

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 1, 2013 to NOVEMBER 30, 2013

I. ADMINISTRATIVE LAW

A. *Pizza Pub of Burnside v. Com., Dept. of ABC*

[2012-CA-002031](#) 11/27/2013 2013 WL 6188979

Opinion by Judge Lambert; Judges Combs and Thompson concurred. The Court of Appeals reversed the opinion and order of the Franklin Circuit Court affirming the decision of the ABC Board to revoke appellant's "limited restaurant" license to sell alcohol. The Court first held that the ABC Board had properly declined to permit appellant's owner, a non-attorney, from representing appellant, a corporation, at the revocation hearing. However, the Court then held that the ABC Board acted arbitrarily and violated appellant's due process rights when it failed to continue the revocation hearing despite appellant's lack of representation and corresponding inability to meaningfully participate in the hearing. Appellant's counsel had withdrawn via a notice filed six days before the hearing and had requested time for appellant to retain new counsel and for its new counsel to adequately prepare for the hearing. The matter was remanded for a new hearing before the ABC Board.

II. ASSOCIATIONS

A. *Steenrod v. Louisville Yacht Club Ass'n, Inc.*

[2011-CA-001444](#) 11/08/2013 2013 WL 5951904

Opinion by Judge Taylor; Judge Stumbo concurred; Judge Maze concurred via separate opinion. In an action where a boat owner sued a yacht association, alleging that the association was not properly organized and established as a condominium property regime and therefore could not assess any type of condominium fees, the Court of Appeals reversed the circuit court's entry of summary judgment in favor of the yacht association. The Court held that the "boat slip units" that comprised the marina governed by the yacht association were not condominium units within the meaning of KRS 381.810(1) and therefore could not be considered as part of a condominium property regime for purposes of KRS 381.805-KRS 381.910 (the Horizontal Property Law). The boat slip units were located entirely upon navigable waters and did not qualify as "an enclosed space" or consist of "a room or rooms" as plainly required under the definition of unit set forth in KRS 381.810(1). In reaching this conclusion, the Court noted that under the Kentucky Condominium Act (KRS 381.9101-KRS 381.9207), which was created as a supplement to the Horizontal Property Law, boat slips could be construed as condominium units. However, that act was effective "only to the extent of events or circumstances occurring after January 1, 2011." In the case at hand, the events and circumstances leading to the filing of the instant action clearly occurred prior to January 1, 2011; therefore, the Kentucky Condominium Act was inapplicable.

III. CHILD SUPPORT

A. *Adams-Smyrichinsky v. Smyrichinsky*

[2013-CA-000181](#) 11/15/2013 2013 WL 6037306

Opinion by Judge Combs; Judges Nickell and Stumbo concurred. In an action where a husband sought to reduce his child support obligation, the Court of Appeals held that Kentucky law, not Indiana law, applied to the question of modification. Although the divorce judgment establishing the child support obligation was rendered in Indiana, the parties and children all lived in Kentucky and the Indiana court had relinquished jurisdiction to the Oldham Family Court in 2011. Consequently, Kentucky had assumed continuing and exclusive jurisdiction over the matter, and the family court had not erred in applying Kentucky law.

IV. CONSTITUTIONAL LAW

A. *Prickett v. Commonwealth*

[2013-CA-000027](#) 11/22/2013 2013 WL 6145529 Rehearing Pending

Opinion by Judge Thompson; Judge Caperton concurred; Judge Taylor concurred in result only. The Court of Appeals held that appellant could not challenge the constitutionality of KRS 29A.290(2) on appeal because he had failed to notify the Attorney General of his challenge before entry of final judgment. Although the Court noted that the Kentucky Supreme Court had held to the contrary in *Owens v. Commonwealth*, No. 2006-SC-000713-MR, 2008 WL 466132 (Ky. 2008), the Court concluded that it was bound by the published opinion of *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008), wherein the Supreme Court held that KRS 418.075 requires notice be given to the Attorney General prior to the entry of final judgment in all cases where a constitutional challenge is made to a statute.

V. CRIMINAL LAW

A. *Gibson v. Commonwealth*

[2012-CA-002104](#) 11/22/2013 2013 WL 6153700

Opinion by Judge Lambert; Judges Caperton and Moore concurred. The Court of Appeals reversed and remanded an order revoking appellant's probation because the revocation proceedings failed to comply with the minimal requirements of due process under *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Although appellant's probation officer was sworn in as a witness in order to affirm the trial court's recitation of the case history, and an officer allegedly assaulted by appellant was introduced to the court, the Commonwealth never called or questioned any witnesses, and defense counsel was not permitted to cross-examine or to call any witnesses.

B. *Robinson v. Commonwealth*

[2012-CA-001915](#) 11/27/2013 2013 WL 6188964 DR Pending

Opinion by Judge Lambert; Judges Combs and Thompson concurred. The Court of Appeals held that the circuit court retained jurisdiction to revoke appellant's probation after the expiration of the original probationary period, despite the language of KRS 533.020(4), where a warrant had been issued for appellant's arrest within the probationary period and was pending at the time of the revocation hearing.

C. *Walker v Brown*

[2012-CA-001818](#) 11/22/2013 2013 WL 6145528

Opinion by Judge Lambert; Judges Moore and VanMeter concurred. In a post-conviction appeal, the Court of Appeals held that appellant's third CR 60.02 motion to vacate a 2003 order denying his petition for a writ of habeas corpus was frivolous and wasteful. Consequently, the Court granted the Commonwealth's motion to dismiss the appeal and issued sanctions against appellant pursuant to KRS 454.410. The Court noted that appellant had filed over fifty petitions and/or appeals in both state and federal courts in his efforts to challenge his 1998 criminal convictions.

VI. FAMILY LAW

A. *Fairhurst v. Moon*

[2013-CA-000061](#) 11/27/2013 2013 WL 6189002

Opinion by Judge Maze; Chief Judge Acree and Judge Clayton concurred. The Court of Appeals reversed and remanded the trial court's order granting visitation to a maternal grandmother over the parents' objections. Grandmother brought a petition for grandparent visitation pursuant to KRS 405.021(1) after the parents had severely limited her visitation time. On the second day of the visitation hearing, the trial court interrupted father's testimony and granted visitation based upon father's statement that he had never completely denied visitation to grandmother. On appeal, the Court held that the trial court misapplied the burden of proof and the standard for grandparent visitation. Under *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the presumption that fit parents act in the best interests of their children applies to all of the parents' decisions regarding third-party visitation - not just a complete denial of visitation. The grandparent has the burden to rebut this presumption with clear and convincing evidence that visitation is in the child's best interest under the factors set out in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012) and *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004). The Court further emphasized that the trial court can only make this determination after hearing all of the evidence and not just part of the parents' case. Consequently, the Court directed the trial court to complete the evidentiary hearing and to consider the petition for visitation under the correct standard.

B. Sadler v. Buskirk

[2012-CA-001157](#) 11/22/2013 2013 WL 6145475 DR Pending

Opinion by Judge Clayton; Judge Caperton concurred; Judge Taylor concurred and filed a separate opinion. In an action where the administratrix of a decedent's estate sought to establish that the decedent's ex-wife had no rights to the decedent's individual retirement account (IRA), the Court of Appeals held that a property settlement agreement entered into by the former husband and wife upon their divorce did not divest the ex-wife of a beneficial interest in the IRA. In reaching this decision, the Court noted that although the property settlement agreement assigned a sole ownership interest in the IRA to the decedent, his ex-wife was never removed as the named beneficiary on the account; therefore, she was entitled to the proceeds of the IRA upon decedent's death. The property settlement agreement neither mentioned nor provided for the disposition of the beneficial interest, as opposed to the ownership interest, in the IRA, and the decedent had had many years to complete forms to designate a new beneficiary but had failed to do so. The Court further noted that unlike devised interests under a last will and testament, non-testamentary beneficial interests were not statutorily divested upon divorce. In his concurring opinion, Judge Taylor observed that the statutory principles set forth in KRS 391.360 regarding written provisions for the transfer of property outside of probate also supported the decision.

VII. JUVENILES

A. *B.H. v. Commonwealth*

[2013-CA-000385](#) 11/22/2013 2013 WL 6145532 Rehearing Pending

Opinion by Judge Moore; Chief Judge Acree and Judge Jones concurred. A Standard School Attendance Order (SSAO) was entered after a juvenile's mother filed a petition claiming that the juvenile was beyond her control. However, the juvenile repeatedly violated the SSAO and the juvenile court attempted various means of getting the juvenile to comply. After yet another violation of the SSAO and the court's finding that reasonable efforts had been made to prevent the juvenile's removal from her home, the court ordered the juvenile placed in the temporary custody of the Cabinet for Health and Family Services. On appeal, the Court of Appeals held that the SSAO was a valid court order pursuant to KRS 600.020(64) and that the juvenile had received the due process rights to which she was entitled at that stage of the proceedings. Therefore, the Court determined that the juvenile was properly found to be in contempt based upon her violation of the SSAO. The Court also held that placement of the juvenile in the temporary custody of the Cabinet was warranted pursuant to KRS 610.050.

VIII. OPEN RECORDS

A. *University of Louisville v. Sharp*

[2012-CA-000838](#) 11/22/2013 2013 WL 6145391

Opinion by Judge VanMeter; Judges Clayton and Combs concurred. In an Open Records Act case, the Court of Appeals reversed the trial court's grant of summary judgment in favor of appellee and remanded with instructions to enter summary judgment in favor of the University of Louisville because the requested records had been properly withheld pursuant to KRS 61.878(1)(i) and (j). The records included email correspondence about a "communications meeting" regarding a pending merger between the university's hospital and other medical entities. The Court held that the emails were not incorporated into a "final agency action," which would have subjected them to disclosure, since the meeting was preliminary in nature and did not resolve the ultimate issue of merger. Instead, the meeting merely constituted a step towards final agency action and, thus, the emails discussing the meeting were properly withheld.

IX. STATUTE/RULE INTERPRETATION

A. *Bryan v. CorrectCare-Integrated Health, Inc.*

[2012-CA-001500](#) 11/08/2013 2013 WL 5951906 Rehearing Pending

Opinion by Judge Combs; Judges Nickell and Stumbo concurred. In an action alleging negligence in the care and treatment of an inmate, the Court of Appeals reversed and remanded in part as to an award of costs to the defendants. The Court specifically held that the amount and nature of expenses incurred by two defense expert witnesses were not properly presented to and considered by the trial court. Because the defendants neglected to itemize with specificity the amount that they sought to recover as to these witnesses, the trial court was required to recalculate its award of costs in light of KRS 453.040(1)(a), which provides for an “allowance to witnesses” to be recovered by the party succeeding on the merits. Although neither “allowance” nor “per diem” is clearly defined by statute, the Court construed the statute as broadly intending that the trial court must compute such an award with specificity.

X. WORKERS' COMPENSATION

A. *Kentucky State Police v. McCray*

[2013-CA-000857](#) 11/01/2013 2013 WL 5864401 Released for Publication

Opinion by Judge Stumbo; Judge Nickell concurred; Judge Combs concurred via separate opinion. The Court of Appeals reversed a decision of the Workers' Compensation Board that directed an ALJ to reexamine a police officer's claim for benefits upon holding that the officer's post-traumatic stress disorder (PTSD) was not compensable. The officer suffered PTSD after killing a man while on duty. The Court held that KRS 342.0011(1), *Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564 (Ky. 2001), and *Kubajak v. Lexington-Fayette Urban County Government*, 180 S.W.3d 454 (Ky. 2005), require the presence of a “physically traumatic event” in order for a claimant to be entitled to workers' compensation benefits arising from PTSD. In this case, the officer was not physically injured during the shooting, so his PTSD was not compensable.