PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MAY 1, 2014 to MAY 31, 2014

I. ARBITRATION

A. ***Diversicare Healthcare Services, Inc. v. Estate of Hopkins ex rel. Prince***

2013-CA-001258 05/09/2014 2014 WL 1876136 Released for Publication

Opinion by Judge Caperton; Judges Combs and Dixon concurred. In dismissing the appeal as untimely, the Court of Appeals held that an order denying a motion to compel arbitration was appealable to the same extent as orders or judgments in a civil action, despite its lack of "final and appealable" language, in light of the statute creating an interlocutory right of appeal of "[a]n order denying an application to compel arbitration." KRS 417.220(1)(a) and (2).

B. ***Kindred Healthcare, Inc. v. Henson***

2013-CA-000895 05/16/2014 2014 WL 1998728 Rehearing Denied

Opinion by Judge Nickell; Judges Dixon and Taylor concurred. During the process of admission to a nursing home owned and operated by appellants, the patient was unable to execute the admission documents and designated her son (appellee) to do so for her, stating "I'm too nervous and shaky. Rick, take care of it for me." Appellee executed all documents presented to him, including an optional arbitration agreement, and his mother was admitted to the home. Following the mother's release, appellee, acting as next friend, brought a negligence action against appellants. Appellants moved to compel arbitration pursuant to the agreement executed at admission. However, the trial court, relying on *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), found that appellee was without authority to bind his mother to the arbitration agreement. The Court of Appeals affirmed upon holding that *Ping* was properly applied. The Court held that the grant of authority to appellee was akin to creating a health-care agency with no specific authority granted to settle or resolve disputes. Thus, like the general power of attorney at issue in *Ping*, the general verbal directive here was insufficient to grant actual, apparent, or implied authority to appellee that would bind his mother to any form of alternative, non-judicial dispute resolution. The Court also rejected appellants'

argument that appellee acted solely as his mother's scrivener and not as her agent as both unpersuasive and unpreserved. The Court also rejected appellants' invitation to apply federal preemption principles.

II. ATTORNEY AND CLIENT

A. ***Ford v. Faller***

2013-CA-001298 05/30/2014 2014 WL 2795145 Rehearing Pending

Opinion by Judge Jones; Judges Lambert and Stumbo concurred. This appeal concerned the filing of an attorney's lien pursuant to KRS 376.460, and whether that lien violated KRS 434.155. The Court of Appeals held that appellee's interpretation of KRS 376.460 was not so unreasonable as to make her conduct criminal under KRS 434.155. The Court expressed its belief that the General Assembly's purpose in adopting KRS 434.155 was to protect individuals from liens that are forged, false, or fraudulent. In the case of an attorney's lien, the statute would be violated where an attorney filed a lien related to a matter for which she never worked, misrepresented the nature of fee she was due, or the like. As such, the Court did not believe that the statute was designed to criminalize a mistaken legal interpretation. Accordingly, the Court affirmed the trial court's entry of summary judgment in favor of appellee as appellant could not establish a private cause of action pursuant to KRS 446.070.

III. BUSINESS ORGANIZATIONS

A. ***Li An Chou v. Chilton***

2009-CA-002198 05/23/2014 2014 WL 2154087

Opinion by Judge Stumbo; Chief Judge Acree concurred; Judge Thompson concurred in part, dissented in part, and filed a separate opinion. The Court of Appeals reversed in part and affirmed in part an order dismissing a complaint without prejudice. Appellant brought suit against his business partners for fraud, breach of loyalty, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and misappropriation of funds. He also sought the formal dissolution of the parties' business, a construction company called "Ram.Chou Construction." Appellees moved to dismiss the action, alleging that appellant did not have standing to pursue his cause of action because Ram.Chou was the real party in interest and had not been named in the complaint. The trial court agreed and dismissed the complaint without prejudice. On appeal, appellant argued that he had standing to pursue the claims as an individual. The Court of Appeals held that appellant, as an individual, had standing to pursue the dissolution of the company. The Court also held that appellant had standing to bring suit for the alleged breach of the covenant of good faith and fair dealing and fraud due to provisions contained in Ram.Chou's operating agreement. However, the Court further held that appellant did not have standing to pursue his claims for breach of loyalty, breach of fiduciary duty, and the misappropriation of funds. In dissent, Judge Thompson asserted that appellant had standing to pursue the breach of fiduciary duty claim pursuant to *Patmon v. Hobbs*, 280 S.W.3d 589 (Ky. App. 2009).

IV. CHILD SUPPORT

A. ***Hempel v. Hempel***

2013-CA-001503 05/16/2014 2014 WL 1998729 Released for Publication

Opinion by Chief Judge Acree; Judges Caperton and VanMeter concurred. Appellant, a child support obligor, sought reversal of the family court's denial of his motion to recoup overpayment of support. In affirming, the Court of Appeals clarified *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986), noting that while the Court in *Clay* was influenced by the Maryland case of *Rand v. Rand*, 392 A.2d 1149 (Md. App. 1978), it did not embrace that case *in toto*. *Rand* held that if the child support obligee still has the child support payment in her possession, or has "its equivalent," then the obligor may recover it. However, *Clay* did not include the "equivalent source" language in its distillation of *Rand* and held only that "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support." Here, Mother confirmed that no child support had ever been deposited into the children's savings accounts and that she had not accumulated any funds from unspent child support. Therefore, there was no accumulation of unexpended child support funds from which appellant could recoup the amount overpaid. The Court further held that appellant could not recoup any overpayment from the children's college savings account.

B. ***Wolfe v. Wolfe***

2013-CA-001306 05/30/2014 2014 WL 2795871

Opinion by Judge Stumbo; Judges Jones and Thompson concurred. The Court of Appeals reversed the denial of a motion for reconsideration in which appellant sought child support arrearages in a divorce action. The decree of dissolution was silent as to any child support arrearages. In denying the motion, the trial court held that a mediation agreement entered into by the parties resolved all issues, but the agreement was silent as to child support arrearages; therefore, it would not consider the issue. The Court held that because child support payments become fixed once they accrue, past due payments cannot be modified by a trial court. Therefore, the Court remanded for a hearing on the issue of child support arrearages.

V. CONSUMER PROTECTION

A. ***Elendt v. Green Tree Servicing, LLC***

2013-CA-000698 05/30/2014 2014 WL 2795144

Opinion by Judge Maze; Judges Lambert and Moore concurred. Buyers of a mobile home sold "as is" sued seller for fraud and violation of the Kentucky Consumer Protection Act for misrepresenting through its alleged agents that the home was in "move in" condition. The circuit court granted summary judgment for seller. The Court of Appeals reversed, holding that genuine issues of material fact existed as to whether certain individuals who walked through the mobile home with buyers were agents of seller, whether the alleged agents made misrepresentations concerning the condition of the mobile home, and whether buyers were put on notice of mold during their walkthrough. The Court further held that a clause in the contract for the sale of the mobile home stating that the item was sold "as is" did not preclude buyers from suing seller for fraud or for unfair, false, and deceptive representations in violation of the KCPA.

VI. CONTRACTS

A. ***Enerfab, Inc. v. Kentucky Power Co.***

2013-CA-000753 05/30/2014 2014 WL 2795148

Opinion by Judge Dixon; Judges Caperton and Combs concurred. The injured employee of a maintenance contractor brought a negligence action against an electrical utility company, seeking to recover for injuries sustained in a fall that occurred while the employee was performing maintenance work at a power plant. The utility filed a third-party complaint against the contractor, seeking indemnification for any and all sums recovered by employee. The circuit court entered summary judgment in favor of the utility on its indemnity complaint. The Court of Appeals affirmed. The trial court determined, and the Court agreed, that the contractor was obligated to indemnify the utility for attorneys' fees and all costs of litigation associated with enforcement of the parties' indemnity agreement. The Court held that the "sole negligence" exception contained in the indemnity agreement did not apply because under the undisputed facts, there could be no finding that liability arose from the utility's sole negligence because the injured employee was not wearing the KOSHA-required safety belt at the time of his accident and thus was negligent *per se*. The Court concluded that it was irrelevant under the plain language of the indemnity agreement which parties were negligent so long as the utility was not solely negligent.

VII. CRIMINAL LAW

A. ***B.B. v. Commonwealth***

2011-CA-002044 05/16/2014 2014 WL 1998725 DR Pending

Opinion by Judge Lambert; Judges Combs and Thompson concurred. The Court of Appeals reversed a circuit court judgment affirming the district court's order adjudicating appellant guilty of manslaughter in the second degree, assault in the first degree, and wanton endangerment in the first degree. The charges stemmed from an automobile accident. The Court held that the evidence was insufficient to show that appellant had acted wantonly, as was required to support his convictions. Even though appellant had driven with more than the number of passengers allowed under his restricted driver's license, the passengers testified that he was driving carefully, he had the music turned down, and the passengers were all old enough to make their own decision as to whether to use a seat belt or not. The Court held that because appellant had not acted wantonly, he was not guilty of manslaughter, assault, or wanton endangerment. The Court further held that a license infraction does not amount to wanton conduct, even in the event that the loss of life occurs.

B. ***Epperson v. Commonwealth***

2013-CA-000431 05/09/2014 2014 WL 1873570 DR Pending

Opinion by Judge Maze; Judges Jones and Moore concurred. In a criminal appeal, the Court of Appeals held that the amendment of an indictment to charge appellant under a different subsection of the law prohibiting driving under the influence, which fundamentally altered the defense strategy on the eve of trial, prejudiced appellant's defense; therefore, he was entitled to a continuance and the trial court abused its discretion in denying such. Under the original charge, the Commonwealth was required to prove impairment, whereas under the amended indictment the Commonwealth only had to prove the mere presence of an alleged substance to establish guilt. Consequently, the defense strategy to have appellant admit to ingesting substances - but to present expert testimony that he was not impaired - would have resulted in an admission of guilt under the amended indictment. Therefore, a new trial was merited. The Court further held, however, that appellant had failed to show that toxicology tests for his blood sample lacked reliability; thus, *Daubert* did not preclude admission of the test results or expert testimony regarding the results. The Court further held that the statute governing the inadmissibility of laboratory tests showing the presence of substances for which a defendant had a prescription, KRS 189A.010(4), did not violate equal protection. The statute did not create and treat differently two similarly-situated classes of individuals because it did not provide immunity for those with a prescription. Instead, it merely subtracted a single item of admissible evidence. Moreover, even if it treated similarly-situated drivers differently, the Commonwealth's interest in protecting the public from persons who obtained medication illicitly constituted a rational basis for such treatment.

C. ***Hinchey v. Commonwealth***

2012-CA-000561 05/02/2014 2014 WL 1765193 Released for Publication

Opinion by Judge Maze; Judges Clayton and Nickell concurred. The Court of Appeals held that the warrantless search of appellant's vehicle was proper under the search-incident-to-arrest exception to the warrant requirement. Appellant used his vehicle to flee from police, the police heard a sound like a shot coming from the vehicle as appellant fled his parents' house, appellant was seen reaching for something while he was driving, and - based on the totality of the circumstances - officers had a reasonable basis to conclude that the vehicle contained evidence of the crime for which appellant was arrested. Officers observed several of the items in plain view through the windows of the car, and since the weapons were unsecured and in an open car, the police had a reasonable basis to believe that the evidence could be accessed or destroyed. The Court further held that the search was proper under the inventory search exception to the warrant requirement. Officers intended to tow appellant's car even before they saw the weapons due to the nature of the charges. Moreover, it was the policy of the police department to conduct an inventory search any time that a vehicle was seized, and there was ample cause to seize the vehicle. The Court then held, however, that appellant's possession of two firearms in the vehicle constituted a single course of conduct, and, therefore, one of his two convictions for possession of a handgun by a convicted felon would be set aside as violative of the prohibition against double jeopardy.

D. ***Wood v. Commonwealth***

2013-CA-000369 05/16/2014 2014 WL 1998727

Opinion by Judge Combs; Judges Clayton and Nickell concurred. Following his conviction of criminal mischief in the first degree, fourth-degree assault, and two counts of violating a protective order, appellant asserted error in the penalty stage. The Commonwealth was permitted to inform the jury that appellant had a past conviction of reckless homicide. The circuit court refused to allow appellant to introduce the circumstances of the charge, which reflected that appellant had been involved in a robbery in which his accomplice was killed by the homeowner. On appeal, the Court of Appeals held that it was error for the circuit court to disallow the evidence. The Truth-in-Sentencing statute provides that a defendant is allowed to introduce mitigating evidence that pertains to the circumstances of the offense. The omission of the subject evidence was arguably prejudicial to appellant; therefore, the case was remanded for a new sentencing phase.

VIII. DAMAGES

A. ***Jones v. Marquis Terminal, Inc.***

2013-CA-000702 05/23/2014 2014 WL 2155255 Rehearing Pending

Opinion by Judge Combs; Judges Clayton and Stumbo concurred. An equipment owner brought an action against a company that rented equipment for unpaid rent, conversion, and for an injunction for immediate return of the equipment. Following a bench trial, the circuit court entered judgment in favor of the owner but limited the owner's recovery based on his failure to mitigate damages and recover the equipment. The Court of Appeals reversed the circuit court's conclusion that the owner had failed to mitigate damages. The Court held that while a plaintiff must minimize or avoid losses, his efforts need not be unduly risky, expensive, or burdensome. A defendant also bears the burden of proving that the plaintiff failed to mitigate damages. Observing no failure by the owner as to mitigation of damages, the Court reversed on this issue. The Court also held that an award of pre-judgment interest was due to the equipment owner as a matter of course since there was no dispute regarding either the number of days the company retained possession of the equipment or the rental rate. Finally, the Court held that the owner's claim for conversion was not sustainable under these facts since he did not show that he had sustained tort damages or a loss independent of his contract damages.

IX. EDUCATION

A. ***Board of Regents of Kentucky Community and Technical College System v. Farrell***

2012-CA-001367 05/30/2014 2014 WL 2794977 Rehearing Pending

Opinion by Judge Moore; Judges Lambert and Maze concurred. State employees brought a declaratory judgment action challenging furloughs as implemented by the Education and Workforce Development Cabinet and the Justice and Public Safety Cabinet. The overarching issues raised were whether the furlough authority given to the Executive Branch, as described in the Executive Branch Budget Bill for the 2010-2012 biennium, 1) represented an unconstitutional delegation of authority; 2) violated the equal protection and due process rights of the various employees; or 3) was properly applied to the various employees. The circuit court granted summary judgment in favor of the employees and enjoined the defendants from imposing any additional furloughs on those employees. On appeal, the Court of Appeals affirmed in part and reversed in part. The Court first held that it fell within the General Assembly's constitutional mandate to delegate authority to the Governor and the Executive Branch to reduce appropriations through the furloughs contemplated in the Budget Bill. The Court then held that the furloughs of teachers employed by the Department of Education based on the Executive Branch's budgetary decisions did not violate the teachers' equal protection guarantees under the state constitution by treating those teachers differently from teachers employed by local school districts who were exempt from furlough. The Executive Branch's budgetary decisions could not have "treated" teachers employed by local school boards at all, let alone in a different fashion, because they were not Executive Branch employees and were not subject to or affected by the budgetary decisions of the Executive Branch. Moreover, in terms of procedural due process relative to the furloughs, no state law or other kind of understanding or agreement operated to vest these appellees with a right to anything beyond a written notification by the appointing authority "at least seven (7) calendar days prior to the date of furlough," as provided in the House Bill's effectuating regulation, 101 KAR 5:015E § 2(5)(b).

The Court then held, however, that the furlough authority had been improperly applied to the appellees in two instances. In the first instance, the Executive Branch had purported to furlough the Kentucky School for the Blind, Kentucky School for the Deaf, and Area Technology Center teachers on Labor Day. However, these appellees were never scheduled to work on Labor Day by their Appointing Authority and, under the terms of the House Bill, the furloughs could only have been applied to days and hours where an Appointing Authority had scheduled work. Thus, the Executive Branch had not reduced wages commensurately with a reduction of hours as contemplated by its furlough authority; instead, it had simply paid the appellees less for doing the same

amount of work. In the second instance, the Executive Branch misapplied its furlough authority related to the teachers employed by the Legislative Branch (*i.e.*, the Kentucky Community and Technical College System). Part I(A)(11)(c)(6) of the House Bill was cited as the sole authority for furloughing these appellees. This provision applied to "contract employee[s], or otherwise non-state employee[s], who [are] compensated on an hourly basis[.]" However, the House Bill did not further define "hourly basis"; the plain and ordinary meaning of "hourly basis" is not synonymous with a "salaried" or "monthly basis"; and, these appellees were employed on a salaried or monthly basis. As such, the furlough authority described in the House Bill did not contemplate or apply to these appellees.

B. ***Spalding v. Marion County Bd. of Educ.***

2013-CA-000632 05/02/2014 2014 WL 1765226 DR Pending

Opinion by Judge VanMeter; Chief Judge Acree and Judge Taylor concurred. Appellant, a family literacy instructor who had been employed by a county board of education for nine consecutive academic years, brought an action against the board and the county superintendent of schools. Appellant contested the board's characterization of her employment status as that of a "classified employee" and sought a declaration that her employment status was that of a "certified employee," so as to entitle her to benefits and protections including a continuing contract. The trial court entered summary judgment in favor of the board. On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded. The Court held that the trial court correctly determined, as a matter of law, that appellant's position as family literacy instructor with the board was that of a "classified employee," rather than a "certified employee." The Court then held, however, that a genuine issue of material fact existed as to whether the board's conduct during the course of appellant's employment led appellant to reasonably believe that she was a "certified employee"; therefore, the trial court improperly disposed of appellant's equitable estoppel claim on summary judgment grounds.

X. FAMILY LAW

A. ***B.L. v. J.S.***

2013-CA-000733 05/09/2014 2014 WL 1873615 Released for Publication

Opinion by Judge Jones; Chief Judge Acree and Judge Maze concurred. The Court of Appeals affirmed the trial court's order terminating Father's parental rights to minor child and granting appellees' petition for adoption. The Court held that Father's due process rights were not violated during the adoption when Father was not appointed counsel during a neglect proceeding against Mother. The Court also held that there is no requirement for a court to consider less drastic means than adoption prior to granting an adoption pursuant to KRS 199.500. The Court further held that a step great-aunt and step great-uncle qualify as relatives permitted to adopt a child without adoptive placement by the Cabinet pursuant to KRS 199.470.

B. ***Smith v. Smith***

2011-CA-002306 05/23/2014 2014 WL 2154089 Rehearing Pending

Opinion by Judge Clayton; Judges Jones and Taylor concurred. In a post-dissolution appeal, the Court of Appeals held that the trial court had sufficient evidence to ascertain that assets claimed by the ex-wife to be non-marital were acquired during a joint venture and, therefore, did not require a non-marital characterization. Kentucky courts have held that unwed cohabitators can claim an interest in property that is acquired during a relationship if they can establish a partnership, joint venture, or profit-sharing. Here, the trial court determined that the parties were engaged in a joint venture during the time after their first marriage ended when they lived together but had not yet remarried; therefore, assets acquired during that time period were jointly owned for the purpose of property distribution. The Court further held that the trial court correctly determined that other disputed assets also claimed as non-marital by the ex-wife were commingled to the extent that any non-marital value was untraceable. The Court finally concluded that the trial court did not abuse its discretion in its remaining decisions concerning property distribution and child support.

XI. IMMUNITY

A. ***Estate of Morris v. Smith***

2012-CA-001503 05/16/2014 2014 WL 1998726 DR Pending

Opinion by Chief Judge Acree; Judges Dixon and Thompson concurred. The Court of Appeals affirmed a judgment granting summary judgment in favor of members of the Graves County Fiscal Court, in their individual capacities, on the basis of their qualified official immunity. The Court held that the act of placing or not placing signs and guardrails on county roads is discretionary and not ministerial; this discretionary decision involves policy considerations, fiscal concerns, and alternate safeguards. The Court further held that the failure by the county road foreman and officials to exercise discretion to install a warning sign for a sharp curve of highway that a driver failed to successfully negotiate, resulting in the driver leaving the roadway and striking a tree, did not rise to the level of objective bad faith. The Opinion also addressed the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) and its function and interplay with the exercise of this discretionary act.

XII. MORTGAGES

A. ***Acuff v. Wells Fargo Bank, N.A.***

2012-CA-001221 05/09/2014 2014 WL 1873503 Rehearing Pending

Opinion by Judge Dixon; Chief Judge Acree and Judge Combs concurred. In an action where a purported mortgagee brought a foreclosure action against mortgagors, the trial court granted summary judgment to the purported mortgagee. The Court of Appeals reversed and remanded, holding that where a plaintiff attempts to enforce bearer paper as the holder thereof and a defendant raises an issue as to the actual possession of the original note involved in a mortgage foreclosure, the purported holder has a duty to establish such under Kentucky's Uniform Commercial Code. The Court then held that a genuine issue of material fact as to the purported mortgagee's status as the holder of the original note at the time the foreclosure action was initiated precluded summary judgment.

XIII. SECURITIES

A. ***Rosen v. Com., Public Protection Cabinet, Dept. of Financial Institutions***

2013-CA-001211 05/23/2014 2014 WL 2155266

Opinion by Judge Caperton; Judges Clayton and Nickell concurred. A securities broker sought review of the decision of the Department of Financial Institutions (DFI) that he was an unregistered investment advisor. In affirming, the Court of Appeals agreed with the trial court and the DFI that appellant's actions rendered him an unregistered investment advisor under KRS 292.310(11) and KRS 292.330(8). In actively managing his clients' accounts, appellant had unfettered discretion, buying and selling securities as he saw fit; thus, he was advising his clients as to the prudence of investing in, purchasing, or selling securities through his actions. The clients understood that the trades made by appellant were based on his expertise in trading, and the clients could see what he recommended via trading by accessing their accounts. The Court concluded that to hold otherwise would be to leave investors unprotected, in disregard of KRS 292.530.

XIV. UCC

A. ***American Founders Bank, Inc. v. Moden Investments, LLC***

2012-CA-001276 05/09/2014 2014 WL 1873504 Released for Publication

Opinion by Chief Judge Acree; Judges Dixon and Lambert concurred. The payee on a cashier's check brought an action against a bank for conversion after the check was presented for deposit with a forged endorsement. Following a bench trial, the circuit court entered judgment for payee in the amount of $100,185.92 plus interest. On appeal, the Court of Appeals affirmed. The Court held that, when presented with a claim for conversion against a bank under KRS 355.3-420 which is then met with the defense of KRS 355.3-406(1), the factfinder must: (1) determine the bank's liability under KRS 355.3-420; (2) then determine under KRS 355.3-406(1) whether the bank customer "substantially contribute[d] to an alteration … or to the making of a forged signature on [the subject] instrument"; (3) if not, KRS 355.3-406 is inapplicable; but (4) if so, the factfinder must then allocate the loss between the bank and its customer "according to the extent to which the failure of each to exercise ordinary care contributed to the loss." KRS 355.3-406(2). However, the factfinder need not proceed beyond the first step if the bank fails to preserve its affirmative defense under KRS 355.3-406. The Court also held that not every written or verbal statement in the context of litigation constitutes a judicial admission.

XV. WILLS AND ESTATES

A. ***Briggs v. Kreutztrager***

2013-CA-000020 05/30/2014 2014 WL 2795058

Opinion by Judge Thompson; Judges Clayton and Taylor concurred. The Court of Appeals affirmed a jury verdict finding testamentary documents invalid based on lack of testamentary capacity and undue influence. The Court held that any alleged error in permitting former Kentucky Supreme Court Justice William Graves to testify as an expert witness regarding his personal knowledge of the testator's legal skills and the professional standards for preparation of a will or prejudice was not preserved for review, where the proponent of the will failed to make a single objection during the testimony. The Court also held that the trial court did not abuse its discretion in limiting the cross-examination of Justice Graves concerning the legal principles applicable to testamentary capacity. Further, the Court held that the jury instructions properly did not include abstract legal principles, including legal presumptions. Finally, the Court concluded that the trial court did not commit reversible error when, following the verdict, it declared the will invalid and ordered appellant to appear for examination regarding the testator's assets and asset transfers.

B. ***Reynolds v. Reynolds***

2013-CA-000865 05/23/2014 2014 WL 2155265

Opinion by Judge Lambert, Judges Stumbo and Thompson concurred. The Court of Appeals affirmed the trial court's entry of a summary judgment declaring that an option to purchase real property given to a named beneficiary who predeceased the testator passed to the surviving optionees, rather than to the estate residue. Applying the "polar star rule," the Court held that the testator had intended a lottery-style purchase opportunity for her real property. Because one of the relatives predeceased the testator, he did not receive the opportunity to purchase the property, and it passed to the other members of the class.

XVI. WORKERS' COMPENSATION

A. ***Kentucky Employers' Mut. Ins. v. Burnett***

2013-CA-001834 05/16/2014 2014 WL 2022236 Released for Publication

Opinion by Judge Thompson; Judge Stumbo concurred; Judge Lambert concurred in result only. In affirming the Workers' Compensation Board, the Court of Appeals held that substantial evidence supported the ALJ's finding that claimant's contract of hire was entered into in Kentucky, not Indiana, for purposes of extraterritorial jurisdiction as provided by the Workers' Compensation Act. Although employer made the initial telephone call to claimant while at his Indiana residence, employer at that time asked only for claimant's temporary help and the parties did not enter into a contract of hire until they discussed claimant's full-time permanent employment during dinner at a restaurant in Kentucky. The Court also held that substantial evidence supported the ALJ's finding that claimant's employment was not principally localized in any state for purposes of extraterritorial jurisdiction. Employer testified that he did not have a place of business in Kentucky or Indiana and that he conducted his business in his truck or restaurants using a cell phone. Claimant also testified that 90% of his work was performed in Kentucky. The Court further held that claimant preserved the issue of permanent total disability benefits at the benefit review conference when he requested benefits pursuant to KRS 342.730.