

**PUBLISHED OPINIONS**  
**KENTUCKY COURT OF APPEALS**  
**OCTOBER 1, 2016 to OCTOBER 31, 2016**

**I. CRIMINAL LAW**

**A. Curtis v. Commonwealth**

[2015-CA-000069](#) 10/28/2016 2016 WL 6311218

Opinion by Judge Thompson; Judges Clayton and VanMeter concurred.

Appellant entered a conditional guilty plea to trafficking and PFO charges and reserved his right to challenge the trial court's denial of his motion to suppress evidence. He alleged that law enforcement did not have reasonable suspicion to conduct a warrantless search of his person and that, in conducting the search, the officers were not acting on drug court procedures, as required by the drug court program consent form he signed as a condition of his participation in the program. The Court of Appeals affirmed, holding that under the totality of the circumstances, the officers had a reasonable suspicion that appellant was selling heroin in violation of the conditions allowing him to participate in drug court. The Court further held that the officers were acting pursuant to the conditions of appellant's probation when they conducted the search. Specifically, they were aware of his participation in drug court, and the drug court supervisor was aware that a search was planned. The supervisor also advised the officers that appellant could be searched pursuant to the drug court agreement.

**B. Kays v. Commonwealth**

[2014-CA-001924](#) 10/14/2016 2016 WL 5956995

Opinion by Judge Nickell; Chief Judge Kramer and Judge Thompson concurred.

Appellant, a former high school teacher and volleyball coach, was convicted of third-degree rape and sodomy after preying upon a 15-year-old student and volleyball team member. The Court of Appeals affirmed the conviction, first holding that no error occurred where the trial court excused for cause a juror who said that the prospect of retaliation against him and his family would

impact his ability to deliberate. The Court reasoned that even if the Commonwealth proved its case beyond a reasonable doubt, the juror would be cognizant of his fear of reprisal and would be more likely to vote to acquit. The concern came to light when the venireman approached the bench during recess and spoke privately with the trial judge. While all counsel were in the courtroom, they were not called to the bench to participate in the discussion, which the Court of Appeals noted was not the best practice. The Commonwealth's case was built around hundreds of electronic messages, Facebook messages and cell phone calls between appellant and the victim. No one from Facebook was called to the stand to identify the messages - a flaw appellant claimed was fatal - but all of the messages were properly introduced through an individual involved in the message who identified and authenticated them. The Court next held that because appellant's marriage disintegrated soon after his indiscretions were revealed, and he was divorced at the time of trial, his attempt to use spousal privilege to prevent his ex-wife from testifying about a private conversation they had during the marriage was thwarted. This ruling was based on KRS 620.050, which abrogates the marital privilege when child abuse is alleged. Finally, appellant asserted as an unpreserved error that the jurors did not receive full and accurate sentencing information - specifically, that as a sex offender he must complete a five-year period of post-incarceration supervision and any violation during that time will result in an additional five years of imprisonment; that he is subject to lifetime registration as a sex offender; that no matter how many credits he earns in prison as a violent offender, his sentence will not be reduced below 85 percent of the sentence imposed; and that sex offenders are rarely released on parole and often serve their full sentence. The Court determined that appellant could have cross-examined the probation and parole officer who testified on each of these points, or offered his own witness, but having done neither, there was no palpable error requiring reversal. The Court noted that all information given to the jurors was accurate and that the trial court did not prevent appellant from offering proof he now claimed was critical.

## II. FAMILY LAW

### A. *Boone v. Boone*

[2015-CA-001456](#) 10/14/2016 2016 WL 5956988

Opinion by Judge Combs; Judges Clayton and Maze concurred.

The issue presented in this appeal was whether recusal of a family court judge in a marital dissolution action required recusal of that judge in domestic violence proceedings involving the same parties. The Court of Appeals held that recusal in all matters was required in light of the “one judge, one family” approach to family law in Kentucky. Thus, when the family court judge recused in the divorce action, she simultaneously and automatically disqualified herself from any pending DVO proceeding involving the parties.

### B. *Smith v. Smith*

[2015-CA-000339](#) 10/28/2016 2016 WL 6311213

Opinion by Judge J. Lambert; Judges Taylor and Thompson concurred.

In a marital dissolution action, Husband appealed an order awarding Wife a non-marital interest in the marital residence as well as maintenance. The Court of Appeals affirmed, holding that Wife presented sufficient evidence to establish a non-marital gift used for the down payment on a prior marital residence and adequately traced it to the purchase of the final marital residence. The Court also rejected Husband’s argument that Wife was precluded from receiving maintenance because she had failed to exert enough effort to seek employment after she filed for dissolution. A spouse’s efforts to secure employment are not part of the statutory criteria for a court to consider in determining whether a maintenance award is appropriate.

### III. WORKERS' COMPENSATION

#### A. Podgursky v. Decker

[2015-CA-001390](#) 10/21/2016 2016 WL 6134898

Opinion by Judge Jones; Judges Clayton and Taylor concurred.

This appeal presented an issue regarding the scope and meaning of the language “person employed for not exceeding twenty (20) consecutive work days” as used in KRS 342.650(2). The ALJ interpreted this language to mean that an individual had to perform actual services for his employer for twenty consecutive days. The Workers’ Compensation Board reversed. On appeal, the Court of Appeals affirmed the Board. The Court relied upon the definition of “work” set forth in the Workers’ Compensation Act, *i.e.*, that “work” means “providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.” KRS 342.0011(34). Based on the record, the Court concluded that there was clearly an implied (if not express) agreement in place between Decker and Modern Woodworking that Decker would “provide services to [Modern Woodworking] on a regular and sustained basis” in exchange for remuneration. The fact that there was not always work for Decker to perform every day was not determinative of his employment status. Even though Decker did not report to Modern Woodworking every day, he certainly performed work for Modern Woodworking on a regular basis over a sustained period of time for a period of over twenty consecutive days, thereby removing him from the scope of KRS 342.650(2).