

**KENTUCKY SUPREME COURT  
MARCH 2020**

**I. CONTRACT LAW:**

**A. Paul Mostert v. The Mostert Group, LLC**

**[2017-SC-000600-DG](#)**

**March 26, 2020**

Opinion of the Court by Justice Hughes. Minton, C.J.; Keller, VanMeter, Wright, JJ., and Dunaway and Rhoads, S.J., sitting. All concur. Lambert and Nickell, JJ., not sitting. Appellant Paul Mostert developed computer technology aimed at predicting a thoroughbred's success by analyzing its biomechanics. In 2003, Mostert agreed to transfer the technology to a newly-formed business, The Mostert Group, LLC (TMG), in exchange for TMG stock, cash and a promissory note payable in installments. Mostert subsequently refused to deliver to TMG the source code, a component essential to maintaining and updating the software technology, so TMG declined to make the final promissory note payment to Mostert. In the interim, TMG filed two lawsuits against Mostert in Fayette Circuit Court and, after years of litigation, appealed from an order granting partial summary judgment in favor of Mostert. Based on its construction of the documents executed by the parties in 2003, the Court of Appeals reversed and remanded to the trial court, finding that Mostert's refusal to turn over the source code was a breach of his contract with TMG.

On appeal, the Supreme Court affirmed the Court of Appeals. The resolution of this case hinged on the interpretation of the parties' agreements, and the Court reasoned that the unambiguous language of a contract will be enforced as written. Because the agreements indicate that the parties recognized and intended a difference between "software" and "source code," it is clear that Mostert agreed to transfer the source code to TMG. By refusing to relinquish possession he breached the agreement. Mostert's breach excused TMG's obligation to perform, and therefore Mostert was not entitled to summary judgment granting him the last installment payment.

**II. CRIMINAL LAW:**

**A. Larry Lamont White v. Commonwealth of Kentucky**

**[2014-SC-000725-MR](#)**

**March 26, 2020**

Opinion of the Court by Justice VanMeter. All sitting; all concur. This case was heard on remand from the Supreme Court of the United States ("SCOTUS") for further consideration in light of the decision in *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017), discussing death penalty eligibility for defendants whose intellectual capacity is questioned. Following SCOTUS's remand, White filed a *pro se* motion asking to have his intellectual disability claim waived. On remand, the Court opined that a defendant who has set forth evidence of a

potential intellectual disability cannot waive his intellectual disability claim, “as that would impose the death penalty on a potentially intellectually disabled defendant—something the Commonwealth is without power to do.” The Court also held that White established a reasonable doubt as to his intellectual capacity based on his age 12 IQ scores of 71 and 68. The Court remanded White’s intellectual disability claim to the trial court to conduct an evidentiary hearing on this issue.

**B. Commonwealth of Kentucky v. Travis M. Bredhold**

**AND**

**Commonwealth of Kentucky v. Efrain Diaz, Jr. and Justice Smith**

[2017-SC-000436-TG](#)

**March 26, 2020**

[2017-SC-000536-TG](#)

**March 26, 2020**

[2017-SC-000537-TG](#)

**March 26, 2020**

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal, Transfer Granted. Appellees Bredhold, Diaz and Smith, each indicted in Fayette County for murder and robbery, each older than eighteen (18) but under twenty-one (21) years of age at the time of the alleged crimes, and for whom the Commonwealth noticed its intent to seek the death penalty, challenged pretrial the constitutionality of Kentucky’s death penalty statute. Each Appellee requested the trial court to extend *Roper v. Simmons*, 543 U.S. 551 (2005), death penalty prohibition for juvenile offenders under eighteen (18) years of age. The trial court was persuaded that the current national consensus and more recent scientific research now support raising the age for death-penalty eligibility to twenty-one (21) years of age and accordingly declared Kentucky’s death penalty unconstitutional. Question presented: Whether evolving standards of decency are such that the Eighth Amendment to the United States Constitution prohibits imposition of the death penalty as to a defendant under twenty-one (21) years of age at the time of his offense. Held: The question whether Kentucky’s death penalty is unconstitutional as to the age-based group identified by Appellees is currently not justiciable. At this stage of the criminal proceedings, none of the Appellees has been convicted, much less sentenced, and thus none of the Appellees has standing to present the issue of whether Kentucky’s death penalty constitutes “cruel and unusual” punishment under the Eighth Amendment.

**C. Tammy Roberts v. Commonwealth of Kentucky**

[2018-SC-000249-MR](#)

**March 26, 2020**

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Hughes, Keller, Lambert, and VanMeter, JJ., concur. Nickell, J., concurs in result only. A Graves Circuit Court jury convicted Appellant, Tammy Marie Roberts, of murdering her boyfriend, James Pinion. She was sentenced to twenty years’ imprisonment and appealed to the Supreme Court of Kentucky as a matter of right, Ky. Const. §110(2)(b). In her appeal, Roberts alleged: (1) the trial court erred in failing to grant a mistrial, (2) the trial court erred in refusing to instruct on self-defense and

imperfect self-defense, (3) the trial court erred in ruling she did not qualify for the domestic violence exemption, and, (4) that she should be granted a new trial because of cumulative errors. The Supreme Court held that the trial court erred in failing to grant a mistrial where the Commonwealth played recordings of police interviews with Roberts containing references to a prior assault she committed 12 years earlier. The Supreme Court held that the trial court should have granted Roberts's motion in limine which sought to exclude the evidence, but this alone was not reversible error. The Supreme Court reversed the trial court, holding the lower court committed reversible error in denying Roberts's motions for mistrial after the inadmissible evidence was played numerous times for the jury. Furthermore, the Supreme Court held the trial court's ruling that Roberts had not met the burden in showing her actions were "in regard to" domestic violence for parole eligibility in KRS 403.720 was clearly erroneous where extensive evidence indicated that Pinion's act of taking money from Roberts was an act of domestic violence in the couple's relationship.

### **III. FAMILY LAW**

#### **A. B.S.S. v. K.S., now K.G. 2019-SC-000019-DG**

**March 26, 2020**

Opinion of the Court by Justice Lambert. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. Hughes, Keller, Lambert, VanMeter and Wright, JJ., concur. Minton, C.J., dissents. A child custody and visitation case wherein the Mother filed a motion for sole custody of the Child during the parties' dissolution of marriage proceedings. The basis for the Mother's motion for sole custody was that the Father was under investigation by the CHFS for allegedly sexually abusing the child. The family court granted the Mother temporary sole custody of the Child. The Father subsequently filed for visitation in the dissolution action. After the Father filed for visitation, a dependency, neglect, and abuse action was filed against the Father with the same family court judge that presided over the dissolution action. The family court denied the Father's motion for visitation due to the pending dependency, neglect, and abuse action. In the dependency, neglect, and abuse action, the family court ultimately found a risk of sexual abuse if the Child was returned to the Father's care. Prior to a disposition hearing in the dependency, neglect, and abuse action, the Father appealed to the Court of Appeals. The Court of Appeals failed to recognize that the appeal was interlocutory and affirmed the family court.

After the Court of Appeals affirmed the family court in the dependency, neglect, and abuse action, the Father filed a motion to modify visitation. The family court judge noted that he did not find that sexual abuse occurred in the dependency, neglect, and abuse hearing, but rather that a risk of sexual abuse was present. After a hearing, the family court then ordered an incremental reunification plan between the Father and the Child. On appeal to the Court of Appeals, the Mother argued first that, because the Court of Appeals affirmed the family court in the dependency, neglect, and abuse proceeding, law of the case doctrine precluded the

family court from disregarding its previous findings when ruling on visitation in the dissolution action. She further asserted that the family court abused its discretion by ignoring its own previous finding that sexual abuse occurred. The Court of Appeals did not address the law of the case argument, as it found clear error in the family court's finding that it did not find that sexual abuse occurred in the dependency, neglect, and abuse proceedings.

This Court's holding was twofold. First, dependency, neglect, and abuse proceedings and dissolution of marriage proceedings are two different causes of action, and therefore law of the case doctrine was inapplicable. Second, the family court did in fact only find a risk of harm was present in the dependency, neglect, and abuse proceedings though not that sexual abuse had occurred. Holding there was substantial evidence to support the trial court's findings, the Court of Appeals was reversed.

**B. Ashley Layman v. Richard Lee Bohanon, Jr.**  
**[2019-SC-000364-DGE](#) March 26, 2020**

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, and Wright, JJ., concur. VanMeter, J., concurs in result only. Nickell, J., not sitting. The family court issued an order modifying the parties' timesharing arrangement and holiday schedule and recalculating child support. The father appealed. The Court of Appeals affirmed the family court's modification of the holiday schedule but reversed that portion of the family court's order that modified timesharing and child support. The Supreme Court granted discretionary review on the timesharing and child support issues and ultimately reversed the Court of Appeals. The Supreme Court first held that the Court of Appeals had incorrectly applied the presumption of joint custody and equal parenting time found in KRS 403.270. Because this was a timesharing modification, KRS 403.320—not KRS 403.270—applied, and that statute did not contain any such presumption. The Supreme Court next held that the trial court did not err in modifying timesharing under the standard set forth in KRS 403.320. Lastly, the Supreme Court held that the trial court did not err in declining to impute any income to the mother for gifts received by her parents because the evidence indicated that these gifts were either nonrecurring or were given to the children rather than the mother.

**IV. ATTORNEY DISCIPLINE:**

**A. Character and Fitness Committee of the Kentucky Office of Bar  
Admissions v. Bradley Stuart Sowell**  
**[2019-SC-000413-OA](#) March 26, 2020**

Opinion and Order of the Court. Hughes, Keller, Lambert, Nickell, VanMeter, and Wright, JJ., sitting. All concur. Minton, C.J., not sitting. Under SCR 2.042(1), applicants for admission to the Bar may be subject to a written agreement with the

Character and Fitness Committee imposing conditions on the applicant's license to practice. Upon violation of the terms and conditions of the agreement, the Committee has two options: extend the terms and impose additional conditions or recommend to this Court revocation of the member's conditional license.

In this case, Sowell and the Committee entered into multiple agreements governing his conditional admission to practice and his substance abuse issues. Each agreement required Sowell to abstain from alcohol and the use of unprescribed controlled substances, and to be monitored by the Kentucky Lawyer's Assistance Program ("KYLAP"). After the Director of KYLAP reported Sowell's non-compliance to the Office of Bar Admissions, he was notified that the Character and Fitness Committee would hold a "show cause" hearing for Sowell to explain why the Committee should not recommend to the Supreme Court suspension of his license to practice law for noncompliance. Sowell appeared with counsel but the Committee ultimately filed a Recommendation of Licensure Revocation with the Court.

The Court acknowledged that relatively few cases have discussed the application of SCR 2.042(1) to a bar applicant who, as a condition of admission, is placed under a consent agreement such as Sowell. But relying on *Character & Fitness Comm. Office of Bar Admissions v. Jones*, 62 S.W.3d 28 (Ky. 2001), the Court noted that Consent Agreements should be construed like all contracts. Accordingly, because Sowell admitted violating the terms of the Agreement, the Court accepted the recommendation of the Committee and ordered the revocation of Sowell's license to practice law.

**B. Kentucky Bar Association v. Jason Nicholas Martin**

**[2019-SC-000657-KB](#)**

**March 26, 2020**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association (KBA) petitioned the Supreme Court to indefinitely suspend Martin from the practice of law pursuant to Supreme Court Rule (SCR) 3.380(2) for violating SCR 3.164 by failing to answer an Inquiry Commission charge. The charge related to Martin's representation of a client in a probate matters and included violations of SCR 3.130(1.1) for failure to provide competent representation, SCR 3.130(1.3) for lack of diligence and SCR 3.130(8.1)(b) for failure to respond to a lawful demand for information from a disciplinary authority. The record reflected that Martin was served with the charge in September 2019 but failed to respond. Accordingly, under SCR 3.380(2), the Supreme Court indefinitely suspended Martin from the practice of law.

**C. Kentucky Bar Association v. Jason Pierce Mac Iain**

**[2019-SC-000643-KB](#)**

**March 26, 2020**

Opinion and Order of the Court. All sitting; all concur. Disciplinary action was initiated against Mac Iain after his guilty plea to the misdemeanor charge of

endangering the welfare of a minor child. By Supreme Court order dated June 19, 2019, Mac Iain was indefinitely suspended from the practice of law in Kentucky under SCR 3.380(2). Mac Iain failed to respond to the disciplinary charges against him, prompting the Board of Governors to move the Court to impose discipline under SCR 3.210. Specifically, the Board recommended that Mac Iain be suspended for 181 days, that he be referred to the Kentucky Lawyer Assistance Program (KYLAP), and that he be required to pay the costs in this action.

Having reviewed the record, the Court agreed that the Board reached the appropriate conclusions as to Mac Iain's guilt. Mac Iain did not file a notice to review the Board's decision, and the Court did not elect to review the decision of the Board under SCR 3.370(8). Accordingly, the decision of the Board was adopted under SCR 3.370(9).

**D. Kentucky Bar Association v. Lisa M. Wells**  
**[2020-SC-000012-KB](#)**

**March 26, 2020**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a motion asking the Supreme Court to temporarily suspend Wells from the practice of law pursuant to SCR 3.165(1)(c) and (d). In 2016, Wells received a ticket in Ohio for operating a motor vehicle while impaired. Wells was in possession of drugs during the traffic stop and received both felony and misdemeanor drug charges. She entered a guilty plea to the charges in 2017 and was granted an Intervention in Lieu of Conviction (ILC). Under the terms of her ILC, Wells was to undergo a two-year period of rehabilitation. Wells did not successfully complete the program and the court revoked her ILC. She was found guilty of four counts of aggravated possession of drugs, a fifth-degree felony in Ohio.

Based on the nature of Wells' conviction, the Court held under SCR 3.165(1)(d) that there was probable cause to believe Well is "addicted to intoxicants or drugs" and "does not have the physical or mental fitness to continue to practice law." Accordingly, the Court granted the Inquiry Commission's motion and temporarily suspended Wells from the practice of law.

**E. Maury David Kommor v. Kentucky Bar Association**  
**[2020-SC-000035-KB](#)**

**March 26, 2020**

Opinion and Order of the Court. All sitting; all concur. Kommor filed a motion under SCR 3.480(2) for the Supreme Court to enter an Order suspending him from the practice of law for 181 days, to be probated for two years, subject to certain conditions. The Kentucky Bar Association filed a response stating no objection to the motion and the proposed sanction. The disciplinary charges against Kommor arose from his failure to properly administer his escrow account, resulting in mismanagement of a client's settlement funds. Kommor admitted that his actions violated SCR 3.130(1.3); SCR 3.130(1.4)(a)(4); SCR 3.130(1.15)(a);

and SCR 3.130(1.15)(b). In reviewing Kommor's violations, the Supreme Court noted that Kommor had no prior disciplinary history, had fully cooperated with the Office of Bar Counsel, was not convicted criminally for his actions, and had fully accounted to his client for her funds. In light of these factors, and upon review of the disposition of similar disciplinary cases, the Court accepted Kommor's proposed sanction and suspended him from the practice of law for one-hundred-eighty-one (181) days, probated for two years.