

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JANUARY 01, 2021 to JANUARY 31, 2021

I. ADOPTION

A. A. K. H. VS J. D. C., ET AL.

[2020-CA-0380](#) 01/22/2021 2021 WL 219210

Opinion by JONES, ALLISON, E.; ACREE, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Stepfather filed a petition for adoption of Child against the consent of Biological Father. Biological Father opined the hearing should be bifurcated. Stepfather opposed, arguing it was improper to conduct a termination hearing under KRS Chapter 625 apart from an adoption hearing. The family court entered an order bifurcating the proceeding. Following the hearing, the family court found there was no abandonment by neglect under KRS Chapter 625 and declined to terminate Biological Father's parental rights. The Court reversed and remanded with directions to the family court to follow the adoption statutes set forth in KRS Chapter 199. The Court noted that bifurcation in an adoption proceeding is unusual but not necessarily reversible error. So long as the four considerations surrounding an adoption without consent are properly considered and findings and conclusions are made in accordance with KRS Chapter 199, the family court could conceivably bifurcate the proceeding. The Court further held that an adoption without consent does not require that all the elements of the termination statute be satisfied. Significantly, there is no requirement that the child has been abused or neglected. KRS 199.500(4) provides adoption without consent may be granted if it is pleaded and proved that *any*, not *all*, of the provisions of KRS 625.090 are met. The family court erroneously believed Stepfather had to satisfy all prongs of the parental termination statute before it could grant adoption.

II. ARBITRATION AGREEMENTS

A. LEGACY HEALTH SERVICES, INC., ET AL. VS CHRISTOPHER JACKSON, III, AS ADMINISTRATOR OF THE ESTATE OF CHRISTINE JACKSON

[2019-CA-1770](#) 01/15/2021 2021 WL 137772

Opinion by ACREE, GLENN E.; KRAMER, J. (CONCURS) AND TAYLOR, J. (CONCURS AND WRITES SEPARATE OPINION)

Appellants, who own and operate a nursing care facility, appealed from an order denying their motion to compel arbitration of medical negligence claims brought by Christopher Jackson, III, as guardian for his mother, Christine. The Court reversed and remanded, holding that under *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017), KRS 387.500, *et seq.* may not be interpreted in a way that recognizes a guardian's authority to enter into contracts generally but denies a guardian's authority to execute an arbitration agreement. This is so because *Kindred* prohibits adoption of a legal rule singling out arbitration agreements for disfavored treatment. The Court further noted that the scope of authority of a guardian is much broader than that of a traditional power-of-attorney.

B. CAMBRIDGE PLACE GROUP, LLC D/B/A CAMBRIDGE PLACE, ET AL. VS VICTORIA MUNDY, ET AL.

[2019-CA-1923](#) 01/22/2021 2021 WL 219206

Opinion by DIXON, DONNA L.; CLAYTON, C.J. (CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION) AND JONES, J. (CONCURS)

Appellants, who own and operate a nursing care facility, challenged a Fayette Circuit Court order denying their motion to compel arbitration on negligence claims brought by the estate of a former resident. At issue was an arbitration agreement signed by the resident's wife, his attorney-in-fact. The circuit court held that there was not a valid agreement with the resident where the wife designated she signed solely in her legal representative capacity as his wife, not his attorney-in-fact, and spouses are not authorized to bind one another to arbitration. Affirming, the Court held that a signatory's designation of capacity is controlling.

III. CRIMINAL LAW

A. COMMONWEALTH OF KENTUCKY VS KRISTEN M. NORTON

[2019-CA-1809](#) 01/08/2021 2021 WL 68310

Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Norton, who was charged with twelve counts of unlawful transaction with a minor, endangering the welfare of a minor, possession of drug paraphernalia, and possession of marijuana, moved to suppress evidence seized under a search warrant issued following a warrantless entry and search of her apartment. The matter began as part of an unrelated investigation by the Kentucky State Police into the theft of some firearms. The Trooper determined that Harris, a person who had been living with the victim, was likely involved. The victim further advised the Trooper that Harris was known to associate with M.B., a juvenile. Two Troopers arrived at an apartment complex where K.N., another juvenile with whom M.B. was known to associate, resided. One of the Troopers knocked, and Norton answered the door. Both Troopers testified that they

could smell marijuana when the door opened, but neither Trooper observed any criminal activity at the time. Norton offered to check if M.B. or Harris was present. When she started to close the door, the Troopers prevented her and entered the apartment. The Troopers walked through the apartment, eventually finding M.B. and Harris, along with several other juveniles. After removing M.B. and Harris, one of the Troopers asked Norton for permission to search the apartment. She declined and requested he obtain a warrant. On advice of an assistant county attorney, the Trooper conducted another sweep of the apartment, which found additional juveniles but no contraband. The Troopers then obtained a search warrant. The subsequent search produced the stolen firearms, marijuana, and drug paraphernalia. The trial court granted the suppression motion, finding no exigent circumstances to justify the warrantless entry. The Commonwealth argued that the warrantless entry and search was justified under the “emergency aid” exception and the need to prevent the destruction of evidence. However, there was no evidence that any person in the apartment was in imminent danger or in need of immediate assistance. Furthermore, when the Troopers entered the apartment, they only had a suspicion that M.B. could be there and had no direct information that Harris was with him at the time. And while the smell of an illegal substance may provide probable cause for a search warrant, it is not sufficient to justify a warrantless search absent a showing of exigent circumstances. Finally, the Court held that the mere possibility that evidence may be destroyed is not sufficient to constitute exigent circumstances to justify a warrantless entry. Since the Commonwealth failed to prove exigent circumstances, the Court affirmed the trial court’s granting of the motion to suppress evidence recovered from the search.

B. COMMONWEALTH OF KENTUCKY VS REBECCA DAWN HAMPTON

[2020-CA-0055](#) 01/22/2021 2021 WL 219527

Opinion by TAYLOR, JEFF S.; CLAYTON, C.J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

The Commonwealth of Kentucky appealed from an order granting Appellee’s motion to vacate and expunge her prior felony conviction. In 2009, Appellee was charged with trafficking in a controlled substance within 1,000 yards of a school, which was a Class D felony. She was sentenced to one year of imprisonment, which was probated for three years. On appeal, the Commonwealth argued the circuit court erroneously granted the motion because expungement was precluded by KRS 431.073(1)(d), asserting the statute is applicable to only those persons convicted of a Class D felony prior to January 1, 1975. The Court affirmed, holding that the statute clearly creates two classes of persons eligible to apply for expungement: a person convicted of a Class D felony, or a person convicted of an offense prior to January 1, 1975, which was punishable by not more than five-years’ incarceration.

IV. DISABILITY

A. LADONNA MAY VS BOARD OF TRUSTEES OF KENTUCKY RETIREMENT SYSTEMS

[2020-CA-0110](#) 01/08/2021 2021 WL 68068

Opinion by DIXON, DONNA L.; COMBS, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Ladonna May challenged an order upholding Kentucky Retirement Systems' denial of her disability benefits application as untimely where it was deposited with the mail carrier on the due date instead of filed with the agency as required by law. KRS 61.600(1)(c); 105 KAR 1:210, Section1(2)(a). Appellant argued the Court should (1) reverse *Jenny Wiley Health Care Center v. Commonwealth of Kentucky Cabinet for Human Resources*, 828 S.W.2d 657 (Ky. 1992), wherein the Kentucky Supreme Court held under similar facts that strict compliance with agency regulations was required; and (2) deem her application timely pursuant to CR 76.40. Affirming, the Court held that *Jenny Wiley* was dispositive of the result and was not subject to reversal by the Court. SCR 1.030(8)(a). The Court further held that CR 76.40 was inapplicable where the application was required to be filed with the agency, not an appellate court.

V. DOMESTIC VIOLENCE

A. JOHNATHAN JONES VS GLYNIS MARIA JONES

[2020-CA-0265](#) 01/08/2021 2021 WL 68316

Opinion by GOODWINE, PAMELA G.; CLAYTON, C.J. (CONCURS) AND KRAMER, J. (CONCURS)

Johnathan Jones appealed from an interpersonal domestic violence order entered against him by the Fayette Family Court in favor of his sister-in-law, Glynis Maria Jones. On appeal, Johnathan argued the family court improperly interpreted KRS 456.010(6) to include attempted sexual assault and abused its discretion in finding by a preponderance of the evidence that he attempted to sexually assault Glynis, stalked her, and committed sexual abuse in the third degree. The Court determined KRS 456.010(6) must be read to include attempted sexual assault, and sufficient evidence existed in the record to support the family court's findings of attempted sexual assault, stalking, and sexual abuse in the third degree.

VI. MUNICIPAL EMPLOYEES AND OFFICERS

A. CLARK COUNTY ATTORNEY VS TRAVIS THOMPSON, ET AL.

[2019-CA-1349](#) 01/08/2021 2021 WL 68331

Opinion by THOMPSON, KELLY; MAZE, J. (CONCURS IN RESULT ONLY) AND L. THOMPSON, J. (CONCURS)

KRS 83A.080(1) requires a non-elected municipal office to be created via ordinance. Because the City of Winchester, Kentucky, did not pass an ordinance creating the position of Winchester police officer, the Court concluded that Winchester police officers must be municipal employees, not municipal officers. Consequently, Appellee Travis Thompson could serve simultaneously as both a Winchester police officer and a Clark County fiscal court magistrate.

VII. PROPERTY

A. SUZANNE WHEELER, ET AL. VS KATHARINE LAYTON

[2018-CA-1748](#) 01/15/2021 2021 WL 137358

Opinion by TAYLOR, JEFF S.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellants Suzanne Wheeler and Jackson Day Wheeler appealed from a circuit court order dismissing Katharine Layton as a party to their lawsuit against the Estate of Matthew Layton and Katharine Layton for alleged claims arising upon Matthew Layton's death. The Court affirmed. Matthew and Katharine were married for fourteen years before divorcing in 2017. Matthew subsequently died. Suzanne filed a complaint seeking to dispute the disallowance of her claims against the Estate pursuant to KRS 396.055. The complaint further alleged claims against Katharine individually in regards to a \$70,000 check payable to Suzanne drawn on Matthew and Katharine's joint checking account that had not been delivered to Suzanne at the time of Matthew's death, as well as certain real property owned jointly by Matthew and Katharine during their marriage, with respect to which Suzanne asserted an ownership interest by virtue of a disputed holographic will. The circuit court concluded Katharine was the legal owner of both the bank account and real property upon Matthew's death, and thus there was no legal basis for any claim by Suzanne against Katharine. The Court held the bank account was a jointly owned account by Matthew and Katharine with a right of survivorship as set forth in KRS 391.315. It further held the \$70,000 check was an incomplete gift because it was not delivered to Suzanne before Matthew's death. Therefore, Katharine had no legal obligation to honor the check. Next, the Court held that because Katharine and Matthew acquired the real property while married, their ownership initially constituted a tenancy by the entirety. Upon entry of the decree of dissolution, Katharine and Matthew held the real property as tenants in common because a decree of dissolution, by operation of law, terminates a tenancy by the entirety and the concomitant right of survivorship to the entire estate. The Court held that although Matthew and Katharine continued joint ownership of the real property as tenants in common after their divorce, nothing prevents a husband and wife from agreeing to hold title to real property as joint tenants with a right of survivorship after their divorce. The issue whether such an intent is reflected in the settlement agreement

between Matthew and Katharine was not identified as an issue on appeal, and Suzanne was not a party to the settlement agreement and has no standing to assert a claim for alleged violations of it. Therefore, though the Court disagreed with the circuit court's legal analysis regarding the ownership of the real property upon Matthew's death, it affirmed the circuit court's grant of summary judgment for Katharine dismissing the claims asserted by Suzanne against her.

VIII. QUALIFIED OFFICIAL IMMUNITY

A. **LARRY ELKINS, ET AL. VS WESTERN SHORES PROPERTY OWNERS ASSOCIATION, INC.**

[2020-CA-0228](#) 01/08/2021 2021 WL 68335

Opinion by DIXON, DONNA L.; COMBS, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellants appealed an order denying their motion to dismiss claims against them in their individual capacities. The Court affirmed. The case arose from the failure to complete roadways in Western Shores Subdivision; the roadways are governed by Subdivision Regulations of Calloway County, Kentucky. Prior to approval of the final plat, the developer was required to post surety bond, ensuring completion of subdivision's roadways; however, the bond expired prior to completion. Western Shores Property Owners Association, Inc. sued County Defendants because they failed to properly bond roads as mandated by the regulations, the roads were incomplete, and County Defendants refused to accept the roads under their jurisdiction for regular maintenance. The trial court dismissed the negligence claims against County Defendants in their official capacities as barred by sovereign immunity but did not dismiss the negligence claims against County Defendants in their individual capacities. The Court held County Defendants were not entitled to qualified official immunity because their actions were ministerial rather than discretionary. The Court discussed the use of the words "may" and "shall" in the regulations which demonstrated County Defendants' actions in the case were unquestionably ministerial in nature.

IX. TRIAL VERDICTS

A. **LAUREN SAVAGE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JAMES SAVAGE VS ALLSTATE INSURANCE COMPANY, ET AL.**

[2017-CA-0615](#) 01/15/2021 2021 WL 137261

Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

Allstate and Hartford each acquired salvage vehicles, a Toyota and a Jeep, respectively, from their insureds. Allstate and Hartford then contracted Co-part, a

national auto and salvage dealer, to sell the vehicles. One of Co-part's "members," a Mexican auto dealer named Baraza, purchased the vehicles at online auction sales. Baraza dispatched an agent, Ramos, to pick up the vehicles in Maryland and Kentucky. Co-part released the Toyota to Ramos at its Maryland facility. Ramos drove the vehicle to Co-part's Kentucky facility, where Co-part released the Jeep to Ramos. Ramos attached temporary permits he had obtained from the State of Arizona to each vehicle and connected the Jeep to the Toyota by means of a tow bar. The vehicles were subsequently involved in the subject accident on I-65, in which James Savage was killed. The trial court dismissed the Estate's claims against Ramos, Allstate, Hartford, and Co-part and its executives. It also denied the Estate's motion to file an amended complaint naming Liberty Mutual, Co-part's insurance carrier. The trial court permitted the Estate's common law claims for negligent entrustment to go forward against Co-part and its Louisville employees. The jury found that neither Co-part nor its employees was liable under these common law claims. The jury awarded a judgment against Chapa, the sole remaining defendant, for \$75,000 in compensatory damages and \$5 million in punitive damages. The jury also awarded \$500,000 for loss-of-consortium to Savage's widow, and the trial court entered a judgment on the jury verdict.

On appeal, the Court affirmed the judgment in part, reversed in part, and remanded the matter for a new trial, holding: first, the trial court properly quashed service on Ramos due to the Estate's failure to comply with the Hague Convention and the provisions of KRS 454.210(3)(c), which required an additional mailing from the Secretary of State to Ramos in Mexico. Second, the trial court did not err in dismissing the claims against Allstate and Hartford because their obligations to insure the vehicles ended upon transfer of the vehicle titles at delivery, and they could not be vicariously liable for Co-part's negligence because Co-part was acting only as an independent contractor in selling the vehicles. Third, the claims against Co-part's executives were properly dismissed because they had no responsibilities for supervising or training Co-part employees. Fourth, the trial court did not abuse its discretion in denying the Estate's motions to file amended complaints as there was no evidence to support the assertion that Allstate, Hartford and Co-part were engaged in a joint venture. Fifth, the Estate could only assert the common law negligence claims based upon Co-part's conduct in Kentucky involving the Jeep and not upon the conduct in Maryland involving the Toyota.

Sixth, the trial court did not err in dismissing most of the statutory claims against Co-part because Co-part did not meet the definition of an "owner" or "operator" of the motor vehicles under certain statutes. However, the Court reversed the trial court's dismissal of the Estate's claim under KRS 186A.100 because the statutory term "purchaser for use" means a consumer, as opposed to a dealer-to-dealer transaction. As a result, Co-part had a statutory duty to determine whether the Jeep was properly licensed prior to allowing Ramos to operate it on the highway. Similarly, the Court reversed the trial court's dismissal of the Estate's claim against Co-part under KRS 189.224 because the flat-tow combination employed by Ramos clearly amounted to operating both vehicles for purposes of the statute.

Seventh, the trial court abused its discretion by allowing Co-part to withdraw an earlier admission that Ramos “drove out” the Toyota from its Maryland facility; the Estate was unfairly prejudiced because Co-part waited to withdraw the admission until after discovery had ended. Eighth, the Court affirmed the trial court’s order excluding evidence that Savage was drawing Social Security Disability benefits because as a general rule, the estate of a decedent who had no power to earn money at the time of his death cannot recover for lost disability benefits.

Ninth, the trial court did not abuse its discretion in excluding evidence regarding Liberty Mutual’s role in Co-part’s defense, Allstate’s and Hartford’s roles in the vehicle sales, and Co-part’s statutory duties as a used-car dealer. Tenth, the trial court was not obligated to conduct a *Daubert* hearing prior to excluding portions of the testimonies offered by the Estate’s expert witnesses because the experts were excluded on grounds other than qualifications. However, the trial court improperly excluded the testimony of one of the Estate’s experts as to the duties owed by salvage and impound yards. Eleventh, Co-part’s experts could properly offer opinions about the cause of the accident even though their opinions were based in part upon hearsay contained in police reports. But one of the experts should not have been allowed to offer an accident reconstruction opinion since he admitted that it was outside of the scope of the field for which he was qualified as an expert.

Twelfth, the trial court abused its discretion by allowing evidence that Savage was not wearing a helmet and had prescription medication in his system at the time of the accident. However, evidence of Savage’s prior accidents, medical history, and drug use was relevant to the claim for loss of consortium provided that it was not used as improper character evidence. Thirteenth, the Estate was not entitled to a directed verdict against Co-part on the negligent entrustment claims because there were issues of fact concerning breach and causation. But the trial court properly granted a directed verdict on the punitive damages claims because the Estate failed to present any evidence showing fraud, oppression, malice or gross negligence by Co-part. Finally, the Court held that the Estate had not preserved its request to amend the judgment against Chapa.