

Judicial Discretion
Kentucky Dept. of Public Advocacy
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I. “Judicial Discretion” Defined:

Ordinary Meaning of “Discretion”: “Individual choice or judgment; Power of free decision or latitude of choice within certain legal bounds.” *Merriam-webster.com*

“Plenary Discretion” (or “Plenary Authority”): means “complete in every respect; absolute; unqualified.” *Merriam-webster.com*. Examples of Plenary Discretion in the Law:

- Prosecutorial discretion whether to charge a crime, what charge to seek, whether to dismiss a charge, sentencing recommendations;
- Congress’ power to regulate interstate commerce.

“Judicial Discretion”: “The power or right to make official decisions using reason and judgment to choose from among acceptable alternatives.” *Legal-dictionary.thefreedictionary.com*

Federal Case Law Description of Judicial Discretion, Chf. Justice John Marshall, **Osborn v. Bank of the US, 22 US 738 (1824)**(emphasis added):

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. ***When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it.*** Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

Kentucky Case Law Description of Judicial Discretion, **City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964), overruled on other grounds, Nolan v. Spears, 432 S.W.2d 425 (Ky. 1968)**(emphasis added):

Discretion of court is a liberty or ***privilege allowed to a judge***, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, ***guided by the spirit, principles, and analogies of the law***, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law...

Discretion is not a judge's sense of moral right; neither is it his sense of what is just. He is not clothed with a dispensing power or privileged to exercise his individual notions of abstract justice. With him there is no scope for judicial caprice. Principles of law are to be ascertained and followed. Justice is administered in the courts on settled and fixed principles.

II. Examples of Judicial Discretion:

In almost every case involving a discretionary decision, it will involve a weighing of factors or circumstances:

- What amount to set bail;
- Whether to sever or join co-defendants in a criminal trial;
- Whether to continue the trial of a case;
- Whether to probate a defendant in a probatable case;
- Whether probative value of evidence is substantially outweighed by danger of undue prejudice to right to a fair trial;
- Whether best interests of the child warrants termination of parental rights of a parent;
- Whether to allow expert funds in an indigency case.

III. Limitations on Judicial Discretion:

Prior Case Law: ***Penner v. Penner*, 411 S.W.3d 775 (Ky. App. 2013)**: An abuse of discretion when trial court in a divorce case treated husband's restricted stock shares as both marital property (thus, subject to division between the parties) and as his income (for purposes of determining child support), in opposition to unpublished case of ***Burton v. Burton*, 2011 WL 557469 (Ky. App. 2011)**.

Rule: ***Zewoldi v. Transit Authority of River City*, 553 S.W.3d 841 (Ky. App. 2018)**: An abuse of discretion when the trial court refused to apply business record hearsay exception under **KRE 803(6)**, and refused to admit self-authenticating employee records.

Statute: ***Pasley v. Pasley*, 333 S.W.3d 446 (Ky. App. 2010)**: An abuse of discretion when trial court granted a Domestic Violence Order (DVO) without finding from a preponderance of the evidence that acts of domestic violence and abuse have occurred and may again occur, as per KRS 403.750(1).

Constitution: ***Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky. App. 1977)**: “[T]here is no discretion to refuse to reduce excessive bail,” adopting interpretation of **Eighth Amendment** by ***Stack v. Boyle*, 342 U.S. 1 (1951)**.

Principles of Fairness: ***Commonwealth v. James*, 586 S.W.3d 717 (Ky. 2019)**: An abuse of discretion when trial court refused to grant a directed verdict of not guilty on charge of tampering with physical evidence when defendant dropped a glass pipe on the ground in plain view of a police officer, in spite of statutory language making it a crime to “conceal” or “remove” evidence:

While it could be argued that the terms “remove” and “conceal” are so broad on their face as to include a person's act in dropping or tossing evidence with their back turned to an officer, such a reading would ***“lead to results that are inexplicably harsh.”***
(Emphasis added)

IV. Standards of Appellate Review:

Appellate standards range from most deferential to the trial court to the least deferential to the trial court.

Abuse of Discretion (most deferential): Was the decision arbitrary, capricious, whimsical, or unsupported by sound legal principles? **Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004)**: “We note that clear error and abuse of discretion are separate standards of review... Abuse of discretion applies in situations where, for example, a “court is empowered to make a decision—of its choosing—that falls within a range of permissible decisions.” In other words, the decision must fall within a “zone of reasonableness,” **Stack v. Boyle, supra**.

Clear Error (less deferential): “Clear error applies to a review of a trial court's findings of fact.” **Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004)**. The clear error standard reviews whether the trial court’s findings are supported by **substantial evidence**. “[S]ubstantial evidence’ is ‘[e]vidence that a reasonable mind would accept as adequate to support a conclusion’ and... has sufficient probative value to induce conviction in the minds of reasonable men.” **Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003)**. It is common for some attorneys to conflate the standard for finding facts (clear error) with the standard for making decisions based upon those facts (abuse of discretion), as if they are both decided under one standard (abuse of discretion); but “a]n error that is alleged in the trial court's findings of fact must be reviewed for clear error before the appellate court can reach the discretionary aspects of the trial court's decision.” **Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004)**. (Thus, for example, in a bail case, a finding that a person is a high risk of danger to the community is a fact determination that must be made (and subject to clear error review) before the judge’s decision as to what to set the bail.)

There can be different evidentiary standards for finding facts. (The higher the evidentiary standard, the more substantial the evidence necessary to support the finding of fact.):

- Probable Cause (reasonable belief that something occurred)
- Preponderance of the Evidence (more likely than not that something occurred)
- Clear and Convincing
- Beyond a Reasonable Doubt

De Novo (least deferential): What is the right answer? The appellate court decides the issue as if it had not been decided by the lower court. “When reviewing a trial court’s denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law.” **Jackson v. Commonwealth, 187 S.W.3d 300 (Ky. 2006)**

V. Different Evidentiary Standards can have Different Appellate Review Standards:

Suppression of Evidence Pursuant to a Consent Search Case:

- Evidentiary Standard that Arrestee Consented: **Preponderance of the Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Decision Whether to Suppress: **De Novo**

Termination of Parental Rights Case:

- Evidentiary Standard for Finding Facts Supporting Termination: **Clear & Convincing Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Decision Whether to Terminate Rights Based on those facts: **Abuse of Discretion**

Issuance of a Domestic Violence Order (DVO) Case:

- Evidentiary Standard for Finding that Violence has Occurred/Likely to Reoccur: **Preponderance of the Evidence**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Whether to Issue a DVO: **Abuse of Discretion**

Allowing Expert Funds in an Indigency Case:

- Evidentiary Standard for Finding that Violence has Occurred/Likely to Reoccur: **Reasonable Necessity**
- Appellate Review Standard for Fact Finding: **Clear Error**
- Appellate Review Standard for Whether to Issue a DVO: **Abuse of Discretion**