

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2011**

I. CONTRACTS

- A. Joseph Fischer; and Cindy Fischer v. John R. Fischer, Successor
Executor of the Estate of John Fischer**
[2009-SC-000245-DG](#) March 24, 2011

Opinion of the Court by Justice Noble. All sitting. In a contractual dispute between two brothers over their prior oral arrangement to divide inheritance from their now deceased mother, the Court of Appeals reversed an award on the contract because of the rule voiding contracts that assign a mere expectancy, though this rule had not been raised at trial. The Supreme Court held that the Court of Appeals erred by reversing on an issue not raised at trial, absent the existence of manifest injustice. However, the Court affirmed the Court of Appeals on other grounds properly preserved at trial, namely, that the contract violated the statute of frauds' requirement that contracts involving the transfer of land—a substantial component of the mother's estate—be in writing. The fact that Appellee, victorious at the Court of Appeals, had failed to cross-appeal that court's judgment on the statute of frauds issue, did not preclude review on this issue, where he had raised it in his responsive brief as an alternative grounds for affirming the judgment below. Justices Scott and Schroder concurred in result only.

II. CRIMINAL

- A. Denver Ray Williams v. Commonwealth of Kentucky**
[2009-SC-000440-DG](#) March 24, 2011

Opinion of the Court by Chief Justice Minton. All sitting. The Supreme Court affirmed a Court of Appeals opinion affirming trial court's denial of RCr 11.42 relief. Issues/holdings include: 1) defendant's convictions for two counts of trafficking for possessing one quantity of controlled substance in vehicle and one quantity of controlled substance on his person shortly following arrest did not result in double jeopardy violation because his arrest constituted legal process and precedent requires that the same contraband must be continually possessed—without an interruption in the form of legal process--in order for only one offense to have occurred. Justice Noble concurred in result only.

- B. George Lapradd, Jr. v. Commonwealth of Kentucky**
[2009-SC-000214-DG](#) March 24, 2011

Opinion of the Court by Justice Schroder. All sitting; all concur. The issue in this case was the burden of proof and how the jury was to be

instructed when a choice of evils defense was raised pursuant to KRS 503.030. The Supreme Court held that the jury instructions improperly failed to place the burden of proof on the Commonwealth to show that the defendant was not privileged to take the action he did by including the absence of the choice of evils as an element of the offense at issue, reversing *Beasley v. Commonwealth*, 618 S.W.2d 179, 180 (Ky. App. 1981) and *Peak v. Commonwealth*, 34 S.W.3d 80, 82 (Ky. App. 2000), to the extent they hold otherwise. The conviction for possession of a handgun by a convicted felon and PFO II was reversed and remanded for a new trial.

- C. **James Quisenberry v. Commonwealth of Kentucky**
Kenneth Williams v. Commonwealth of Kentucky
[2009-SC-000302-MR](#) March 24, 2011
[2009-SC-000418-MR](#) March 24, 2011

Opinion of the Court by Justice Abramson. All sitting; all concur. Following a joint trial, the defendants were convicted of offenses stemming from the robbery and killing of a woman and the shooting of the woman's two-year-old child. Upholding the convictions, the Supreme Court held (1) that the use at the joint trial of Quisenberry's redacted police statement did not infringe Williams's confrontation rights; (2) that interrogating officers did not violate Williams's Miranda rights; (3) that Quisenberry's convictions were supported by sufficient evidence; and (4) that Quisenberry's convictions for having facilitated both an assault against and the attempted murder of the child did not violate his right under the Double Jeopardy Clause not to be punished twice for a single offense.

- D. **Duwan Lamar Robbins v. Commonwealth of Kentucky**
[2009-SC-000643-DG](#) March 24, 2011

Opinion of the Court by Justice Cunningham. All sitting. Evidence obtained from defendant's vehicle was admissible because it was validly obtained during a lawful search incident to arrest. Though defendant was initially stopped due to an outstanding bench warrant, his act of throwing a small package of cocaine on the ground gave rise to new charges of trafficking in cocaine. Thus, pursuant to *Arizona v. Gant*, officers had a reasonable belief that evidence relating to the trafficking charge would be found in the vehicle. Justice Noble concurred in result only.

- E. **Jonathan Harris v. Commonwealth of Kentucky**
[2009-000621-MR](#) March 24, 2011

Opinion of the Court by Justice Venters. All sitting; all concur. – Criminal; Direct Appeal. Defendant was convicted of numerous charges,

including a second-degree persistent felony offender enhancement presided over by senior judge sitting as special judge. On appeal Defendant alleged that his conviction was void because it was presided over by an unconstitutionally appointed judge and that because he was under 21 at the time he presented his present plans. The Court held: (1) that the judgment against defendant was not void because, under the circumstances present here, the appointment of a retired judge from the senior status program to preside over his trial did not violate Kentucky Constitutional provisions for elected or gubernatorially-appointed judges; and (2) that defendant's conviction as a second-degree persistent felony offender was proper under KRS 532.080(2) even though the defendant was under the age of 21 at the time he committed the present crimes and that KRS 532.080(2) is constitutional both facially and as applied.

F. Commonwealth of Kentucky v. Raycine Love
[2009-SC-000671-DG](#) March 24, 2011

Opinion of the Court by Chief Justice Minton. All sitting. Supreme Court affirmed Court of Appeals opinion reversing trial court's revocation of Love's probation and order to run Kentucky sentence consecutively to federal sentence. Issues/holdings include: 1) under plain language of KRS 533.040(3), probation revocation must be completed (not just initiated) in order for state court sentence to run consecutively to federal sentence imposed on probationer during state court-imposed probation. Justice Scott dissented by separate opinion, joined by Justice Cunningham.

III. ELECTIONS

A. Jimmy R. Gibson, et al. v. Randy Thomspen
[2010-SC-000708-1](#) March 24, 2011

Opinion of the Court by Justice Cunningham. All sitting; all concur. Movants, whose motion challenging the qualifications of a county judge executive candidate was dismissed for lack of standing, were not entitled to seek relief in the Court of Appeals pursuant to KRS 118.176. By its own terms, that statute affords relief only where the trial court has determined that the candidate is not a bona fide candidate.

IV. MARITAL PROPERTY

A. Carolyn Rice v. Jackie Rice
[2009-SC-000730-DG](#) March 24, 2011

Opinion of the Court by Justice Noble. All sitting; all concur. In a property division proceeding, the trial court had ruled that debt incurred by an adult son, using the parents' credit cards, but with the permission and knowledge of only the husband, was marital debt to be divided equally between the husband and wife, and the Court of Appeals affirmed. The

Supreme Court reversed, holding that the trial court abused its discretion, because debt incurred on behalf of an adult son, no longer an obligee of the parents, is nonmarital property when authorized by only one partner.

V. PERSONAL JURISDICTION

- A. Gerald S. Hinnens v. Brad Robey, D/B/A Robey's Pawn World**
[2009-SC-000389-DR](#) March 24, 2011

Opinion of the Court by Justice Venters. All sitting, all concur. Civil; Application of Long Arm Statute (KRS 454.210); Plaintiff alleged that defendant was subject to personal jurisdiction in Kentucky as a result of out-of-state defendant's sale of a vehicle on the Internet auction site, eBay.com, pursuant to Kentucky's long-arm statute, KRS 454.210, and federal due process standards. The Court held that the eBay transaction fell within the parameters of KRS 454.210, but this single contractual transaction failed to establish sufficient minimum contacts with Kentucky so as to make jurisdiction reasonable under federal due process standards for Kentucky courts to exercise personal jurisdiction over defendant in relation to the vehicle sale.

- B. Caesars Riverboat Casino LLC, et al. v. Carla Beach**
[2009-SC-000634](#) March 24, 2011

Opinion of the Court by Justice Venters. All sitting; all concur. Civil; Application of Long-Arm Statute, KRS 454.210; Plaintiff alleged that out-of-state defendants were subject to personal jurisdiction in Kentucky in a lawsuit brought by Kentucky resident as a result of a slip and fall accident that occurred on a casino boat located in Indiana. Plaintiff alleged long-arm jurisdiction over nondomiciliary defendants' because of their contacts with Kentucky, which consisted of pervasive in-state mass media and billboard advertising; direct mail marketing; special customer programs to attract repeat visits; and substantial charitable and civic activities in Kentucky; and the fact that fifty-percent of their revenues are derived from Kentucky residents. The Court held that none of the activities, contacts, or circumstances of the defendants either individually or in combination, fell within any of the categories specified in our long-arm statute so as to confer Kentucky with in personam jurisdiction over defendants, and thus Kentucky jurisdiction did not have jurisdiction over the lawsuit.

VI. RETIREMENT

**A. Kentucky Retirement Systems v. Dillard Wayne Brown AND
Kentucky Retirement Systems v. Tammy Sizemore**

[2008-SC-000326-DG](#) March 24, 2011
[2008-SC-000898-DG](#) March 24, 2011
[2009-SC-000174-DG](#) March 24, 2011

Opinion of the Court by Justice Scott. All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ., concur. Noble, J., concurs in result only. In this case, the Court reviewed two cases in which Kentucky Retirement Systems had denied disability benefits, as it determined the claimants' conditions pre-existed their employment. The Court stated that "the person seeking the entitlement determination must prove to the trier of fact that his or her condition was not pre-existing membership by a preponderance of the evidence." Furthermore, Kentucky Retirement Systems' determination as to whether a condition was pre-existing must be based upon "objective medical evidence." Both claimants met their burden of proving that their conditions did not pre-exist their employment. Consequently, the Court affirmed the Court of Appeals on these issues. The Court also addressed Sizemore's claim that the Court of Appeals erred in upholding Kentucky Retirement Systems' finding that she was not permanently incapacitated. The Court affirmed the Court of Appeals on this issue as well.

VI. WRITS

**A. Commonwealth ex rel Conway v. Honorable Phillip J. Shepherd,
Judge, Franklin Circuit Court and Gregory Wilson, et al.**

[2010-SC-000586-OA](#) March 24, 2011
[2010-SC-000589-OA](#) March 24, 2011

Opinion of the Court by Chief Justice Minton. All sitting. Supreme Court declined to exercise discretion to issue writ to dismiss death row inmates' declaratory judgment action challenging validity of Kentucky death penalty regulations, to prohibit Franklin Circuit Court from entering orders on matters resolved by or pending before other courts, or to otherwise disturb temporary injunction entered by Franklin Circuit Court staying execution of death row inmate Gregory Wilson. Supreme Court stated that public interest favored allowing declaratory judgment action and Wilson's appeal of Kenton Circuit Court's denial of relief to proceed, that Franklin Circuit Court appropriately balanced equities in entering temporary injunction, and that any possible overstepping by Franklin Circuit Court into matters more appropriately resolved by other courts or any errors in determining validity of death penalty regulations could be adequately remedied by appeal. Justices Cunningham and Scott dissented.

B. Velessa Hathaway v. Audra J. Eckerle and Commonwealth Dodge, LLC
[2010-SC-000457-MR](#) March 24, 2011

Opinion by Justice Venters. All sitting, all concur. Hathaway filed for a writ of prohibition against Judge Eckerle because she ordered Hathaway to arbitrate her dispute with Commonwealth Dodge per an arbitration clause included in a vehicle sales contract. Hathaway argued that she was entitled to a writ because the arbitration clause did not satisfy KRS 417.050 or 417.200, and thus Judge Eckerle was without jurisdiction to order the parties to arbitrate. *See Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). However, the Court held that the Federal Arbitration Act is the law governing this arbitration clause due to a “choice of law” provision in the contract. Thus, neither the Kentucky Arbitration Act or *Ally Cat* applied to the arbitration clause, and Judge Eckerle had jurisdiction to order the parties to arbitrate. Further, the Court held that the arbitration clause in question was not unconscionable and that there were no grounds to revoke the vehicle sales contract at law.

C. Hon. William Mitchell Nance, Circuit Court Judge, 43rd Judicial Circuit, Division Two (Family Court), Commonwealth of Kentucky v. Kentucky Administrative Office of the Courts
[2010-SC-000202-OA](#) March 24, 2011

Opinion of the Court by Justice Noble. Chief Justice Minton not sitting. Judge Nance sought a writ of prohibition to enjoin the Administrative Office of the Courts (AOC) from terminating the employment of the family court administrator in the judicial circuit where he presides. The Supreme Court denied the writ because the Chief Justice, as executive head of the Court of Justice, has the power to appoint administrative assistants as he deems necessary, and hence the derivative power to terminate their employment. The Chief Justice has the further authority to delegate this power, as he did to the Director of the AOC here. Justice Abramson filed a concurring opinion to emphasize that Section 110 of the Kentucky Constitution’s authorization for the Chief Justice to perform all necessary administrative functions is controlling, absent any Supreme Court rule enacted pursuant to Section 116, which might limit such authority. Justice Schroder filed a dissenting opinion, stating that because Section 116 authorizes the Supreme Court as a whole to adopt personnel policy, the Chief Justice may not amend or override personnel policies unilaterally.

VII. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. Margaret M. Jackson-Rigg
[2010-SC-000684-KB](#) March 24, 2011

Opinion of the Court. All sitting. The Supreme Court suspended the Respondent from the practice of law for a period of one year, to be served consecutively to any and all prior suspensions. Justice Schroder dissented.

- B. Kentucky Bar Association v. Christopher S. Harwood**
[2010-SC-000715-KB](#) March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court retroactively suspended the Respondent from the practice of law for a period of six months effective April 7, 2010, to run concurrently with a 6-month sentence that was entered and probated by the Ohio Supreme Court.

- C. Kentucky Bar Association v. Patrick Edward Moeves**
[2009-SC-000270-SC](#) March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court suspended the Respondent from the practice of law for one year for violation of conditional discipline stated in a prior order of the Court. The Court further suspended the Respondent from the practice of law effective March 24, 2011, and until superseded by subsequent order of the Court.

- D. J. Thomas Hardin v. Kentucky Bar Association**
[2010-SC-000800-KB](#) March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court suspended the Movant from the practice of law for two years.

- E. Kentucky Bar Association v. William O. Ayers**
[2010-SC-000811-KB](#) March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court suspended the Respondent from the practice of law for thirty days, effective March 24, 2011, to be served consecutively with any and all prior suspensions.

- F. Kentucky Bar Association v. Leo Marcum**
[2010-SC-000814-KB](#) March 24, 2011

Opinion of the Court. Justice Scott not sitting. The Supreme Court suspended the Respondent from the practice of law for three years, to be served consecutively to any and all prior suspensions.

- G. Kentucky Bar Association v. Sharon Easthom Rowsey**
[2011-SC-000034-KB](#) March 24, 2011

Opinion of the Court. Justice Abramson not sitting. The Supreme Court suspended the Respondent from the practice of law for 181 days, with sixty-one (61) days to serve and the balance being probated pending her successful completion of the Ethics and Professionalism Enhancement Program.

H. Kentucky Bar Association v. David Kaplan

[2011-SC-000038-KB](#)

March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court adopted the recommendation of the trial commissioner to suspend respondent from the practice of law for five years for the commission of several ethical violations all related to the unauthorized practice of law during an earlier suspension.

I. James W. Patton v. Kentucky Bar Association

[2011-SC-000072-KB](#)

March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court reinstated the Movant to the practice of law.

J. Valerie L. Bock v. Kentucky Bar Association

[2011-SC-000074-KB](#)

March 24, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court suspended the Respondent from the practice of law for 181 days, ninety days to be served and the balance of ninety-one days probated until December 2, 2013, subject to certain conditions.