**PUBLISHED OPINIONS**
**KENTUCKY COURT OF APPEALS**
**JULY 01, 2021 to JULY 31, 2021**

## I. CHILD CUSTODY AND RESIDENCY

### A. ***SAMANTHA BURGESS (NOW PHILLIPS) VS. JASON CHASE, ET. AL.***

2020-CA-0713 07/23/2021 2021 WL 3117097

Opinion by CALDWELL, JACQUELINE M.; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Samantha (mother) and Jason (father) were granted joint custody of their minor child, with Jason being designated as the "primary possessor parent" and Samantha being ordered to pay Jason child support. Ten years later, Samantha filed a motion to modify custody, requesting that joint custody continue but that she be named the "primary possessor parent." Thereafter, Joyce Chase (Jason's mother) filed a motion to intervene in the proceedings, alleging that she was the *de facto* custodian and should be awarded custody of the child because she had been the child's primary caregiver and financial supporter for nearly thirteen years. The family court entered an order finding that Joyce qualified as a *de facto* custodian and awarding joint custody of the child to Joyce and Samantha, with Joyce having primary residential custody and Samantha having supervised parenting time. On appeal, the Court of Appeals held that the family court misapplied the law in determining that Joyce qualified as a *de facto* custodian. The facts in this case were that although Joyce provided care and financial support for the child, Samantha continued to exercise her parenting time and provided for the child during such parenting time. In Kentucky, parenting a child alongside the natural parent does not meet the *de facto* custodian standard in KRS 403.270(1)(a). *See Chadwick v. Flora*, 488 S.W.3d 640, 644 (Ky. App. 2016). Thus, in this case, the Court held that because Joyce was simply parenting alongside the child's natural parent (Samantha), the family court erred in according Joyce *de facto* custodian status.

## II. CONTRACTS

### A. ***CURTIS GREEN D/B/A GREEN'S TOYOTA OF LEXINGTON, ET. AL. VS. PHILLIP FRAZIER***

2020-CA-0781 07/09/2021 2021 WL 2878360

Opinion by JONES, ALLISON E.; TAYLOR, J. (CONCURS) AND MAZE, J. (DISSENTS AND FILES SEPARATE OPINION)

Frazier purchased what was warranted to him as a new Toyota Tundra truck from Green's Toyota in Lexington. Frazier signed various documents including a purchase contract, an arbitration agreement, and acknowledgment. These three documents included three different arbitration provisions. It also noted venue was in Fayette County and contained a limitation of damages provision. Sometime later, Frazier was receiving routine maintenance at the dealership and saw a truck that intrigued him. It was at this time Frazier learned employees on the lot had wrecked the truck prior to selling it to Frazier, and warranted to him that the vehicle was new. Frazier filed suit in Powell Circuit Court, where he resides. Green's Toyota filed a

motion to dismiss for lack of jurisdiction or improper venue, or to compel arbitration. The circuit court found that the arbitration clause was unenforceable.

The Court of Appeals found that the analysis must direct towards whether the limitation of damages provision in the contract is unconscionable, rather than whether a limitation of damages provision appears in the arbitration provision. We noted we have previously upheld contracts containing limitations of damages provisions when negotiated between two commercial businesses. Here, however, is a commercial business that used a pre-printed contract on an ordinary consumer. If a consumer contract wishes to contain such a provision, it must do so clearly and concisely. Frazier's contract contained three different provisions that were similar but not identical. Additionally, in the "Acknowledgment" checklist, the limitation of damages was omitted, a provision which is a matter of utmost importance to the consumer. The limitation of damages provision is unconscionable. The Court of Appeals will not additionally sever the contract and order the parties to arbitrate.

Judge Maze dissented and wrote a separate opinion, noting that while he agreed with much of the majority opinion, the clause stipulating to venue would have an effect on available remedies to Frazier. Relying on *Genesis Healthcare, LLC v. Stevens*, 544 S.W.3d 645 (Ky. App. 2017), Judge Maze noted it was for the arbitrator to decide whether the limitation of damages provision was unconscionable and whether that renders the entire provision invalid.

## III. CRIMINAL LAW

### A. ***CLINT COLLINS VS. COMMONWEALTH OF KENTUCKY***

2020-CA-0720 07/30/2021 2021 WL 3234276

Opinion by JONES, ALLISON E; GOODWINE, J. (CONCURS) AND KRAMER, J. (CONCURS)

Clint Collins was an inmate at the Letcher County Jail in April 2019. One of the inmates he was placed with tested positive for methamphetamine, leading to all the inmates housed in that cell to be taken to the hospital for x-rays to see if the drug was present in the jail. The inmates were all strip-searched before transport, the cell was searched after they were removed. The vehicle used for transport was searched prior to transport. Once at the hospital, a deputy found a glass vial containing drug residue. No testimony was offered to show were Collins sat in the vehicle, or the inmates' movements during transport. Collins tested positive for methamphetamine. No testimony was offered regarding the vial. Collins was convicted with possession of a controlled substance and promoting contraband. The Commonwealth conceded that his conviction for promoting contraband and possession of a controlled substance violated double jeopardy. Collins' conviction for possession and the three-year sentence is reversed. As to promoting contraband, we held the presence of methamphetamine in a urine test did not mean he knowingly possessed methamphetamine while at the jail. *See Nethercutt v. Commonwealth*, 43 S.W.2d 330 (Ky. 1931) (holding that the presence of alcohol in stomach does not constitute liquor within meaning of the law). Evidence of being under the influence of or having consumed the substance in the past is not by itself proof of present possession. 28A C.J.S. Drugs and Narcotics § 280. The fact that Collins had methamphetamine in his urine was insufficient circumstantial evidence to prove prior possession beyond a reasonable doubt. It is just as likely the glass vial was hidden by one of

the other inmates in the vehicle, and it is unknown that the substance was actually methamphetamine. The promoting contraband charge is reversed.

### B. ***TAMMY FEINAUER VS. COMMONWEALTH OF KENTUCKY***

2020-CA-0471 07/02/2021 2021 WL 2750547

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS)

In an appeal from two reckless homicide convictions, the Court of Appeals concluded that the trial court abused its discretion by admitting text messages in which the defendant discussed prior incidents involving drinking and driving, texting and driving, and speeding where there was no evidence the defendant was engaging in those illegal behaviors at the time of the fatal collision. The text messages were not admissible to show the defendant had consciousness of guilt because those behaviors are contrary to various statutes and all persons are presumed to know the law. The Court concluded the erroneous admission of the text meessages could not be a harmless error because the Commonwealth repeatedly referred to the text messages in its closing argument to show that the defendant's "norm" was to break the law while driving.

## IV. DISSOLUTION OF MARRIAGE

### A. ***JULIUS J. PAOLI III VS. TERESA W. PAOLI***

2020-CA-0295 07/16/2021 2021 WL 3008741

Opinion by TAYLOR, JEFF S.; CALDWELL, J. (CONCURS) AND JONES, J. (CONCURS)

Husband (Julius) appealed a property division order restoring nonmarital property and dividing marital property between Julius and his wife (Teresa). The division of marital property in a dissolution of marriage proceeding is governed by Kentucky Revised Statutes (KRS) 403.190. Citing *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky. App. 2012), the Court of Appeals noted that because KRS 403.190 merely requires "considering" all the factors relevant to an equitable division of marital property, the circuit court has wide discretion in its decision. First, Julius contended the circuit court erred in its division of cash located in a safe-deposit box in the couple's home. Both Julius and Teresa testified before the circuit court as to the nature and amount of cash in the safe-deposit box. Because the credibility of the witnesses in a bench trial is within the sole province of the circuit court, we held that the circuit court did not abuse its discretion in its finding that Teresa took one-half of the cash from the safe-deposit box and left the other one-half for Julius. Next, Julius asserted that the circuit court erred in equally dividing the parties' 2017 joint income tax refund and Julius' retirement accounts. Julius contended that because he was the sole income earner in the relationship, he should be entitled to the full amounts. As for the joint tax refund, the Court held that income earned during the parties' marriage is marital property, subject to division as marital property. *See Dotson v. Dotson*, 864 S.W.2d 900, 902 (Ky. 1993). With regard to the income used to fund the husband's retirement accounts, the Court held that retirement benefits are subject to division as marital property to the extent they were accumulated during the marriage. *See Tager v. Tager*, 588 S.W.3d 183, 185 (Ky. App. 2019). Accordingly, we held that the circuit

court properly considered Teresa's contribution as the homemaker spouse, the duration of the almost 39-year marriage, and Teresa's economic circumstances, including her being disabled.

## V. TERMINATION OF PARENTAL RIGHTS

### A. ***K. D. H., NATURAL MOTHER VS. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, ET. AL.***

2020-CA-1359, 2020-CA-1361 07/16/2021 2021 WL 3008765

Opinion by MAZE, IRV; JONES, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Mother appealed from judgments of the Spencer Family Court terminating her parental rights to her two children. Holding that the findings and conclusions of the family court lacked the support of substantial evidence, the Court of Appeals vacated the judgments and remanded the case with directions to dismiss the Cabinet's termination petition and order resumption of reunification services. Despite a stipulation of neglect based upon a single drug screen, the Court found that Mother's submission to more than 50 drug screens since that time, almost all of which were negative, coupled with a recent assessment from Centerstone that she did not "currently meet criteria for a substance use diagnosis or substance abuse treatment," constituted overwhelming evidence that the children could no longer be considered to neglected due solely to their Mother's drug use. The Court of Appeals also found no evidence that the Cabinet had provided reasonable efforts to reunite the family, concluding that the requirements of Mother's case plan lacked any reasonable prospect of satisfactory completion given her circumstances. In particular, a $50 visitation charge to engage in supervised visitation was viewed to be unconscionable given the family court's prior finding of indigency and appointment of counsel to represent Mother. The Court of Appeals emphasized that the evidence clearly showed that Mother did not simply choose to ignore the Cabinet's recommendations, but rather disclosed that despite her indigency and the effects of the pandemic, Mother had made significant efforts to remedy the problem which was the sole cause of the removal of the children from her care. Thus, the evidence fell far short of "evinc[ing] a settled purpose to forego all parental duties and relinquish all parental claims to the child," which are pre-requisites to establishing abandonment, desertion or neglect was by clear and convincing proof. Next, the Court noted that the Cabinet sought to be relieved of its obligation to provide reasonable reunification efforts for this family and filed its termination less than one year from the temporary adjudication order despite the fact that KRS 625.090(2)(j) states that that the fifteen-month period of foster care precede the filing of the termination petition. Finally, the Court of Appeals concluded that Mother had been deprived of procedural due process by the conduct of a Zoom hearing over counsel's objection and in which the family court repeatedly stated that she could not hear Mother's testimony.

## VI. TORTS

### A. ***KATELYN TRAPP JOHNSON VS. THE ESTATE OF CHASE MATTHEW TRAPP KNAPP BY MATTHEW KNAPP, ET. AL.***

2019-CA-0902 07/09/2021 2021 WL 2878590

Opinion by THOMPSON, KELLY; MAZE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Katelyn and Matthew conceived a child (Chase) in 2015. While pregnant with Chase, Katelyn told Matthew that he could either take the child after its birth or she would place the child up for adoption. When Chase was born in November 2015, he went to live permanently with Matthew. Chase died tragically in a car accident in October 2017. Thereafter, Matthew filed a wrongful death action on behalf of himself and as administrator of Chase's estate. Matthew sought a declaratory judgment that Katelyn had abandoned Chase and was not entitled to any wrongful death proceeds pursuant to Mandy Jo's law (Kentucky Revised Statutes 391.033 and 411.137). The Boone Circuit Court granted summary judgment in favor of Matthew and Katelyn appealed. The Court of Appeals held that the decision of whether to apply Mandy Jo's law, which limits the ability of a parent who has "abandoned" their child from enriching themselves in the event that their child predeceases them, should be made on a case-by-case basis. *See Simms v. Estate of Blake*, 615 S.W.3d 14 (Ky. 2021); *Kimbler v. Arms*, 102 S.W.3d 517 (Ky. App. 2003). In this case, there were no factual disputes about whether Katelyn failed to provide monetary support or care for Chase from the time he was born until he died. The Court noted that despite Katelyn's admirable motivations for letting Matthew raise Chase, it is an undisputed fact that she offered no financial support for Chase's upbringing, nor did she make an effort to spend any time with Chase once he left the hospital following his birth. Accordingly, we affirm the trial court's decision to grant summary judgment in favor of Matthew.

### B. ***LEIGH ANN REEVES VS. WALMART, INC., ET. AL.***

2020-CA-0679 07/02/2021 2021 WL 2753244

Opinion by THOMPSON, LARRY E; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Leigh Ann Reeves was assaulted outside of a Walmart. She later sued Walmart for negligence for allegedly failing to keep the parking lot in a reasonably safe condition. The trial court granted summary judgment in favor of the defendants, and found that the assault was unforeseeable; therefore, Walmart owed no duty to Ms. Reeves. The Court of Appeals reversed and remanded. The Court held that Walmart had a duty to protect Ms. Reeves, but whether it breached that duty by failing to protect from a foreseeable injury was a factual issue. The Court relied heavily on *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013), in holding that a foreseeability analysis should be done when considering breach of duty because it is an inherently fact-intensive issue, and that foreseeability was no longer an issue of law to be considered exclusively by the court.

## VII. TRUSTS AND ESTATES

### A. ***PHILIP WILLETT AS HEIR OF FRANCES J. VESSELLS, ET. AL. VS. THE ESTATE OF FRANCES VESSELLS, ET. AL.***

2020-CA-0272 07/16/2021 2021 WL 3008734

Opinion by CALDWELL, JACQUELINE M.; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS)

Upon Frances Vessells' death, several documents were located and presented to determine whether they could be properly considered testamentary. Documents found in a safe deposit box at a local bank included a form will which left all assets of Frances' estate to Frances' husband who had predeceased her, and two pages of testamentary documents in Frances' handwriting which listed nine names and which was entitled "Sixty Percent to names Residual Bequest." The two pages of names found in the safe deposit box was signed by Frances at the top of the page. Documents were also found in a lockbox in Frances' home, including a page signed at the top by Frances which listed several bequests of family heirlooms to two persons, and an unsigned page listing specific requests, including that the house and its contents be sold and any proceeds thereof be given to a charity of her niece's choosing. The circuit court held that the documents together should be considered a valid will and codicils thereto. The Court of Appeals reversed, holding that the handwritten pages were not valid codicils to the form will because they were not "subscribed" by the decedent as required by Kentucky law. Kentucky Revised Statutes 446.060(1) states that a decedent's signature must be at the end of a testamentary writing where the law requires the writing to be signed. The Court held that because Frances signed the notebook pages at the beginning rather than the end, a valid codicil was not created.