PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
APRIL 2019

I ADMINISTRATIVE LAW:

A. John B. Baughman v. Commonwealth of Kentucky, Energy and Environment Cabinet, et al.

2018-SC-000104-DG **April 18, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. Energy and Environment Cabinet brought suit against Jeffrey Bowling based on five wastewater treatment plants that were owned and improperly maintained by him. At the conclusion of the nine-year litigation, and despite numerous distributions to the receiver for services throughout the receivership, the court-appointed receiver was owed $27,005. Recognizing the difficulty the receiver would have collecting from Bowling, the trial court assessed this amount against the Cabinet. On appeal, the Court of Appeals reversed, holding that only Bowling could be liable for the monies owed to the receiver. Affirming the Court of Appeals on discretionary review, the Supreme Court held that the expenses incurred by the receiver are not properly characterized as costs under Kentucky Rule of Civil Procedure 54.04, or Kentucky Revised Statute 453.010. Further, precedent does not support assessing the expenses against the Cabinet; the receivership was valid and the Cabinet is not liable merely because it initiated the receivership proceedings. No special circumstances justified requiring the Cabinet, a state agency funded in large part by taxpayers, to cure the receiver's deficiency. The trial court, although well-intentioned in light of the benefits realized as a result of the receiver's services, abused its discretion.

II. CORPORATIONS:

A. Keith Randall Sparkman, Etc. v. Consol Energy, Inc. et al.

2017-SC-000541-DG **April 18, 2019**

Opinion of the Court by Justice VanMeter. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Lambert, J., concurs in result only. Buckingham, J., not sitting. Wright, J., dissents by separate opinion. Keith Sparkman sued Consol Energy (parent company) and Consol of Kentucky (wholly-owned subsidiary) for tortious interference with contractual relations and breach of contract. Sparkman had janitorial services contracts at three mining sites owned by Consol of Kentucky. These contracts were terminated and Amy Little, Sparkman's employee, was given the contracts. Sparkman's strategy at trial was to show that Little was having an affair with Clell Scarberry, a mine foreman, and that Scarberry may have asked a Consol employee to give Sparkman's contracts to Little. Sparkman prevailed at trial on both claims, but the tortious interference claim was reversed by the Court of Appeals. The Kentucky Supreme Court granted discretionary review to determine

whether a parent corporation has the authority to interfere with its wholly-owned subsidiary's contracts. The Court, in following the Restatement of Torts (Second), held that a parent corporation "has a privilege to interfere in the contractual relations of its wholly-owned subsidiary, unless it employs wrongful means or acts contrary to its subsidiary's interest." The Court further held that the alleged affair between Little and Scarberry, and the subsequent award of Sparkman's former contracts to Little was not "wrongful means" as contemplated by the Second Restatement. Accordingly, the Court affirmed the Court of Appeals.

III. CRIMINAL LAW:

A. John Leroy Graham v. Commonwealth of Kentucky

2018-SC-000055-MR **April 18, 2019**

Opinion of the Court by Justice Wright. All sitting; all concur. A Muhlenberg Circuit Court jury found Appellant, Jesse Leroy Graham, guilty of four counts of first-degree sodomy and two counts of first-degree sexual abuse. Appellant entered an Alford plea to six additional charges and was sentenced to thirty years' imprisonment. The twelve charges concerned four separate victims, each of whom was under the age of twelve. Appellant appealed as a matter of right, Ky. Const. § 110(2)(b), alleging that: (1) the trial court abused its discretion in its admission of improper evidence pursuant to Kentucky Rules of Evidence (KRE) 404(b); (2) the trial court abused its discretion in denying Appellant's motion for mistrial; and (3) the Commonwealth improperly questioned Appellant, amounting to a violation of *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997). The Supreme Court disagreed with Appellant's arguments that his convictions should be overturned. The Supreme Court held that none of Appellant's claimed KRE 404(b) errors resulted in the admission of evidence of other crimes, wrongs, or acts. Next, while acknowledging that bystanders should not gesture to a witness (and warning attorneys to warn bystanders in the future about such actions), the Court held that a mistrial was not warranted under the facts of this case wherein a bystander gave a child witness a "thumbs up" during a break in his testimony. Finally, the Court held that the Commonwealth asking Appellant if he believed the victims made up the story against him when the two locked themselves in a bedroom after becoming angry that Appellant would not take them fishing did not amount to a Moss violation. Rather, the Commonwealth never asked Appellant to characterize the victims' testimony as untruthful. The Commonwealth just further explored a motive Appellant had presented in his direct testimony as to the victims' motive for their accusations.

B. Ronnie Leach v. Commonwealth of Kentucky

2018-SC-000239-MR **April 18, 2019**

Opinion of the Court by Justice Keller. All sitting; all concur. The Court affirmed Ronnie Leach's conviction of six counts of Sexual Abuse in the First Degree, victim under 12; one count of Sexual Abuse in the First Degree; and four counts of Sodomy in the First Degree, victim under 12. Leach argued several grounds for relief: (1) the trial court erred when it allowed the government to present KRE 404(b) evidence; (2)

the trial court erred when it did not allow the defense to present KRE 412 evidence; and (3) the trial court erred when it allowed Facebook messages into evidence when they were not properly authenticated. The Supreme Court held that allegations by someone else of sexual abuse by the defendant were admissible as modus operandi. As an issue of first impression, the Supreme Court also held that allegations by another person of sexual abuse perpetrated by the defendant that prompted disclosure of the abuse by the victim in the case was admissible as inextricably intertwined evidence. The Supreme Court also held that the victim's prior allegations of sexual impropriety against another person were not admissible as they were not demonstrably false. Finally, the Supreme Court held that objection to admission of Facebook messages was waived by the defendant.

C. Kentucky Department of Corrections v. Mark Dixon
2017-SC-000127-DG April 18, 2019

Opinion of the Court by Justice Hughes. Minton, C.J.; Buckingham, Hughes, Keller, Lambert, and Wright, JJ., sitting. All concur. VanMeter, J., not sitting. Dixon was sentenced to serve three consecutive sentences totaling twenty-six years in prison; ten years of the sentence was for first-degree assault, a violent offense as defined in KRS 439.3401. After completing ten years of his sentence, Dixon initiated an administrative review of his sentence contending that he was entitled to work-time credit on the remaining sentences for the non-violent offenses. The Department denied the credit on the grounds that Dixon's total combined sentence of twenty-six years was not partitionable by offense and, as a violent offender, he was not allowed any work-time credit. A divided Court of Appeals' panel reversed the trial court, concluding Dixon was entitled to work-time credit on his nonviolent offense sentences. On discretionary review, the Supreme Court addressed whether the disallowance of sentence credit to a violent offender under KRS 197.047(6)(b) applies to the aggregate sentence imposed pursuant to KRS 532.120(1)(b) when it is composed of sentences for both violent and nonviolent offenses. Reversing the Court of Appeals, the Court held that when a criminal defendant is serving consecutive, indeterminate sentences, KRS 532.120(l)(b) directs that those sentences are to be combined into an aggregate term — a single, continuous sentence. The disallowance of work-time sentence credit to a violent offender in KRS 197.047 applies to the single, continuous sentence.

IV. FAMILY LAW:

A. Dixie Meinders, et al. v. Daryl K. Middleton
2018-SC-000251-DGE April 18, 2019

Opinion of the Court by Justice Lambert. All sitting. Buckingham, Hughes, Lambert, Keller, and Wright, J.J., all concur. Minton, C.J., concurring in result only in which VanMeter, J. joins. A child custody case wherein the child's biological mother misrepresented to Appellant Rhiannon Scronce that she was the child's paternal aunt. Shortly after the child was placed with Rhiannon through a neglect action, it was established via paternity test that the child's biological father was the Appellee Keith

Middleton. The McCracken Circuit Court denied Middleton's request for custody, finding that Rhiannon was the child's de facto custodian. The Court of Appeals reversed that finding on the six-month time requirement but remanded the case for findings per *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). On appeal to this Court Scronce argued: (1) that the time period required to gain de facto status under KRS 403.270 does not have to be continuous, and may therefore be aggregated; (2) that KRS 403.270 requires a parent to file a separate legal proceeding in order to toll the de facto custodian time period in accordance with *Spreacker v. Vaughn*, 397 S.W.3d 419 (Ky. App. 2012); and (3) that a putative father, who has been established as the biological father of a child via paternity test, must nonetheless file a separate motion to establish paternity in order to establish legal, as opposed to factual, parenthood.

The Court rejected all of Scronce's arguments, holding: (1) that the time period required to gain de facto custodian status under KRS 403.270 must be one, continuous period; (2) that any direct participation by a parent in a custody proceeding evincing a desire to regain custody is sufficient to toll the requisite de facto custodian time period under KRS 403.270, overruling *Spreacker v. Vaughn*, 397 S.W.3d 419 (Ky. App. 2012) in favor of *Heltsley v. Frogge*, 350 S.W.3d 807 (Ky. App. 2011); (3) that KRS 600.020(46)'s definition of "parent," as well as the trial court's recognition of Middleton as the child's biological father, was sufficient to legally establish his parenthood; and (4) that Scronce therefore did not qualify as the child's de facto custodian; and (5) that the sole custody of the child should be placed with Middleton as the Mother had agreed. The Court also held that the trial court erred in ordering an ICPC (Interstate Compact for the Placement of Children) home study as to the father's home in Missouri because the statute does not apply to the "sending or bringing of a child into a receiving state by his parent."

V. WRONGFUL TERMINATION:

A. Carol Greissman v. Rawlings and Associates, PLLC

2017-SC-000518-DG **April 18, 2019**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Carol Greissman, a licensed attorney in Kentucky, was terminated by Rawlings and Associates, PLLC for refusing to sign an agreement providing, inter alia, for non-solicitation of Rawlings & Associates' customers or clients following cessation of employment. Greissman's refusal to sign was based on her belief that the provision violated a Rule of Professional Conduct prohibiting non-competition agreements between lawyers and law firms. SCR 3.130, Rule 5.6. The issue before the Court was whether the Court of Appeals erred in opining that the Rules of the Kentucky Supreme Court do not establish public policy which in turn may form a basis for a wrongful termination claim. The Supreme Court held that the Court of Appeals erred in holding that Greissman's complaint should have been dismissed for failure to state a claim, but nonetheless affirmed on other grounds. The Supreme Court concluded that the circuit court properly granted summary judgment in favor of Rawlings & Associates since the agreement at issue contained a savings clause which excepted the solicitation of legal work from coverage "to the extent necessary to comply with rules of

professional responsibility applicable to attorneys." Thus, the agreement furnished to Greissman for signature did not violate SCR 3.130, Rule 5.6 as a matter of law.

VI. ATTORNEY DISCIPLINE:

A. Carroll Hubbard, Jr. v. Kentucky Bar Association

2018-SC-000436-KB **April 18, 2019**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. Hubbard was counsel for a party in a contentious case. While the case was pending, Hubbard clipped a picture of opposing counsel and her wife from a newspaper, drew an arrow to the couple, and wrote several derogatory terms beneath the photograph. He then addressed the envelope to opposing counsel and her wife and mailed it to them.

At a hearing in the visitation case, Hubbard denied that he mailed the newspaper clipping, despite the judge directly asking him on two separate occasions if he had done so. Hubbard was then sworn-in after being called as a witness by opposing counsel and, under oath, denied it was his handwriting on the envelope. Opposing counsel filed a bar complaint against Hubbard and the next day Hubbard self-reported to the KBA, filing a complaint on himself. In his self-report, Hubbard admitted to mailing the clipping to opposing counsel and her wife and issued an apology.

The Inquiry Commission charged Hubbard with five counts of misconduct, including two counts of violating SCR 3.130-3.3(a)(1), for knowingly "mak[ing] a false statement of fact or law to a tribunal." Hubbard admitted he violated this rule by denying to the court that he had any involvement in mailing the newspaper clipping. The Inquiry Commission also charged Hubbard with two counts of violating SCR 3.130-8.4(c), which provides that "it is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Hubbard admitted he violated the rule by denying to opposing counsel twice during the hearing that he sent the clipping to her and his wife. Finally, Hubbard was charged with one count of violating SCR 3.130(8.4)(b), which provides: "[i]t is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Hubbard admitted that his conduct in denying under oath that his handwriting was on the envelope addressed to opposing counsel amounted to a violation of this rule. Specifically, Hubbard violated KRS 523.040 (false swearing – a Class B misdemeanor). Hubbard further admitted to filing a JCC complaint against the judge as a retaliatory and vindictive act, and to lying to another local attorney regarding the nature of the JCC complaint.

The parties agreed the appropriate sanction for Hubbard's ethical violations was a sixty-day suspension from the practice of law on the condition that he send

written apologies to the judge, opposing counsel, opposing counsel's wife, and the local attorney to whom he lied about the JCC complaint. Hubbard moved the Court to approve the negotiated sanction and the KBA did not object.

After examining relevant case law, the Court agreed that Hubbard was guilty of all charged counts, and that a sixty-day suspension was the appropriate sanction. The Court further ordered Hubbard to send apology letters to the aggrieved parties and to file the letters with the circuit clerk and the Office of Bar Counsel.

B. Inquiry Commission v. Andrew Nicholas Clooney
2018-SC-000595-KB **April 18, 2019**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission provided four verified complaints filed by Clooney's former clients against Clooney and his firm, Clooney Law Office. The Inquiry Commission also attached a standard complaint, for a total of five complaints, all representing civil actions filed in Jefferson Circuit Court. The Office of Bar Counsel also received bar complaints relating to three of the five civil actions. In all of the cases, it was alleged that Clooney misappropriated or mishandled client funds, including forging clients' signatures on settlement releases.

Based on these allegations, the Inquiry Commission petitioned the Court to temporarily suspend Clooney under Supreme Court Rule (SCR) 3.165(1)(a) and 3.165(1)(b), which permits temporary suspension if there is probable cause to believe an attorney has been misappropriating or mishandling funds, or that his conduct poses a threat of harm to his clients or the public. A show cause order was issued on February 14, 2019, but Clooney failed to respond. The Court held there was sufficient supporting evidence in the record to warrant temporary suspension. Accordingly, the Court ordered Clooney temporarily suspended, pending further orders.

C. Kentucky Bar Association v. Christy Hanley Shircliff
2018-SC-000607-KB **April 18, 2019**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Buckingham, J., not sitting. The Kentucky Bar Association ("KBA") moved the Court to set aside the findings of guilt in the Court's February 14, 2019 Opinion and Order, which found Shircliff guilty of a pending disciplinary charge and suspended her indefinitely under SCR 3.380(1). Shircliff also moved the Court to amend, alter, or vacate the opinion because she had submitted an answer to the disciplinary charge. Although the answer was submitted after the original deadline, the KBA deemed the answer to be filed and Shircliff was no longer in default. Finally, the KBA moved the Court to order Shircliff to show cause as to why she should not be held in contempt of the Court for violating the February 14, 2019 order of suspension, alleging that she had practiced law after the date the order became effective.

The Court agreed with the KBA and set aside the findings of guilt contained in the February 14, 2019 Opinion and Order, finding instead that the underlying disciplinary case was still pending at the KBA. The Court denied Shircliff's motion to amend, alter, or vacate the February 14, 2019 order of indefinite suspension because Shircliff has failed to file a response to the KBA's motion seeking indefinite suspension with this Court and had failed to account for her failure to file an answer to the underlying disciplinary charge before the original deadline. Finally, the Court ordered Shircliff to show cause as to why she should not be held in contempt of the Court for violating the February 14, 2019 order of indefinite suspension.

D. Kentucky Bar Association v. Andrew Nicholas Clooney
2019-SC-000114-KB **April 18, 2019**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association (KBA) petitioned the Supreme Court to indefinitely suspend Clooney from the practice of law under Supreme Court Rule (SCR) 3.380(2) for violating SCR 3.200 by failing to answer a KBA charge. The charge was initiated because of Clooney's failure to answer a Bar Complaint filed by a former client. Upon review of the record, the Court agreed that the proposed sanction was appropriate under SCR 3.380(2) and indefinitely suspended Clooney from the practice of law in the Commonwealth.