

**PUBLISHED OPINION CASE SUMMARIES
KENTUCKY COURT OF APPEALS
OCTOBER 2009**

I. ATTORNEY FEES

A. Bonar v. Waite, Schneider, Bayless & Chesley Co., L.P.A.

[2007-CA-001374](#) 10/16/09 2009 WL 3336065 Rehearing Pending
Opinion by Judge Dixon; Judge Nickell and Senior Judge Knopf concurred. The Court affirmed a judgment of the circuit court ruling that the appellant attorney was not entitled to any attorney's fees from a class action lawsuit involving child sexual abuse against the Roman Catholic Diocese of Covington. The Court ultimately held that the trial court properly denied the request for attorney's fees. In reaching that conclusion the Court first held that the trial court did not err in denying appellant's motion for partial summary judgment. The denial was not interlocutory and not reviewable on appeal. Further, appellant could not have been prejudiced because she was provided the right to establish the merits of her position during trial. The Court next held that the trial court did not err in dismissing appellant's individual claims against two class attorneys. Appellant entered into an agreed order specifying that the firm was the proper defendant, there was no merit to appellant's claim that she was forced to enter the agreed order, and she waived the issue upon the signing of the agreed order and the filing of an amended complaint. The Court next held that the trial court properly limited appellant's access to discovery as to other class actions and practices regarding fee splitting and opting out class members as the information did not have any correlation to whether appellant was entitled to a fee. The Court next held that the trial court did not abuse its discretion in prohibiting testimony regarding other counsels' fee arrangements that had no relevance to whether appellant was entitled to a fee or if so, how much. The Court next held that the trial court properly excluded appellant's expert evidence when appellant failed to show that the retired former judge possessed any specialized knowledge that would assist the trial court, since the trial court did not need guidance on the ultimate issues to be decided. The Court next held that appellant was not denied a fair trial as the trial court's comments regarding her ethical violations could not improperly influence the same court during the bench trial. The Court next held that there was no merit to the claim that the trial court erred by entering orders that were inconsistent with prior court rulings. First, the issue was unpreserved as appellant failed to raise it in her prehearing statement as required by CR 76.03(8). Further, the prior judge in the case did not enter an order on the record that could be construed the law of the case. The Court next held that the trial court did not err in relying on *Baker v. Shapero*, 203 S.W.3d 697 (Ky. 2006), in addressing the proper measure for the allowance of a fee. Because the trial court concluded that appellant voluntarily withdrew from the case due to a conflict of interest, the appropriate method of determining what compensation she was owed was based on *quantum meruit*. Even if appellant could prove that she had a binding fee agreement, it could not be enforced when she voluntarily withdrew in the initial

stages of the case. The Court next held that the trial court's findings with respect to appellant's ethical violations were based upon substantial evidence in the record that she violated SCR 3.130(1.3), (1.7), (1.9), and (1.16).

II. CIVIL PROCEDURE

A. **Goldsmith v. Fifth Third Bank**

[2008-CA-001414](#) 10/30/09 2009 WL 3486696

Opinion by Judge Wine; Judges Acree and Stumbo concurred. The Court vacated and remanded an order of the circuit court granting appellant CR 60.02 relief and all orders of the court entered thereafter and remanded with instruction to the trial court to reinstate an *in rem* summary judgment and order of sale. The Court held that CR 60.02 relief should not have been granted as a matter of law in the case because appellant expressly waived his right to a guardian *ad litem* under CR 17.04. Further, CR 60.02 relief was inappropriate because the alleged errors could have been raised in a direct appeal. The Court finally held that the CR 60.20 motion was untimely and therefore, the trial court was without jurisdiction to grant it. The claim was one of "excusable neglect" rather than an extraordinary circumstance and therefore, the one-year time limitation found in CR 60.02(a), (b), and (c) was applicable. Although appellant also claimed to be proceeding under CR 60.02(d) and (e), he was unable to prove fraud on the part of appellee. Because the trial court erroneously invoked the post-judgment relief of CR 60.02, it had no jurisdiction to proceed and therefore, all order of the court following the order setting aside the original judgment and order of sale were void.

B. **Nelson County Board of Education v. Forte**

[2008-CA-001958](#) 10/09/09 2009 WL 3231646 DR Pending

Opinion by Judge Taylor; Chief Judge Combs and Judge Nickell concurred. The Court affirmed an order of the circuit court which vacated and remanded an order of the Board of Claims dismissing an action as time barred under KRS 44.110(1). The Court held that the circuit court properly vacated and remanded. The term "court" as used in KRS 413.270(1) included the Board of Claims and therefore, the tolling provision of KRS 413.270(1) was applicable to an action filed in the Board of Claims.

III. CONTRACTS

A. **Kegel v. Tillotson**

[2008-CA-001938](#) 10/30/09 2009 WL 3486739

Opinion by Judge Caperton; Judges Dixon and Taylor concurred. The Court reversed and remanded an order of circuit court granting a motion for summary judgment in favor of appellee and denying a motion for summary judgment in favor of appellants on appellants' complaint alleging that appellee violated, and continued to violate a non-compete clause she signed with the prior owner of the business for which she worked selling promotional products and advertising merchandise. The Court first held that the trial court erred in finding that the non-compete clause was

not assignable. The contract was not one of personal confidence as appellee's resignation letter showed that her relationship was with the company, not with the former owner, and evidenced an implicit acknowledgment that appellants stood in the former owner's shoes insofar as their contractual rights were concerned. The Court further held that appellee's status as an independent contractor did not alter the applicability of prior precedent that a successor employer may enforce an employee's restrictive covenant as an assignee of the original covenant. The Court next held that the trial court's finding that the non-compete clause was unconscionable was prematurely entered. Whether or not the particular non-compete clause was conscionable was highly fact specific and the trial court could apply the "blue pencil" rule to reform or amend restrictions that are overly broad or burdensome.

IV. CRIMINAL LAW

A. **Akins v. Commonwealth**

[2008-CA-000286](#) 10/16/09 2009 WL 3321012

Opinion by Chief Judge Combs; Judge Thompson and Senior Judge Harris concurred. The Court affirmed a judgment of the circuit court convicting appellant of carrying a concealed deadly weapon, possession of marijuana, and possession of a handgun by a convicted felon, and sentencing him as a persistent felony offender (PFO). The Court vacated and remanded a judgment of the circuit court convicting appellant of possession of a handgun by a convicted felon and a separate PFO conviction. The Court first held that the police did not lack reasonable suspicion to stop appellant. His conduct furnished an articulable, reasonable suspicion that criminal activity might be afoot. Further, his reactions to the police - taking immediate, evasive flight upon seeing a police vehicle approach and then leaping from a front porch as the two police vehicles approached - also furnished reasonable, articulable suspicion for the initial stop. In addition, a warrant for his arrest removed any doubt as to the propriety of his arrest once he was stopped. The Court next held that appellant was not deprived of a fair trial when one officer testified that the other officer recognized appellant and advised him that appellant was wanted on warrants. Appellant specifically and emphatically declined an offer to admonish the jury following the unsolicited comments and allusion to the outstanding warrant was not so "devastating" to his defense that an admonition would not have been sufficient to cure any alleged error. The Court finally held that appellant's second indictment for possession of a handgun violated the bar against double jeopardy as it was not a new, separate offense but was part and parcel of an ongoing, uninterrupted course of conduct.

B. **Buford v. Commonwealth**

[2008-CA-001272](#) 10/02/09 2009 WL 3151090 DR Pending

Opinion by Judge Thompson; Chief Judge Combs and Senior Judge Buckingham concurred. The Court reversed an order of the circuit court denying a motion for specific performance of a plea agreement and remanded to allow appellant to withdraw his guilty plea. The Court first held that appellant was statutorily required

to be a lifetime sex offender registrant under KRS 17.520(2)(a)(4), and neither the trial court nor the Commonwealth could provide any lesser requirement. Therefore, the trial court could not strictly enforce the Commonwealth's contractual obligation that limited the registration period to 10 years. However, because the period of registration was the central issue during the plea proceedings, appellant was misinformed on the law, and the trial court had reason to know that the registration period was an essential element of the agreement, fundamental fairness required that appellant be permitted to withdraw his guilty plea and proceed to trial.

C. Campbell v. Commonwealth

[2008-CA-001881](#) 10/30/09 2009 WL 3486711

Opinion by Judge Caperton; Judges Dixon and Taylor concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to CR 60.02 to correct his sentence in light of *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008). The Court held that *Peyton* was not intended to be applied retroactively. The Court further held that because the issue was purely legal, appellant was not entitled to an evidentiary hearing or findings of fact. Further, the denial of CR 60.02 relief did not fall within the purview of CR 52.04 and thus, did not require written findings and conclusions.

D. Commonwealth v. Brewer

[2008-CA-001503](#) 10/30/09 2009 WL 3486704

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court reversed a trial court order declaring a jury verdict void *ab initio* and granting appellee a new trial and ordered the trial court to reinstate the verdict and enter a judgment of conviction. The Court held that while upon a proper and timely motion, appellee would have been entitled to a new trial when a juror admitted to having a prior felony conviction. However, the verdict entered by a jury that included a disqualified juror was not void *ab initio* and therefore, was not subject to collateral attack. Pursuant to RCr 10.02, ten days after the jury rendered its guilty verdict the trial court lost its authority to grant a new trial. Because the defendant knew about the potential disqualification of the juror in time to file a proper and timely motion pursuant to RCr 10.02(1), appellee's due process concerns were protected.

E. Hill v. Thompson

[2009-CA-000015](#) 10/23/09 2009 WL 3400680

Opinion by Judge Caperton; Judges Clayton and Dixon concurred. The Court affirmed an order of the circuit court denying appellant's petitions for declaration of rights under House Bill 406 and the rules of policy and procedure of the Kentucky Department of Corrections (DOC). The Court first held that a literal interpretation of KRS 439.344, as it pertains to credit toward a criminal sentence for time spent on parole by a parolee, was against the clear intent of the legislature and would yield different, if not conflicting, results. Thus, the trial court properly concluded that appellant was not entitled to credit against his sentence for time spent while on parole when he was returned to prison for absconding from parole supervision and not for a new felony conviction for which he was convicted after he had already

returned to prison for the parole violation. The Court next held that the DOC did not abuse its discretion in declining to award good time credit to appellant under KRS 197.045(3), particularly in light of appellant's successful escape during the time he was being considered for a good time award. Further, the one-year statute of limitations set forth in KRS 413.140 barred appellant's action for declaration of rights brought 13 years later.

F. Lindsey v. Commonwealth

[2007-CA-002469](#) 10/16/09 2009 WL 3320827

Opinion by Judge Nickell; Judges Stumbo and Wine concurred. The Court affirmed a judgment of the circuit court based upon appellant's conditional guilty plea to several drug offenses. The Court held that the trial court did not err by denying appellant's motion to suppress evidence obtained from a search of an automobile in which appellant was a passenger. The officer had reasonable suspicion to stop the driver of the vehicle and probable cause to search the car. Appellant could not re-litigate the facts and issues already decided in the direct appeal of the driver of the vehicle, *Rountree v. Commonwealth*, 2008 WL 4601285, (October 17, 2008). The Court also held that the holding in *Rountree* did not run afoul of *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

G. Noland v. Commonwealth

[2008-CA-000876](#) 10/09/09 2009 WL 3231461 DR Pending

Opinion by Judge Caperton; Judges Keller and Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion to vacate his conviction pursuant to RCr 11.42. The Court first held that the trial court properly held that appellant was barred from raising a new issue on the date of the evidentiary hearing on his motion. Appellant knew well before the hearing date about the issue related to trial counsel's advice on his parole eligibility date. His failure to mention it in his original motion and then failure to add it by amending his motion prior to the hearing precluded review. Even so, parole eligibility was a collateral issue beyond the scope of the Sixth Amendment and therefore, counsel was not ineffective for any failure to correctly inform appellant as to his parole eligibility prior to entry of his guilty plea. The Court rejected appellant's argument that post-conviction counsel was ineffective for failing to amend the RCr 11.42 motion to include the issue. The Court then held that appellant was not denied effective assistance of counsel for counsel's failure to fully investigate a defense of voluntary intoxication and to correctly advise him of the defense. Appellant failed to properly raise in the trial court the issue of whether counsel correctly advised him as to the correct burden of proof at trial. Even so, the record established that appellant was made aware of a potential intoxication defense and that he was aware of his choice to go to trial with the potential of receiving the maximum sentence or to choose the minimum sentence in a plea agreement.

H. Rosario v. Commonwealth

[2008-CA-002053](#) 10/02/09 2009 WL 3151116 DR Pending

Opinion by Judge Caperton; Judges Clayton and Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion to modify the terms of his probation. The Court held that sex offender registration under KRS Chapter 17 was mandatory and neither a condition of sentencing nor discretionary for the trial court. The Court then held that any appeal must necessarily be from the conviction upon which registration was based. Therefore, the appeal was untimely.

I. Smith v. Commonwealth

[2008-CA-000770](#) 10/23/09 2009 WL 3400285

Opinion by Judge Caperton; Judge Stumbo and Senior Judge Buckingham concurred. The Court affirmed a judgment of the circuit court entered pursuant to appellant's conditional guilty plea after the court denied a motion to suppress evidence. The evidence was seized pursuant to a search warrant obtained based on information gathered from a warrantless search of trash cans left for collection. The Court first held that the motion to suppress was properly denied as the trial court's finding that the information contained in the affidavit was not stale was supported by substantial evidence. The information provided in the four corners of the affidavit indicated that criminal drug activity was of a protracted and continuous nature. Thus, based on the nature of the drug offenses, the judge could properly infer there was a fair probability that evidence of wrongdoing would still be found on the premises, despite the fact that identifying material was not found in a third trash pull. Further, the information in the affidavit was accurate and not misleading. The Court then held that Section 10 of the Kentucky Constitution did not afford greater protection than the Fourth Amendment of the U.S. Constitution. Therefore, the warrantless search and seizure of trash left for collection did not require an articulable, individualized suspicion.

J. Thorpe v. Commonwealth

[2008-CA-000823](#) 10/02/09 2009 WL 3151027 Released for publication

Opinion by Chief Judge Combs; Judge Thompson and Senior Judge Harris concurred. The Court reversed and remanded for a new trial, appellant's conviction of fraudulently obtaining a prescription for a controlled substance and of being a persistent felony offender. The Court first held that the trial court improperly admitted witness testimony concerning a telephone conversation between appellant and her mother. RCr 7.24(1) required the Commonwealth to furnish the defendant with the substance of the statement when they used the statement to incriminate appellant and the statement went directly to the issue of *mens rea*, having the ability to either inculcate or to exculpate appellant, and there was a reasonable probability that if appellant's counsel had been prepared to confront the evidence, the jury might have reached a different verdict. The Court next held that the trial court abused its discretion by allowing testimony consisting of accusations and innuendoes of appellant's faulty caretending of her mother. An admonition would not have cured the evidentiary error in that the inadmissible evidence had an inflammatory impact on the jury evidenced by the maximum sentence given with little actual evidence of the charged crime. The Court concluded that the discovery error combined with the inadmissible testimony denied appellant her right to a fair trial. The Court finally

held that, under KRS 15.733(2)(c) & (d), the prosecutor was not required to recuse because she was the first cousin of appellant's half-brothers who testified for the Commonwealth.

V. EMPLOYMENT

A. **Powers v. Lexington-Fayette Urban County Government**

[2008-CA-000081](#) 10/30/09 2009 WL 3486423

Opinion by Judge Acree; Chief Judge Combs and Senior Judge Buckingham concurred. The Court affirmed a judgment of the circuit court entered pursuant to a jury verdict in favor of an employer on an employee's claim that her employment was terminated in violation of the Whistleblower Act, KRS 61.101 et seq. On cross-appeal, the Court first held that the employer was not entitled to a directed verdict as appellant reported a co-worker's alleged violations to her own agency, which was an appropriate authority under the statute. On direct appeal, the Court then held that the evidence that appellant's employment was terminated because her services were no longer needed was sufficient to support the jury verdict finding that her whistleblowing activity was not a material factor in the decision to terminate her employment. Therefore, the trial court did not err in denying appellant's motions for directed verdict and judgment notwithstanding the verdict. The Court finally held that because the jury's verdict was supported by substantial evidence, the denial of appellant's motion for a new trial was not clearly erroneous.

VI. FAMILY LAW

A. **C.R.G. v. Cabinet for Health and Family Services**

[2009-CA-000276](#) 10/30/09 2009 WL 3487036

Opinion by Judge Thompson; Judges Stumbo and Wine concurred. The Court affirmed an order of the family court terminating appellants' parental rights to their minor children. The Court held that clear and convincing evidence existed to support the trial court's finding that the children were abused and neglected and that termination of the mother's and father's parental rights was in the children's best interest. Because the applicability of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), to termination of parental rights appeals was not brought to the attention of this Court by the parties and because the briefs were not accompanied by motions to withdraw, the Court declined to consider them as *Anders* briefs or to address whether *Anders* may be invoked in a termination of parental rights case.

B. **Crowder v. Rearden**

[2007-CA-002604](#) 10/02/09 2009 WL 3231360

Opinion by Judge Nickell; Judge Lambert and Senior Judge Henry concurred. The Court affirmed orders of the family court finding appellant in contempt for her failure to cooperate with the sale of a marital residence and for her failure to pay her portion of the mortgage and denying a motion to alter, amend or vacate the order. The Court held that the trial court did not abuse its discretion in finding appellant in

contempt and imposing a jail sentence for her failure to obey multiple directives. Appellant was found in contempt, was warned additional sanctions could be imposed, and was given the opportunity to purge herself of contempt, which she did not do. The Court also held that appellant could not successfully assert a defense of impossibility when she failed to appeal the determination of her portion of the mortgage, she failed to offer any proof of change in circumstances, and she abandoned the home without making any provision to secure or maintain it. The Court finally rejected appellant's argument that appellee was required to mitigate his damages so that appellant should not be held accountable for destroying appellee's credit rating and for not paying her share of the mortgage.

C. Money v. Money

[2007-CA-001750](#) 10/16/09 2009 WL 3320594

Opinion by Senior Judge Harris; Judges Acree and Clayton concurred. The Court affirmed an order of the circuit court assigning additional marital debt to appellant and denying appellee's motion to find the parties' settlement agreement unconscionable. The Court first held that the trial court did not err in assigning a margin loan account to appellant. Although the debt was not mentioned specifically in the agreement, the agreement was unambiguous in its assignment to appellant of all but the debts specifically assigned to appellee. The Court then held that CR 59.02 and CR 59.05 were not applicable so as to make appellee's motion to assign the debt untimely. The motion was not one to alter, amend or vacate the provisions of the decree but rather, to request enforcement of the terms of the agreement. The Court finally held that the trial court did not abuse its discretion by finding the settlement agreement conscionable when both parties were represented by counsel through all stages of negotiation, appellee's counsel drafted the settlement agreement, and appellee did not allege a change of circumstances that subsequently rendered the agreement unconscionable.

D. Rearden v. Rearden

[2006-CA-002362](#) 10/02/09 2009 WL 3231237

Opinion by Judge Nickell; Judge Lambert and Senior Judge Henry concurred. The Court affirmed in part, reversed in part and remanded a judgment of the family court classifying various items as marital property and denying an award of attorneys' fees in a dissolution action. The Court first held that the family court abused its discretion in classifying a down-payment on the marital home as marital property when appellant clearly proved that he transferred the funds from his personal money market account prior to the marriage. The fact that the closing on the home occurred after the wedding did not matter. However, the Court held that appellant failed to trace back to his private non-marital bank account a refund received from the down payment and therefore, that amount was properly classified as marital property. The Court next held that the family court did not abuse its discretion in classifying as marital property three items of personalty purchased with appellant's personal credit card during the marriage. Appellant failed to sufficiently overcome the presumption that the items were marital property by proving they were purchased with non-marital funds. The Court next held that the family court did not err in finding that

appellee was entitled to a share of appellant's military retirement benefits, even though the marriage lasted only two months of appellant's military enlistment. However, the Court held that the trial court abused its discretion in transforming the monthly award to a present-day lump sum payment without explaining how the court determined that the amount was a reasonable calculation of appellee's expected future interest. The Court finally held that the family court did not err in denying appellant's request for attorneys' fees after the court found appellee to be in contempt of court on more than one occasion. KR 403.220 did not authorize a trial court to consider fault, willful disobedience, or anything beyond the financial positions of the parties.

E. Snodgrass v. Snodgrass

[2007-CA-001974](#) 10/16/09 2009 WL 3320601

Opinion by Judge Acree; Judge Clayton concurred; Judge Keller concurred in result only. The Court vacated and remanded an order of the circuit court denying relief to appellant pursuant to CR 60.02(f) by which he sought to amend language in a divorce decree relating to the division of his military retirement benefits. The Court held that the trial court erred in denying the motion. The family court's implicit acknowledgement of the need to clarify the division suggested that appellant presented a prima facie case under CR 60.02(f). Appellant did not have a fair opportunity to present his claim at the trial on the merits when he was not notified that the final hearing would take place on the date a hearing before the domestic relations commissioner was scheduled, he was not given an opportunity participate telephonically, appellee waived the recording or transcript of the hearing, and appellant was deprived of his claim to his non-marital portion of his retirement benefits. Further, granting relief to appellant would not be inequitable to appellee as she was not deprived of rights or property to which she was entitled. The Court rejected appellee's arguments that appellant should be denied relief for failure to hire an attorney to represent him in the dissolution action, for failure to appeal the decree and for waiting for six-and-one-half years to object to the decree's language. The Soldiers' and Sailors' Civil Relief Act of 1940 protected appellant's rights, as he was not available to appear in person because of his military service and his service had a material adverse effect upon his rights. Further, CR 60.02(f) was the proper vehicle to correct the error, as the original decree appeared on its face to accomplish what appellant sought. Finally, appellant was not dilatory in seeking a change in the language of the decree when he pursued the matter shortly before he retired, after he was informed that appellee was seeking a percentage of his total pay.

VII. INSURANCE

A. Bryant v. Hopkins

[2008-CA-002099](#) 10/09/09 2009 WL 3231220 DR Pending

Opinion by Judge Lambert; Senior Judge Henry concurred; Judge Stumbo dissented by separate opinion. The Court affirmed an order of the circuit court granting summary judgment and dismissing appellant's complaint against the appellee

insurer for underinsured motorist (UIM) benefits. The Court held that the trial court did not err in ruling that the insurer was not estopped from denying liability for UIM insurance benefits. The insurer's election to protect its subrogation rights under *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), and KRS 304.39-320 by advancing payment, did not create a presumption or acknowledgement that the UIM insurance carrier had admitted coverage to the injured party beyond the amount advanced under its policy or that it waived any defense of non-coverage in any subsequent litigation. Simply discussing the claim prior to the initiation of litigation did not imply or create a reasonable presumption that the claim was accepted or admitted. Further, once the trial court permitted the insurer to amend its answer, the existence of an admission upon the record was essentially extinguished. Finally, the contract of insurance could not be created or enlarged by estoppel or waiver. Since appellant was not entitled to UIM benefits in the first place, estoppel was not available to provide benefits.

B. *Cain v. American Commerce Insurance Company, Inc.*

[2008-CA-001500](#) 10/30/09 2009 WL 3486701

Opinion by Judge Stumbo; Judges Acree and Wine concurred. The Court affirmed a declaratory and final judgment of the circuit court interpreting KRS 304.39-140 and determining that appellee fully satisfied its obligation to pay benefits under an insurance policy it issued to appellant. The Court held that KRS 304.39-140(1) did not require the insurer to provide \$40,000 in added reparation benefits but merely to offer it to appellant. Because appellant did not request the coverage, the insurer was not required to provide it. The Court further held that because appellant did not request the coverage, the trial court did not err in ruling that she was not entitled to relief under the Kentucky Unfair Settlement Practice Act or a common law bad faith claim. Similarly, she was not entitled to interest on any overdue payments nor attorney fees.

VIII. JUVENILES

A. *J. S. v. Commonwealth*

[2009-CA-000805](#) 10/30/09 2009 WL 3487870

Opinion by Judge Acree; Judges Caperton and Keller concurred. The Court affirmed an order of the family court committing appellant to the Cabinet for Health and Family Services as a habitual runaway. The Court held that the family court did not clearly err in committing appellant as there was substantial evidence indicating that appellant's return to the community would subject him to gang violence and that no less restrictive alternative was feasible. Appellant's delinquent behavior and gang affiliation forced the family court to protect him from not only his own actions but also, from his community.

IX. PROPERTY

A. *Jones v. Sparks*

[2008-CA-002006](#) 10/16/09 2009 WL 3321370

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Henry concurred. The Court affirmed a judgment of the circuit court finding that appellants did not have an easement to use a road on appellees' property. The Court first held that because there was no written contract establishing an easement, legal title was barred by the statute of frauds, KRS 371.010. The Court then held that the trial court properly found that appellants were not entitled to equitable relief. There was no evidence that the deceased owner of the property conveyed a false impression or concealed a material fact related to the road, nor believed that appellants would rely on his conduct, so as to estop the owners of the property from denying the existence of an easement. Appellants' claim for a quasi-easement failed as a matter of law, as there was no common ownership of the property. Appellants' claim for an easement by way of necessity failed as they had another means of access to their property. Appellees were not unjustly enriched as appellant did not confer any benefit. The Court finally held that the trial court did not improperly admit statements made by the deceased as they were properly admitted under KRE 803(1) as an exception to the hearsay rule.

B. Roberts v. Mortgage Electronic Registration Systems, Inc.

[2008-CA-000262](#) 10/30/09 2009 WL 3486594

Opinion by Judge Thompson; Chief Judge Combs concurred; Senior Judge Buckingham dissented by separate opinion. The Court reversed and remanded an order of the circuit court granting a motion for default and summary judgment. The circuit court applied the doctrine of equitable subrogation and found that appellee's lien had priority over appellant's lien in a foreclosure action. The Court held that the trial court erred in applying the doctrine of equitable subrogation in reordering lien priorities to appellant's detriment and that the liens should have been prioritized in accordance with KRS 382.280. The Court distinguished the narrow holding in *Louisville Joint Stock Land Bank v. Bank of Pembroke*, 225 Ky. 375, 9 S.W.2d 113 (1928), and held that the facts did not justify the relief sought when appellee lacked diligence in discovering appellant's lien and appellant's interest could be entirely or partially defeated if the property was sold for an amount insufficient to repay both appellant and appellee.

X. TORTS

A. Goodman v. Goldberg & Simpson, P.S.C.

[2008-CA-000921](#) 10/16/09 2009 WL 3321024 Rehearing Pending

Opinion by Senior Judge Harris; Judges Acree and Lambert concurred. The Court affirmed a summary judgment granted in favor of lawyers (including appellant's brother) and a law firm and dismissed appellant's tort claims against them related to the distribution of assets from two estates. The Court held that the trial court correctly concluded that there were no genuine issues of material fact. First, even if appellant's brother made alleged representations as to the division of their father's estate, appellant provided no evidence that he relied upon the representations to his detriment other than to state that he would have initiated criminal proceedings against the father. The court next held that there was no evidence of a contract

between appellant and the father so that his claim of intentional interference with contract must fail. The Court next held that the father did not owe appellant a fiduciary duty as an intended beneficiary of the mother's estate so that his claim for aiding and abetting breach of fiduciary duty failed as a matter of law. The Court next held that there was no concrete evidence to establish that the brother committed any wrongdoing against appellant and it was the father's prerogative to dispose of his estate as he saw fit. Therefore, the claim for the tort of outrage must fail. The Court next held that because there was no attorney-client relationship between the brothers, the claim of legal malpractice must fail. The Court next held that there was no evidence that the law firm or the attorney who drafted the father's will had any knowledge of any purported agreement as to the distribution of assets and moreover, they owed a fiduciary duty to the father and therefore, the claim for breach of fiduciary duty and malpractice as to them must fail. The Court next held that the law firm did not owe a duty to appellant as an intended third-party beneficiary of the father's will. The Court finally held that the trial court did not prematurely enter summary judgment. Appellees moved for summary judgment after two years after which the trial court allowed another six months of discovery, the record was voluminous, appellant had the opportunity to and did supplement the record, and appellant did not specify what significant information he was not able to obtain through discovery.

B. Hawes v. LaPointe

[2008-CA-001559](#) 10/16/09 2009 WL 3321082 Rehearing Pending
Opinion by Judge Dixon; Judge Caperton and Senior Judge Henry concurred. The Court vacated and remanded an order of the circuit court dismissing appellant's/cross-appellee's civil action against appellee/cross-appellant in which he sought damages for assault, battery and emotional distress. The Court first held that the trial court did not erroneously violate appellant's/cross-appellee's right to a jury trial by granting the motion to dismiss. His rights could not be violated by a procedure he specifically agreed to. The Court next held that the trial court clearly erred in dismissing the civil action against appellee/cross-appellant on the grounds that his conduct was lawful and justified under KRS 503.080 and KRS 503.055. While KRS 503.058 was remedial and thus retroactive, KRS 503.055 was not in effect at the time of the incident in question and since it was deemed to be a substantive change in the law, it could not be applied retroactively. The Court further held that the trial court erroneously interpreted KRS 503.055. There was no evidence in the record to support a finding that appellee/cross-appellant held a "reasonable fear of imminent peril or great bodily harm."

XI. WORKERS' COMPENSATION

A. Bowerman v. Black Equipment Company

[2008-CA-000828](#) 10/02/09 2009 WL 3162147 Released for publication
Opinion by Judge Nickell; Judge Caperton concurred; Judge Keller dissented by separate opinion. The Court reversed and remanded an opinion of the Workers' Compensation Board affirming the opinion and award of an Administrative Law

Judge. The Court held that the reversal of prior dispositive factual findings rendered in an interlocutory opinion - absent the introduction of new evidence, fraud or mistake - was arbitrary, unreasonable, unfair and unsupported by sound legal principles. While the abatement of the claim pending maximum medical improvement did not mandate an award of temporary total disability (TTD) benefits, the ALJ's original factual findings mandated an award under KRS 342.0011(11)(A) during the abatement of the claim.