

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000841-MR

CITY OF MAYFIELD, KENTUCKY

APPELLANT

GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK
ACTION NO. 16-CI-00112

v.

BARRY M. KENNEMORE, GRAVES
COUNTY CLERK; GRAVES COUNTY
BOARD OF EDUCATION; AND
KENTUCKY LEAGUE OF CITIES

APPELLEES

OPINON AND ORDER
AFFIRMING IN PART
AND REVERSING IN PART

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal of the Graves Circuit Court's order declaring that the Graves County Board of Education's petition for a referendum on the City of Mayfield's ordinance annexing four parcels of property owned by the Board had properly complied with statutory requirements. The order also granted the Board's

motion to intervene in the suit brought by the City against the Graves County Clerk, and denied the City's request for an injunction to prevent the Clerk from certifying the petition.

In late 2015, the city of Mayfield (the City) passed two ordinances allowing it to annex the properties owned by the Graves County Board of Education (the Board). The ordinances were published and became effective on January 19, 2016, and were again published on March 7, 2016. In a letter sent to the Mayor of Mayfield on January 5, 2016, an attorney representing the Board objected to the annexation. The Board considered the letter to be its notice to the City that it was petitioning for a referendum on the annexation, to be certified by the Graves County Clerk (the Clerk) and brought for a vote in the November general election. In response, the City filed a declaratory judgment action against the Clerk and sought an injunction to prevent the Clerk from certifying the petition. The Board, to protect its interests, filed a motion to intervene.

The City argued that the Clerk could not certify the petition because it did not meet the requirements of Kentucky Revised Statute (KRS) 65.012 which requires “[a]ll referendum petitions permitted by general law in KRS Chapter[] . . . 81A . . .” to include the

- (a) Printed name of the petitioner;
- (b) Signature of the petitioner;
- (c) Year of birth of the petitioner;
- (d) Residential address of the petitioner; and
- (e) Date that the petitioner signed the petition.

The statute also requires that, to be eligible to sign a referendum petition, a person must be a registered voter who lives in the area to be affected by the referendum.

Id. The Board countered that the petition was instead governed by KRS 81A.420(2). That statute allows property owners, as well as residents of the affected area, to petition for a referendum:

If following the publication of the annexation ordinance pursuant to subsection (1) of this section and within sixty (60) days thereof, or if in any annexation proceeding where the annexing city has not adopted a final annexation ordinance, within sixty (60) days of February 12, 1988, fifty percent (50%) of the resident voters or owners of real property within the limits of the territory proposed to be annexed petition the mayor in opposition to the proposal, an election shall be held at the next regular election if the petition is presented to the county clerk and certified by the county clerk as sufficient not later than the second Tuesday in August preceding the regular election:

The circuit court heard arguments from the City and the Board on May 16, 2016, and on May 20, 2016, it entered its order granting intervention, denying injunctive relief, and declaring that the petition had been properly submitted. It ordered the Clerk to certify the petition and place the question of annexation on the ballot in the general election. The circuit court reasoned that the Board could not meet the requirements of KRS 65.012 since it has no date of birth, no address, and is not a registered voter in the area to be annexed. However, it did find that the Board properly filed a petition under KRS 81A.420(2). Acknowledging the

conflict between the statutes regarding the requirements for a valid petition, the court found KRS 81A.420 more specifically addressed a petition for a referendum on an annexation.

The City appealed and asked this Court to expedite the appeal, which we have done. We now address the merits.

Standard of Review

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[i]n all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Conclusions of law, however, are reviewed *de novo*. See *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006); *Ladd v. Ladd*, 323 S.W.3d 772, 775 (Ky. App. 2010). Questions regarding intervention pursuant to CR 24.01 are also reviewed under the clearly erroneous standard. *Carter v. Smith*, 170 S.W.3d 402, 409 (Ky. App. 2004). A decision is clearly erroneous when it is “unsupported by substantial evidence.” *Danville–Boyle County Planning and Zoning Comm’n v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992). And, substantial evidence is evidence “that has sufficient probative value to induce conviction in the minds of reasonable people.” *Thompson v. Kentucky Unemployment Ins. Comm’n*, 85 S.W.3d 621, 624 (Ky. App. 2002).

Intervention by the Board

The City first argues the circuit court erred in allowing the Board to intervene in its suit against the Clerk because the Board's motion did not state grounds for intervention "accompanied by a pleading setting forth the claim or defense for which intervention is sought." CR 24.03. It claims the Board had no interest because KRS 65.012 governs any petition for a referendum, and that statute does not allow for a mere non-resident owner to file a petition. The Board counters that KRS 81A.420 governs and therefore, as the owner of the subject property, it must have a right of intervention to protect its interest. The circuit court granted the Board's motion pursuant to either CR 24.01, intervention as a matter of right, or, in the alternative, CR 24.02, permissive intervention.

We agree with the circuit court that intervention was proper.

Intervention of right "shall be permitted" when the party seeking to intervene "claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties." CR 24.01(1). The party's interest must be a "present substantial interest in the subject matter of the lawsuit," rather than an expectancy or contingent interest. *Baker v. Webb*, 127 S.W.3d 622, 624 (Ky. 2004) (citing *Gayner v. Packaging Service Corp. of Ky.*, 636 S.W.2d 658, 659

(1982)). Intervention must be timely, and the intervenor must establish the elements as required by the rule: an interest relating to the subject of the action, an inability to fully protect that interest, and a lack of other parties who could protect it on behalf of the intervenor. *See Carter v. Smith*, 170 S.W.3d 402, 410 (Ky. App. 2004).

Here, we believe the Board had an intervention of right: it timely filed its motion to intervene; its interest, the properties to be annexed, did not merely relate to the subject of the action but *were* the subject of the action; its interest could be impaired or impeded by annexation; and the only other party, the Clerk, certainly had no interest other than whether he would be required to certify the petition.¹ Although the Board did not file its motion to intervene precisely as provided in CR 24, the circuit court clearly understood the Board's reason for seeking to intervene.

The Civil Rules prescribe a practical pattern for the conduct of litigation and the effective administration of justice. To this end reasonable compliance is necessary. The proper application and utilization of those Rules should be left largely to the supervision of the trial judge, and we must respect his exercise of sound judicial discretion in their enforcement.

Naive v. Jones, 353 S.W.2d 365, 367 (Ky. 1961). The circuit court's order granting intervention was not clearly erroneous, and we therefore affirm.

¹ At the May 16, 2016 hearing, the Clerk openly remarked that he "had no dog in the fight."

Statutory Construction

As the circuit court determined, the main question to be resolved involves the statutory interpretation of, and the interplay between, KRS 81A.420(2) and KRS 65.012. The City argues that there is no conflict between the two statutes, and the circuit court erred in so finding: the plain language of KRS 65.012 repeatedly uses the word “shall,” and “shall means shall.” Therefore that statute alone applies. The legislature is presumed to know of existing statutes when it passes new legislation, and KRS 65.012 is the newer statute. The Board, on the contrary, contends KRS 81A.420 applies because it more specifically addresses annexation.

The circuit court considered two canons of statutory construction: the rule that a more recent statute governs, *see, e.g., Williams v. Commonwealth*, 829 S.W.2d 942, 944 (Ky. App. 1992), and the rule that a more specific statute governs. *See, e.g., Withers v. University of Kentucky*, 939 S.W.2d 340, 345 (Ky. 1997). The circuit court ruled that the more specific statute, KRS 81A.420, governed when a property owner is not a natural person but an entity seeking to protect its property interest, whereas KRS 65.012 governs those petitions submitted by natural persons who are residents of the area to be affected. Questions of statutory interpretation are reviewed *de novo* by this Court. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644,

647 (Ky. 2007).

The purpose of judicial statutory construction is to carry out the intent of the legislature: courts must consider “the intended purpose of the statute—the reason and spirit of the statute—and the mischief intended to be remedied. The courts should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent.” *Commonwealth v. Kash*, 967 S.W.2d 37, 43–44 (Ky. App. 1997). Furthermore,

[t]he law on statutory construction in this state is well summarized in the case of *Brown v. Hoblitzell*, Ky., 307 S.W.2d 739, 744 (1956), as follows:

In enacting laws, the Legislature is presumed to take cognizance of the existing statutes and the condition of the law so that when the statute under consideration is ambiguous, the new enactment is to be construed in connection and in harmony with the existing laws as a part of a general and uniform system of jurisprudence. *Button v. Hikes*, 296 Ky. 163, 176 S.W.2d 112, 150 A.L.R. 779; *Reynolds Metal Co. v. Glass*, 302 Ky. 622, 195 S.W.2d 280. Apparent conflicts or repugnancies between statutes on the same general subject enacted at different times should be reconciled in the light of the existing statutes and Constitution. *Cawood v. Coleman*, 294 Ky. 858, 172 S.W.2d 548; *Burbank v. Sinclair Prairie Oil Co.*, 304 Ky. 833, 202 S.W.2d 420. If the conflict cannot be reconciled, the latter statute controls. *Butcher v. Adams*, 310 Ky. 205, 220 S.W.2d 398.

These two statutes are impossible to construe “in

connection and in harmony with” each other and cannot be reconciled. Thus a conflict exists, and the later statute controls.

Commonwealth v. Hunt, 619 S.W.2d 733, 734 (Ky. App. 1981). Likewise, there is clearly a conflict between the two statutes at issue here: either the Board can file a petition pursuant to KRS 81A.420 or it cannot file a petition because it does not meet the requirements of KRS 65.012.

KRS 65.012 was enacted in 2012 to

[c]reate a new section in KRS Chapter 65 to establish that referendum petition requirements include the printed name, signature, date of birth, residential address, and the date the petitioner signed the petition and to require that to be eligible to sign a referendum petition a person must live in the district or jurisdiction that will be effected by the referendum and be a registered voter.

Preamble, Senate Bill 123 (2012 Regular Session). Furthermore, the legislature was clearly cognizant of existing statutes on referendums: it specifically includes referendums contained in thirty five Chapters of the Kentucky Revised Statutes which allow for public approval—or disapproval—of governmental actions.² KRS 81A.420 was enacted in 1980 and most recently amended in 1996.

As the later enacted statute, KRS 65.012 controls here. It is well established that a petition for a referendum must strictly comply with statutory

² KRS Chapters 65, 67, 67A, 67C, 68, 76, 81, 81A, 83A, 96, 96A, 97, 98, 99, 107, 108, 109, 132, 147, 157, 160, 162, 165, 173, 178, 183, 212, 230, 242, 243, 244, 262, 269, 424, and 436.

requirements. *City of Taylorsville v. Spencer Cty. Fiscal Court*, 371 S.W.3d 790, 796–97 (Ky. App. 2012); *Bd. of Elections of Taylor County v. Bd. of Educ. of Campbellsville Independent Sch. Dist.*, 635 S.W.2d 324, 328 (Ky. App. 1982); *Bd. of Educ. of Warren County v. Fiscal Court*, 485 S.W.2d 752 (Ky.1972); *Wiggins v. City of Winchester*, 421 S.W.2d 843, 845 (Ky.1967). And, as a non-natural person, the Board cannot comply with the requirements to include the year of birth of the petitioner, KRS 65.021(1)(c), nor can it “(a) live in the district or jurisdiction that will be affected by the referendum; and (b) be a registered voter” as required by KRS 65.021(2). Therefore, the Board cannot file a petition and the County Clerk must be enjoined from certifying the question for a referendum on annexation.³

Conclusion

For the foregoing reasons, we hereby affirm the Graves Circuit Court’s order granting the Board’s motion to intervene, but reverse the circuit court’s order denying the City’s request to prohibit the Graves County Clerk from certifying the petition for a referendum. Because the Board cannot follow the requirements of KRS 65.012, the petition is void and the clerk shall not certify it for placement on the November ballot.

Finally, the Kentucky League of Cities has moved to file an amicus

³ In its letter to the Mayor, the Board alleged that there were residents on the properties. We are at a loss as to why those persons, if registered voters, did not properly file a petition since they apparently would meet the requirements of KRS 65.012.

brief in support of the City's position. Having considered the amicus brief, the Court ORDERS that the motion be, and hereby is, GRANTED. The tendered brief is hereby ordered filed.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ENTERED: August 5, 2016

/s/ Denise G. Clayton
JUDGE, COURT OF APPEALS

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. I would affirm the well-reasoned order entered by the Graves Circuit Court in its entirety, denying injunctive relief sought by the City of Mayfield in this case and which granted a judgment in favor of the Graves County Board of Education placing the City's proposed annexation of School Board property on the ballot in November pursuant to KRS 81A.420.

As noted by the majority, KRS 81A.420 and KRS 65.020 are clearly in conflict. When the courts are faced with conflicts between statutes or sections thereof, it is the duty of the court to harmonize the statutes to give effect of both if possible. *Osborne v. Com.*, 185 S.W.3d 645 (Ky. 2006). While the trial court fulfilled this duty, the majority of this Court has failed to recognize the same.

In construing statutes, the Kentucky Supreme Court has held that courts must give effect to the intent of the General Assembly. *Maynes v. Com.*,

261 S.W.3d 922 (Ky. 2012). That intent is derived from the language of the statute as defined by the General Assembly or in the context of the subject matter at issue. *Shawnee Telecomm. Res., Inc. v. Brown*, 354 S.W.3d 542 (Ky. 2011). And, courts must presume that the General Assembly intended for a statute to be construed as a whole and to be harmonized with all related statutes. *Id.*

The harmonization of statutes looks to interpreting or construing seemingly inconsistent statutes like we are faced with in KRS 81A.420 and KRS 65.012. Courts thus are tasked with adopting an interpretation or construction that will give effect to all of the statutes at issue which also advances legislative intent. *See Combs v. Hubb Coal Corp.*, 934 S.w.2d 250 (Ky. 1996); *AK Steel Corp. v. Com.*, 87 S.W.3d 15 (Ky. App. 2002). And, in harmonizing the statutes, we must remain aware of the purpose(s) which the statutes were intended to accomplish. *City of Owensboro v. Noffsinger*, 280 S.W.2d 517 (Ky. 1955). This Court recently addressed this very issue in *Campbell County Library Board of Trustees v. Coleman*, 475 S.W.3d 40 (Ky. App. 2015), *dis. rev. denied*, 2015-SC-000188 (Ky. 2015).

Upon my review of KRS 81A.420, it is patently clear that the General Assembly intended for an annexation election to be held where “fifty percent (50%) of the resident voters or owners of real property within the limits of the territory proposed to be annexed petition the mayor in opposition to the proposal.”

The statute provides no restriction on the status of an owner, which in this case, the School Board owns 100 percent of the property to be annexed and properly filed a petition for an election with the Mayor of Mayfield. The legislature clearly did not intend to restrict non-resident voters who own property in areas proposed to be annexed from opposing the same, which is the result of the majority opinion in this case. Under the majority's decision today, the only person(s) who can oppose annexations are registered voters who live in the areas affected by the annexation. Not only does this frustrate the legislative intent of the statute, I frankly find such a ruling to be unconstitutional.

The majority has effectively held that corporations and other legal entities that own property but are not natural persons have no legal right to oppose an annexation due to the restrictive language of KRS 65.012. This does not comport with legislative intent or common sense. Additionally, the illogical effect of the majority's ruling would restrict a non-resident voter who owns property in the area to be annexed from opposing the annexation. In this regard, the trial court correctly harmonized the statutes and concluded that KRS 65A.012 is only applicable to petitions filed by resident voters, not owners of real property. This is consistent with the legislative intent and the public policy of the Commonwealth as further stated in the provisions of KRS 81A.510, which contemplates that owners

of industrial plants which are subject to annexation have the right to oppose the same.⁴

In conclusion, I would affirm the trial court's harmonization of the statutes in question and permit the proposed annexation of the Graves County School Board's property to be placed upon the ballot in the November election, pursuant to KRS 81A.420.

BRIEF FOR APPELLANT:

Glenn D. Denton
Paducah, Kentucky

**BRIEF FOR APPELLEE BARRY
M. KENNEMORE:**

John Cunningham
Mayfield, Kentucky

**BRIEF FOR APPELLEE GRAVES
COUNTY BOARD OF
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C. Ed Massey
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**AMICUS CURIAE BRIEF FOR
KENTUCKY LEAGUE OF
CITIES:**

David A. Pike
F. Keith Brown
Shepherdsville, Kentucky

⁴ Kentucky Revised Statutes (KRS) 81A.510 provides that a "person" within the proposed area to be annexed shall have the right to protest the annexation. In Kentucky, pursuant to KRS 446.010(33), a person includes corporations and bodies – politic, such as a School Board.