion that the easement had been extinguished by joinder of the dominant and servient estates prior to appellant's acquisition of his property, as well as its conclusion that the extinguished easement was not revived by its mere mention in subsequent conveyances of the estates at issue. The Court further held that appellant's failure to list the issue of reversing the circuit court's judgment regarding adverse possession or prescriptive easement in his prehearing statement precluded review of those issues.