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Kentucky Law Survey Issue

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FOREWORD: KENTUCKY LAW SURVEY

by Margaret G. Kippley

The Northern Kentucky Law Review is pleased to present its inaugural issue of the Kentucky Law Survey. The Survey, last offered by another publication in 1986, will be an annual update of developments in Kentucky law. We are glad to be able to bring this service to practitioners and scholars who wish to keep abreast of Kentucky law.

We are especially proud of the panel of authors who have responded to our invitation to write for this inaugural issue. Our lead article on Kentucky Constitutional Law is written by Chase's Distinguished Jurist in Residence, Justice Donald C. Wintersheimer of the Kentucky Supreme Court. We would like to thank our authors for their contributions and invite our readers to inform us as to how the Survey can serve their needs.
ARTICLES
STATE CONSTITUTIONAL LAW

by Justice Donald C. Wintersheimer*

I. INTRODUCTION

The primary focus of constitutional law in the United States has been the Federal Constitution and its judicial interpretations. Many legal scholars have been preoccupied with federal constitutional questions. However, the Federal Constitution relies extensively on mechanisms provided in state constitutions and leaves nearly all matters within the boundary of state authority to be regulated by state constitutions and laws.

Since the early 1970's there has been an increased interest in the judicial interpretation of individual rights as provided in state constitutions. Although state constitutional principles have always been important in civil litigation, a heightened interest in criminal procedures has led a growing number of state courts to discover expanded individual rights applicable to criminal defendants in their own constitutions. It has been said that such developments provide greater civil liberties for citizens than are generally required by the Federal Constitution and that state constitutional decisions are generally insulated from federal review. United States Supreme Court Justice Louis Brandeis noted in his dissent in New State Ice Co. v. Liebmann, that a single courageous state may serve as a laboratory in which to try novel social and economic experiments without risk to the rest of the country.1 A similar view was expressed by U.S. Supreme Court Justice Oliver Wendell Holmes in regard to social experiments

* The Honorable Donald C. Wintersheimer is an Associate Justice of the Kentucky Supreme and is Distinguished Jurist in Residence at Chase College of Law. (B.A., Thomas More College; M.A., Xavier University; J.D., University of Cincinnati).

in the insulated chambers afforded by the several states in his dissent in *Truax v. Corrigan*. 2

State constitutions perform the same general function in our system of law because the state constitution is a charter of law and government which provides in detail the structure and function of state government. The Federal Constitution is a grant of enumerated powers upon which all exercises of federal authority must be based. In contrast, state constitutions serve as a limitation on the otherwise sovereign power of the state to make laws and govern themselves.

Whereas, the powers delegated to the federal government are few and defined, those which remain in state governments are numerous and indefinite. In *The Federalist No. 45*, James Madison pointed out that "the powers reserved to the several states will be extended to all the objects which, in the ordinary course of affairs, concerned the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State." 3 Madison concludes that the authority of the federal government is related to external objects such as war, peace negotiations and foreign commerce. 4 It must be remembered that Article VI Clause 2 of the United States Constitution rather firmly provides that the United States Constitution and laws shall be the supreme law of the land and the judges in every state shall be bound thereby. The Supremacy Clause clearly governs any conflict between federal and state constitutions. 5

II. THE KENTUCKY EXPERIENCE

Since 1983, the Supreme Court of Kentucky has joined a number of other states in interpreting the state constitution differently than the Federal Constitution. The seed of the contemporary Kentucky constitutional law approach was planted in *Fannin v. Williams*, 6 where the court found unconstitutional a statute which would permit the state librarian to supply text-

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2. 257 U.S. 312, 344 (1921).
4. *Id.*
6. 655 S.W.2d 480 (Ky. 1983) (holding that appropriation of tax money for distributing textbooks to children in nonpublic schools is a violation of section 171 of the Kentucky Constitution which requires that taxes be levied and collected for public purposes only).
books in the nonpublic schools of the state.\textsuperscript{7} The 5-2 majority did not follow the legal philosophy of \textit{Board of Education v. Allen},\textsuperscript{8} which held that a statute accomplishing an almost identical purpose did not violate the Establishment or Free Exercise Clauses of the United States Constitution.\textsuperscript{9} The majority announced that the problem was not whether the statute could pass muster under the Federal Constitution but whether it satisfied a more detailed and explicit Kentucky constitutional provision.\textsuperscript{10}

Kentucky has recognized greater protection for individual rights than the federal floor in a number of cases. For example, in \textit{Ingram v. Commonwealth},\textsuperscript{11} the court held that the double jeopardy provision in the Kentucky Constitution precluded convicting the defendant for two offenses because selling marijuana to a minor and trafficking marijuana within 1,000 yards of a school were considered a single impulse and a single act having no compound consequences.\textsuperscript{12} Additionally, in \textit{Dean v. Commonwealth}\textsuperscript{13} the court found that the right to be present and to confront witnesses is personal to the accused under section 114 of the Kentucky Constitution and under Kentucky Rule of Criminal Procedure 7.12\textsuperscript{15}. Therefore, only the defendant could waive the right to be present at the depositions of two prosecution witnesses.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{7} Id. at 484.
\item \textsuperscript{8} 392 U.S. 236 (1968).
\item \textsuperscript{9} \textit{Fannin}, 655 S.W.2d at 483.
\item \textsuperscript{10} Id.; KY. CONST. § 186 provides that “[a]ll funds accruing to the school fund shall be used for the maintenance of the public school of the Commonwealth and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.”
\item KY. CONST. § 171 deals with taxes to be levied and collected for public purposes only and by general laws and to be uniform within classes.
\item \textsuperscript{11} 801 S.W.2d 321 (Ky. 1990) (distinguishing interpretation of section 13 of the Kentucky Constitution from the interpretation of the double jeopardy clause of the United States Constitution in \textit{Blockburger v. United States}, 284 U.S. 299 (1932)).
\item \textsuperscript{12} Id. at 324.
\item \textsuperscript{13} 777 S.W.2d 900 (Ky. 1989).
\item \textsuperscript{14} KY. CONST. § 11 provides in part that in all criminal prosecutions, the accused has the right to meet the witnesses face to face.
\item \textsuperscript{15} KY. R. CRIM. P. 7.12 provides in part that “The order authorizing the taking of a deposition shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant.”
\item \textsuperscript{16} \textit{Dean}, 777 S.W.2d at 903 (Ky. 1989).
\end{itemize}
A number of states have confronted the problem of the adequacy of educational funding for public schools. It could be said that Kentucky takes it one step further in *Rose v. Council for Better Education, Inc.*,\(^{17}\) in which a majority of the Supreme Court determined that Kentucky’s constitution, which requires an efficient system of common schools throughout the state, afforded individual school children from the commonly called property-poor districts a fundamental right to an adequate education similar to that provided in wealthier school districts.\(^{18}\) This differs from the result in *San Antonio Independent School District v. Rodriguez*.\(^{19}\) In *San Antonio*, the U.S. Supreme Court determined that there was no constitutional right to a particular quality of education which justified invoking the Equal Protection Clause of the Fourteenth Amendment.\(^{20}\) The majority of the Kentucky Supreme Court found such a duty in the Kentucky constitutional requirement that the General Assembly provide an efficient system of common schools.\(^{21}\) The majority in *Rose* found it unnecessary to inject any issue raised under the United States Constitution or Bill of Rights, but instead decided the case solely on the basis of the Kentucky Constitution.\(^{22}\)

Similarly, the Kentucky Constitution was applied in *Tabler v. Wallace*\(^{23}\) to strike down K.R.S. 413.135, which created a statute of repose for persons engaged in the construction industry.\(^{24}\) The Kentucky Supreme Court stated that sections 2\(^{25}\) and 3\(^{26}\) of the Kentucky Constitution suffice to embrace the Equal Protection Clause of the Fourteenth Amendment and that section 59(5)\(^{27}\) of the Kentucky Constitution is more detailed and specific than the Equal Protection Clause of the Federal Constitution.\(^{28}\)

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17. 790 S.W.2d 186 (Ky. 1989).
18. Id. at 205.
20. Id. at 24-25.
22. *Rose*, 790 S.W.2d at 215.
23. 704 S.W.2d 179 (Ky. 1986).
24. Id. at 183.
25. Ky. Const. § 2 states that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”
26. Ky. Const. § 3 provides that all men are equal, there is no exclusive grant except for public services, property is not to be exempted from taxation and that grants are revocable.
27. Ky. Const. § 59(5) provides that the General Assembly shall not pass local or special acts for purposes of regulating the limitation of civil or criminal cases.
In *Perkins v. Northeastern Log Homes* the Kentucky Supreme Court stated that many states have general protection against arbitrary powers as Kentucky has in sections 2 and 3 of the Kentucky Constitution, but very few have the additional protection against local and special legislation as found in section 59 of the Kentucky Constitution. The court went on to comment that, so far as the court could determine, no state "has anything like the combination of broad constitutional protection of individual rights against legislative interference vouchsafed in the 1891 Kentucky Constitution."  

**III. ANOTHER VIEW**  

As in any dynamic legal culture, there are always other views. As noted in the dissent by Justice Wintersheimer in *Commonwealth v. Wasson*, other decisions of the Kentucky Supreme Court indicate an unwillingness to engage in random revision of the Kentucky Constitution by judicial fiat. In *Estep v. Commonwealth*, the court found no violation of section 10 of the Kentucky Constitution nor of the Federal Fourth Amendment. For the unanimous court in *Estep*, Justice Wintersheimer wrote that "pursuant to *United States v. Ross*, where probable cause justifies the search of a lawfully stopped vehicle, it also justifies the search of every part of the vehicle and its compartments and contents that may conceal the object of the search." The opinion stated that the decision is in harmony with Section 10 of the Kentucky Constitution which protects the people from unreason-
able searches because probable cause is still a prerequisite of any automobile search.\textsuperscript{42}

\textit{Crayton v. Commonwealth},\textsuperscript{43} follows \textit{United States v. Leon},\textsuperscript{44} in developing a good faith exception to the rule that excludes evidence in criminal trials obtained by means of a faulty search warrant.\textsuperscript{45} The recent Kentucky decision holds that the application of a good faith exception to the warrant requirement as articulated in \textit{United States v. Leon} does not violate section 10.\textsuperscript{46}

\textit{Jordan v. Commonwealth}\textsuperscript{47} provides that section 13\textsuperscript{48} of the Kentucky Constitution affords no greater protection than does the Federal Fifth Amendment.\textsuperscript{49} \textit{Commonwealth v. Willis}\textsuperscript{50} indicates that section 11\textsuperscript{51} of the Kentucky Constitution gives no greater protection than does the Federal Sixth Amendment.\textsuperscript{52} \textit{Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet}\textsuperscript{53} holds that the standards for classification under the Kentucky Constitution are the same as those under the Fourteenth Amendment to the Federal Constitution.\textsuperscript{54}

\textit{Commonwealth v. Foley}\textsuperscript{55} states that section 1(4) of the Kentucky Constitution\textsuperscript{56} gives no more protection than does the Federal First Amendment. \textit{Tabler v. Wallace},\textsuperscript{57} notes that sections 1,\textsuperscript{58} 2,\textsuperscript{59} and 3\textsuperscript{60} of the Kentucky Constitution "suffice to embrace

\begin{itemize}
\item \textsuperscript{42} \textit{Estep}, 663 S.W.2d at 215.
\item \textsuperscript{43} 846 S.W.2d 684 (Ky. 1992).
\item \textsuperscript{44} 468 U.S. 897 (1984).
\item \textsuperscript{45} \textit{Crayton}, 846 S.W.2d 684.
\item \textsuperscript{46} Id. at 689.
\item \textsuperscript{47} 703 S.W.2d 870 (Ky. 1985).
\item \textsuperscript{48} Ky. Const. § 13 states that, "No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."
\item \textsuperscript{49} \textit{Jordan}, 703 S.W.2d at 872.
\item \textsuperscript{50} 716 S.W.2d 224 (Ky. 1986).
\item \textsuperscript{51} \textit{See supra} note 14.
\item \textsuperscript{52} \textit{Willis}, 716 S.W.2d at 227.
\item \textsuperscript{53} 689 S.W.2d 14 (Ky. 1985).
\item \textsuperscript{54} \textit{Id.} at 18 (citing Reynolds Metal Co. V. Martin, 107 S.W.2d 251, 260 (1937)).
\item \textsuperscript{55} 798 S.W.2d 947 (Ky. 1990).
\item \textsuperscript{56} Ky. Const. § 1(4) provides that the right of freely communicating thoughts and opinions is an inherent and inalienable right.
\item \textsuperscript{57} 704 S.W.2d 179 (Ky. 1986).
\item \textsuperscript{58} Ky. Const. § 1 deals with the rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances and bearing arms.
\item \textsuperscript{59} \textit{See supra} note 25.
\item \textsuperscript{60} \textit{See supra} note 26.
\end{itemize}
the Equal Protection Clause of the Federal Fourteenth Amendment.”

Earlier, *Cane v. Commonwealth* announced that the right to counsel guaranteed by section 11 of the Kentucky Constitution is “no greater than the right to counsel provided in the Federal Sixth Amendment, as construed in the *Ash* case.” In *Ray v. City of Owensboro*, the court held that there was no deprivation under section 1(5) of the Kentucky Constitution nor under the Equal Protection Clause of the Federal Fourteenth Amendment. *Rawlings v. Butler* found no violation of the U.S. Constitution nor of the Kentucky Constitution when Sisters of the Roman Catholic Church were hired by the Kentucky Board of Education to teach in public schools in rooms rented from the Catholic Church. *Fischer v. Grieb* equates section 3 of the Kentucky Constitution with the Equal Protection Clause of the Federal Fourteenth Amendment. Finally, in *Commonwealth v. Ashcraft*, the court, while finding a statute limiting speech to be unconstitutional under both the Kentucky Constitution and the First Amendment, lamented the expansive interpretation of the First Amendment which has developed, especially with regard to speech detrimental to school authority.

**IV. OTHER AREAS OF CONSTITUTIONAL CONCERN**

The Kentucky Bill of Rights also has been interpreted by the current Kentucky Supreme Court in regard to the right to confrontation and the delicate problems involving the child wit-
ness who has been a victim of sexual abuse.75 In a similar vein, in Gaines v. Commonwealth,76 the court found a statute which permitted testimony to be admitted in a sexual abuse case from a young child who had not been declared competent to testify was an unconstitutional infringement on the inherent powers of the judiciary.77

Commonwealth v. Brown78 addressed a prosecutor's grant of immunity under Kentucky Constitution sections 11,79 19,80 and 233.81 The court found that attorneys for the Commonwealth had no authority to grant immunity from further prosecution to compel testimony of accomplices who refused to testify.82

A. Separation of Powers

Separation of powers treatment can be found in Akers v. Baldwin,83 which involved statutes impairing fact-finding functions and contractual rights and applied Constitutional sections 2784 and 2885. The court examined a mining statute which required a holding by the court that parties to a deed, which did not describe mining methods to be employed, intended coal to be mined by methods commonly known in the area at the time of the execution of the deed.86 The court held that the statute unconstitutionally interfered with judicial power to interpret past transactions under the separation of powers doctrine.87

Legislative Research Comm'n v. Brown88 is a landmark case establishing the relative rights and responsibilities of the legis-

76. 728 S.W.2d 525 (Ky. 1987).
77. Id. at 527 (holding KY. REV. STAT. 421.350(2) unconstitutional).
78. 619 S.W.2d 699 (Ky. 1981).
79. Ky. Const. § 11 deals with the rights of the accused in a criminal prosecution.
80. Ky. Const. § 19 prohibits ex post facto laws.
81. Ky. Const. § 233 provided that the general laws of Virginia are in force in the Commonwealth until they are repealed.
82. Brown, 619 S.W.2d at 701.
83. 736 S.W.2d 294 (Ky. 1987).
84. Ky. Const. § 27 provides that the powers of the government are to be divided among the legislative, executive and judicial departments.
85. Ky. Const. § 28 provides that one department may not exercise power belonging to another.
86. Akers, 736 S.W.2d at 309.
87. Id.
88. 664 S.W.2d 907 (Ky. 1984).
lative and executive branches of government. The Kentucky Supreme Court held that a statute declaring the Legislative Research Commission to be an independent agency of state government violated sections 27 and 28 of the Kentucky Constitution. The court found that the General Assembly could not constitutionally delegate its legislative power to the Commission.

Further separation of powers decisions and application of the principle of comity with regard to truth-in-sentencing legislation are outlined in Commonwealth v. Reneer, applying Constitutional sections 27 and 28. The court held that although the truth in sentencing statute violated the constitutional separation of powers provision, the statute would not be held unconstitutional and would be accepted for the time being under the principles of comity.

Surrogate Parenting Associates, Inc. v. Commonwealth applies Kentucky constitution sections 27 and 28 and determines that public policy considerations of a social and ethical nature are legislative and not judicial. Under the constitutional doctrine of separation of powers, these are problems of public policy which belong in the legislative domain.

B. Jural Rights

Ludwig v. Johnson, is the first case in which sections 54 and 241 of the Kentucky Constitution were discussed in com-

89. Id. at 909.
90. Ky. Const. § 27. See supra text accompanying note 84.
92. Legislative Research Comm’n, 664 S.W.2d at 917.
93. Id.
94. 734 S.W.2d 794 (Ky. 1987).
95. Ky. Const. § 27. See supra text accompanying note 84.
97. Id. at 798.
98. 704 S.W.2d 209 (Ky. 1986).
101. Surrogate Parenting, 704 S.W.2d at 213.
102. Id.
103. 49 S.W.2d 347 (Ky. 1932).
104. Ky. Const. § 54 provides that “[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”
105. Ky. Const. § 241 provides that damages may be recovered for wrongful death.
combination with section 14. Ludwig is best known for its ruling that the so-called "Guest Statute" of Kentucky was unconstitutional as a bar to recovery for the death of a passenger in an automobile arising from the negligence of the driver. Generally, Ludwig stands for the proposition that the open-courts provision of the Kentucky Constitution section 14 was protected from any legislative erosion of the jural rights that were established when the 1890 Constitution was ratified. Saylor v. Hall proclaimed that the legislature had no power to extinguish a common law right for negligence unless no such right of action existed when the General Assembly acted. The common law of Kentucky as it existed prior to the enactment of the legislation was the determining factor. Subsequently, Carney v. Moody held that the statute of repose in Saylor could be validly applied to bar an action similar to the one involved in Saylor.

As noted previously, Tabler held the no-action statute unconstitutional as special legislation. Ultimately, Perkins stated a broad discovery rule that in the circumstances presented, the statute of limitations commences from the date the plaintiff knew or should have discovered "not only that he [had] been injured but also that his injury may have been caused by the defendant's conduct." Other recent cases involving jural rights in a variety of applications include Burrell v. Electric Plant Board, and Fireman's Fund Insurance Co. v. Sherman & Fletcher. In Bur-

106. Ky. Const. § 14 states that "[a]ll courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."
107. Id. at 351.
108. See supra note 106.
109. Ludwig, 49 S.W.2d at 351.
110. 497 S.W.2d 218 (Ky. 1973).
111. Id. at 224-25.
112. Id.
113. 646 S.W.2d 40 (Ky. 1982).
114. Id. at 41.
116. Id. at 183.
118. Id. at 819 (quoting Louisville Trust Co. v. Johns-Manville Products, 580 S.W.2d 497, 501 (Ky. 1979)).
119. 676 S.W.2d 231 (Ky. 1984).
120. 705 S.W.2d 459 (Ky. 1986).
rell, an electric utility company was sued by an employee for injuries allegedly caused by its negligence in construction, installation, and maintenance of a high voltage line. The court found that the employee was entitled under the amended time provision of the Worker's Compensation Act to claim contribution against the employer but was limited by the amount of compensation and other benefits for which the employer was liable on account of the injuries. The utility company was also entitled to maintain an action for indemnity against the employer, assuming that the proof established a right to indemnity. In Fireman’s Fund, K.R.S: 342.690(1), which provided a limitation on the right to indemnity from an employer on the amount of Worker’s Compensation for which the employer was liable, was found constitutional.

In the area of administrative regulations, the court in Kentucky Milk Mktg. and Anti-Monopoly Comm’n v. Kroger Co. determined that the milk-marketing law which prohibited retailers from selling milk below cost violated constitutional provisions prohibiting the exercise of absolute and arbitrary official power pursuant to section 2 of the Kentucky Constitution. The Commission’s finding that the retailer was guilty of violating the milk marketing law was arbitrary and capricious. The court held that all parts of the milk-marketing statute were essentially connected and not severable since the entire act had the purpose of enforcing the provisions of K.R.S. 260.705.

Campbell County v. Kentucky Corrections Cabinet held that the constitutional and statutory system mandates that the corrections cabinet, as the responsible agency of state government for prison administration, must accept delivery of convicted felons

121. Burrell, 676 S.W.2d at 232.
122. Id. at 234.
123. Id. at 236.
125. 691 S.W.2d 893 (Ky. 1985).
126. See supra note 25.
127. Kentucky Milk Mktg. and Anti-Monopoly Comm’n, 691 S.W.2d at 899.
128. Id. at 901.
129. Id.
130. 762 S.W.2d 6 (Ky. 1988).
who have been ordered committed to its custody.\textsuperscript{131} The case required the application of Kentucky Constitution section 254 which provides that, "[t]he Commonwealth shall maintain control of the discipline, and provide for all the supplies and for the sanitary condition of convicts."\textsuperscript{132}

Recent cases of significance in the area of governmental immunity include \textit{Gas Services v. City of London}.\textsuperscript{133} In \textit{Gas Services}, the Kentucky Supreme Court held that a city, as a municipal corporation, could be subject to liability in a class action where the gas company alleged the city's negligence in repairing a sewer line, ultimately caused the failure in the adjacent gas line and the subsequent injury.\textsuperscript{134}

\textbf{C. Borrowing and Taxation}

The court in \textit{Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet}\textsuperscript{135} determined, among other things, that, "a non-discriminatory sales tax is not repugnant to the Commerce Clause of the federal constitution, even though the item taxed may thereafter be used in interstate commerce."\textsuperscript{138} The burden was on the airline to demonstrate entitlement to a statutory exemption for sales tax on fuel and food purchased within the state.\textsuperscript{137} Further, classification by the legislature should be affirmed unless it is positively shown that the classification is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis.\textsuperscript{139} The courts cannot assume that the actions of the legislature are capricious and generally such actions are afforded the presumption of regularity.\textsuperscript{139}

\textit{Gillis v. Yount}\textsuperscript{140} held that a statute classifying unmined coal separately from other real property and taxing it at a rate of one mil violated Constitution section 171\textsuperscript{141} requiring that taxes be uniform on all properties of the same class.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} at 13.
\item \textsuperscript{132} \textit{Id.} at 7.
\item \textsuperscript{133} 687 S.W.2d 144 (Ky. 1985).
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} 689 S.W.2d 14 (Ky. 1985).
\item \textsuperscript{136} \textit{Id.} at 18.
\item \textsuperscript{137} \textit{Id.} at 17.
\item \textsuperscript{138} \textit{Id.} at 19.
\item \textsuperscript{139} \textit{Id.} at 18.
\item \textsuperscript{140} 748 S.W.2d 357 (Ky. 1988).
\item \textsuperscript{141} Ky. \textsc{Const.} § 171.
\item \textsuperscript{142} \textit{Gillis}, 748 S.W.2d at 364.
\end{itemize}
Hayes v. State Property & Buildings Comm' n\textsuperscript{143} held that legislation authorizing the state to finance a private industrial development in order to reduce unemployment did not violate the Kentucky Constitution.\textsuperscript{144} The incentives were granted to the Toyota Motor Corporation to locate in Scott County in central Kentucky.\textsuperscript{145} The constitutional prohibition expressed in section 177 against the granting of state credit\textsuperscript{146} is not involved as long as the expenditure of public money has as its purpose the effectuation of a valid public purpose.\textsuperscript{147} The mere fact that others may incidentally profit when the state incurs indebtedness for its benefit does not bring the action within the letter or spirit of constitutional prohibition against the lending of state credit.\textsuperscript{148} If a levy serves a public purpose in the manner and use of the expenditure, it is proper under a combination of sections 3 and 171.\textsuperscript{149}

Further, the legislation did not violate constitutional limitations, contained in sections 49\textsuperscript{150} and 50,\textsuperscript{151} on the power of the legislature to financially obligate future generations. The state's financial responsibilities were secured only by revenues from any biennial financing agreements and subject to the decision of future legislatures to appropriate any debt service.\textsuperscript{152} Such financing projects are not debt within the meaning of section 49 or 50.\textsuperscript{153} The legislation did not violate the single subject requirement of section 51\textsuperscript{154} because the title furnished a general notification of the subject matter in the legislation.\textsuperscript{155} The legislation did not violate the special legislation prohibition of section 59\textsuperscript{156} of the constitution because its purpose was to reduce unemploy-

\begin{thebibliography}{99}
\bibitem{143} Hayes v. State Property & Buildings Comm.'n, 731 S.W.2d 797 (Ky. 1987).
\bibitem{144} Id. at 802.
\bibitem{145} Id. at 798.
\bibitem{146} Ky. Const. § 177 provides that the credit of the Commonwealth shall not be given.
\bibitem{147} Hayes, 731 S.W.2d at 799.
\bibitem{148} Id. at 800.
\bibitem{149} Id. at 801.
\bibitem{150} Ky. Const. § 49 deals with the General Assembly's power to contract debts.
\bibitem{151} Ky. Const. § 50 deals with the purposes for which debts may be contracted.
\bibitem{152} Hayes, 731 S.W.2d at 803.
\bibitem{153} Id.
\bibitem{154} Ky. Const. § 51 provides that a law may not be related to more than one subject and that subject shall be expressed in the title.
\bibitem{155} Hayes, 731 S.W.2d at 804.
\bibitem{156} Ky. Const. § 59.
\end{thebibliography}
ment even though it was an inducement for a particular company to locate within the state.\textsuperscript{157}

\section*{CONCLUSION}

The recent case of \textit{Commonwealth v. Wasson}\textsuperscript{158} is another example of the Supreme Court of Kentucky interpreting the Kentucky Constitution so as to discover expanded individual rights.\textsuperscript{159} The majority bases its decision on the right to privacy independent of any right gleamed from the Federal Constitution.\textsuperscript{160} The vigorous dissents charge the majority with ignoring the specific offense involved and preferring the rights of some over the rights of others.\textsuperscript{161}

In the emotionally charged area of abortion, there is no specific case involving privacy in Kentucky. Some cases in the same general field have been decided in \textit{Hollis v. Commonwealth}\textsuperscript{162} and \textit{Jones v. Commonwealth}\textsuperscript{163}.

As in any new area of the law or development of the law, there is the problem of a possibility of confusion of principle. A question could be raised as to whether the majority in \textit{Wasson}\textsuperscript{164} has commingled the constitutional right of privacy with the tort of invasion of privacy. Future scholars and judges will have to unravel any such problem.

Underlying the considerations by state courts is a concern expressed by some writers that there seems to be an intent to constitutionalize everything and consequently deprive the legislature of any authority in its field of legislation. Such constitutionalization would work to render the supreme court a super-legislature.

\begin{footnotes}
\item[157.] \textit{Hayes}, 731 S.W.2d at 804-05.
\item[158.] 842 S.W.2d 487 (Ky. 1992).
\item[159.] \textit{Id.}
\item[160.] \textit{Id.}
\item[161.] \textit{Id.} at 503, 509.
\item[162.] 652 S.W.2d 61 (Ky. 1983) (addressing whether killing a fetus is murder of a person within the statutory definition of murder in Kentucky).
\item[163.] 830 S.W.2d 877 (Ky. 1992) (addressing whether person status is determined at the time of injury or at the time of death in the case of injury to a fetus).
\item[164.] \textit{Commonwealth v. Wasson}, 842 S.W.2d 487 (Ky. 1992).
\end{footnotes}
CIVIL PROCEDURE

by Gregory M. Bartlett*

INTRODUCTION

The purpose of this article is to review recent decisions rendered by the Kentucky Supreme Court and the Kentucky Court of Appeals in civil cases wherein significant procedural issues were addressed. The cases encompassed by this review are those reported during calendar years 1991 and 1992. Since many case reports include rulings on procedural matters, along with announcements on substantive law, only those opinions in which the primary issue is one of civil procedure, or in which the procedural issue was novel or noteworthy, will be discussed. For the convenience of the reader, the cases have been grouped under topical headings.

SUMMARY JUDGMENT

Arguably the most important decision in the area of civil procedure in recent years was handed down by the Kentucky Supreme Court in the case of Steelvest Inc. v. Scansteel Service Ctr., Inc. In an unanimous opinion, the Kentucky Supreme Court seized the opportunity to restate its position on summary judgment and to dispel any ambiguity that may have existed in Kentucky law on that matter. The court observed that recent decisions by the court of appeals had indicated a split as to whether Kentucky would follow the more restrictive approach to summary judgment as announced in the benchmark case of Paintsville Hosp. Co. v. Rose, or whether our courts would follow the more liberalized standard for granting summary judgment as announced in three cases which were decided by the United

* Mr. Bartlett is a partner in the Northern Kentucky law firm of Ware, Bryson, West & Bartlett. He is a graduate of the Thomas More College, 1967, and the University of Kentucky (J.D., 1973).

1. 807 S.W.2d 476 (Ky. 1991).
2. 683 S.W.2d 255 (Ky. 1985).
States Supreme Court in 1986. Indeed, the trial court had granted summary judgment based upon the expanded federal standard. In reversing, the Kentucky Supreme Court clearly rejected the "new era" federal standard for summary judgment in favor of the more conservative approach which it had adopted in its Paintsville Hosp. decision.

Writing for the court, Justice Reynolds found "some similarities and many obvious differences" between the new federal standard for summary judgment and the Kentucky standard. In both courts, the movant has the initial burden of showing that no genuine issue of material fact exists. In the federal system, the moving party can meet this burden by showing that the respondent, after sufficient opportunity for discovery, has no evidence to support an essential element in its case. On the other hand, under current Kentucky practice the moving party has a greater burden and must produce evidence of the non-existence of an issue of material fact.

Secondly, in federal court, the test for summary judgment is the same as that for a directed verdict. In Kentucky, it has been held that different consideration should be given to the two motions. Ruling on a summary judgment motion requires greater judicial determination and discretion since the case is taken away from the jury before evidence is actually heard.

Another difference is that federal summary judgment law applies the "scintilla" rule, requiring the respondent to produce

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4. Steelvest, 807 S.W.2d at 479.
5. See Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987); WILLIAM BERTELSMAN & KURT PHILIPPS, KENTUCKY PRACTICE, Rule 56.03, cmt 4 (1990 Supp.). These authorities were cited by the court in the Steelvest decision.
6. Steelvest, 807 S.W.2d at 481. For a discussion of the principles of this "new era" summary judgment practice, see Judge Bertelsman's opinion in Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989).
7. Steelvest, 807 S.W.2d at 482.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
more than a scintilla of evidence to overcome the motion. The Kentucky standard is stricter, denying the motion unless the party can show a right to judgment with such clarity that there is no room left for controversy. Only when it appears impossible for the opposing party to produce evidence at trial warranting a judgment in his favor will the motion for summary judgment be granted.

Finally, both systems require a party opposing a properly supported summary judgment motion to present at least some affirmative evidence showing that there is a genuine issue of material fact before trial. A respondent cannot simply rely upon the hope that the trier of fact will disbelieve the movant's denial of the disputed fact.

In choosing to follow a more restrictive standard for summary judgment, the court acknowledged that the new "relaxed" federal standard will be an effective device in the disposal of unmeritorious litigation. However, the court did not perceive the existence of such an oppressive or unmanageable case backlog, or problems with unmeritorious or frivolous litigation, in the state courts that would require it to adopt a new approach to summary judgment. Thus, the court chose to adhere to the principle that summary judgment is to be cautiously applied and should not be used as a substitute for trial. The court concluded that litigants should not be severed from their right to trial for the sake of efficiency and expediency.

This conservative approach to summary judgment was applied and exemplified in the case of Brown Foundation v. St. Paul Ins. Co. The plaintiff therein sought a declaratory judgment that its insurer provided both coverage and a defense of claims for environmental cleanup damages ordered by the federal government. The insurance company denied coverage upon the grounds that the environmental claims did not arise from an "occurrence"

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 482, 483.
19. Id. at 483.
20. Id.
as that term was defined in the insurance contract. Specifically, the definition provided that the claimed damage be "neither expected nor intended from the standpoint of the insured." Thus, although the plaintiff knew that pollution had taken place on its premises, it argued that environmental damage was neither intended nor expected.

Finding that a genuine issue of material fact existed as to whether the plaintiff expected and intended the damages which resulted in the environmental claims, the supreme court reversed the summary judgment entered in favor of the insurance company, citing the decision in Steelvest. It further observed that the trial court had impermissibly acted as a finder of fact, stating that the lower court's sole duty in deciding a motion for summary judgment is to determine whether there are genuine issues to be tried, and not to resolve them.

The significance of this case is that the central issue depended upon a determination of one party's subjective state of mind. In affirming the summary judgment, the court of appeals had recognized the problem of proving the plaintiff's intent or expectation. Nevertheless, the supreme court held that it was for the jury to determine the party's state of mind by weighing all of the evidence, including circumstantial evidence, and drawing permissible inferences therefrom. Thus, the court once again made clear its preference for allowing a jury to decide factual disputes, even those involving difficult issues of a party's subjective intent.

Several decisions dealing with summary judgment subsequent to the Steelvest case are worthy of mention. In Smith v. Higgins, the supreme court, without specifically mentioning Steelvest, held that whether scars constitute a "permanent disfigurement" for purposes of the Kentucky no-fault threshold was a jury issue. In reversing the summary judgment, the supreme court overruled the court of appeals' decision in Duncan v. Beck which had been

22. Id. at 275.
23. Id.
24. Id. at 276.
25. Id.
26. Id. at 280.
27. 819 S.W.2d 710 (Ky. 1991).
28. Id. at 712.
precedent for 15 years. The court also commented on the procedure for summary judgment motions. It stated that the defendant, by simply moving for summary judgment, could not force the plaintiff to come forward with evidence to defeat the motion. Rather, the defendant first must produce evidence that the injury is not a permanent disfigurement. Only then is the plaintiff required to produce proof in order to defeat the motion for summary judgment.

The procedural requirements for a summary judgment motion were also discussed in two other cases. In Ward v. Commonwealth, Natural Resources and Envtl. Protection Cabinet, the court reviewed the standards for summary judgment detailed in Steelvest, and found that the plaintiff was entitled to summary judgment. In that case, the Commonwealth had filed a properly supported motion for summary judgment. The defendant did not respond to this motion but later argued that summary judgment was improper since the plaintiffs had failed to establish the non-existence of a material fact issue. The court of appeals upheld the entry of summary judgment and noted that a party opposing a properly supported motion can only defeat it by presenting “at least some affirmative evidence showing that there is a genuine issue of material fact before trial.”

The timing of a motion for summary judgment was an issue in Perkins v. Hausladen. In that medical malpractice case, the trial court sustained a motion for summary judgment filed by the defendant on the morning of trial, despite the provision of Kentucky Rule of Civil Procedure (C.R.) 56.03 requiring such a motion be served at least ten days before the time fixed for the hearing. The basis for the defendant’s motion was that the plaintiff did not have an expert who could testify as to the violation of the standard of care. The supreme court ruled that it was error for the trial court to hear the motion on the morning

30. Smith, 819 S.W.2d at 712.
32. Id. at 590, 591.
33. Id. at 590.
34. Id. at 591.
35. 828 S.W.2d 652 (Ky. 1992).
36. Id. at 653.
37. Id.
of trial.\textsuperscript{38} Although it would not go so far as to say that violation of the ten day rule of C.R. 56.03 would always warrant automatic reversal,\textsuperscript{39} the court observed that, in such a complex negligence case, summary judgment based solely on pre-trial depositions and discovery should not be heard on the morning of trial.\textsuperscript{40} The court stated that the proper time to consider dismissal would have been at the close of the plaintiff's proof by way of a motion for a directed verdict.\textsuperscript{41}

Finally, the standard to be utilized by the appellate courts in reviewing the entry of a summary judgment was defined in \textit{Goldsmith v. Allied Bldg. Components}.\textsuperscript{42} The trial court was asked to determine whether the defendant could be considered a statutory employer of the plaintiff in order to invoke the exclusive remedy definition of the workers' compensation laws.\textsuperscript{43} A summary judgment was granted in favor of the defendant on that issue.\textsuperscript{44} On appeal, the court of appeals affirmed using the "clearly erroneous" standard applicable to cases tried upon the facts without a jury in accordance with C.R. 52.01.\textsuperscript{45} On review, the supreme court reversed the entry of summary judgment finding that there were material issues of fact to be determined.\textsuperscript{46} The court further stated that the court of appeals had incorrectly applied the "clearly erroneous" standard.\textsuperscript{47} Comparing the differ-

\begin{itemize}
  \item 38. \textit{Id.} at 656.
  \item 39. \textit{Id.}
  \item 40. \textit{Id.} at 657.
  \item 41. \textit{Id.}
  \item 42. 833 S.W.2d 378 (Ky. 1992).
  \item 43. \textit{Id.} at 379.
  \item 44. \textit{Id.}
  \item 45. \textit{Id.} Ky. R. Civ. P. 52.01 provides:
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  In all actions tried upon the facts without a jury \ldots the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings 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. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.
  \end{quote}
  \item 46. \textit{Goldsmith}, 833 S.W.2d at 381.
  \item 47. \textit{Id.}
\end{itemize}
ence between reviewing a case tried by the lower court under C.R. 52.01 and reviewing the entry of a summary judgment, the court commented that, "[u]nder no circumstances is a summary judgment entitled to the deference or dignity of a case tried by the trial court." In short, the appellate courts will review *de novo* the propriety of a summary judgment in accordance with the standards set forth in the *Steelvest* case.

The foregoing cases bear witness that the courts of Kentucky look with disfavor upon and will exercise caution in considering summary judgment motions. The preference for affording litigants a trial on the merits is clear.

**PERSONAL JURISDICTION**

The power of the courts of Kentucky to exercise personal jurisdiction over non-residents has been reviewed in several recent decisions, one issued by the Kentucky Supreme Court, and four by the Kentucky Court of Appeals. In two of the cases, the court found sufficient minimum contacts with this jurisdiction to satisfy the requirements of due process in exercising jurisdiction over a non-resident defendant. In the three other cases, the court found an absence of such minimum contacts and therefore declined to uphold long arm jurisdiction.

In *Wright v. Sullivan Payne Co.*, the Kentucky Supreme Court ruled that an Iowa corporation lacked sufficient minimum contacts with this state to meet the requirements of the due process clause so as to allow the courts of this state to exercise personal jurisdiction. In that case, the Commissioner of Insurance was acting as a liquidator of a Kentucky insurance company under

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48. *Id.*


52. 839 S.W.2d 250 (Ky. 1992).

53. *Id.* at 253.
the Kentucky Liquidation Act.\textsuperscript{54} It sought to have the Franklin Circuit Court assert personal jurisdiction over Sullivan Payne Company, an Iowa corporation, pursuant to either the Kentucky long arm statute, Kentucky Revised Statute (KRS) 454.210,\textsuperscript{55} or the Liquidation Act.\textsuperscript{56} The latter statute provided that the courts of this state would have jurisdiction over a person who is obligated to an insurer in any way as an incident to any agency or brokerage arrangement.\textsuperscript{57}

The defendant described itself as an intermediary between insurance carriers.\textsuperscript{58} It was a participant in the reinsurance industry and would facilitate the placement of insurance coverage and the preparation of formal contracts between insurers and reinsurers.\textsuperscript{59} It also served as a conduit for the payment of premiums and the transmission of loss payments between the parties.\textsuperscript{60} The company received brokerage commissions based on premiums paid by the insurer to the reinsurer.\textsuperscript{61}

Sullivan was holding funds paid to it by another insurance carrier in connection with a contract with the Kentucky insurance company in liquidation.\textsuperscript{62} The Commissioner of Insurance asserted the jurisdiction of the Franklin Circuit Court in order to gain control of the disposition of these funds.\textsuperscript{63} Sullivan objected to jurisdiction, arguing that it maintained no offices, agents or employees in Kentucky and that it was not licensed to transact business in this state.\textsuperscript{64}

In rejecting the jurisdiction of the Franklin Circuit Court, the Kentucky Supreme Court found that the plaintiff had failed to carry its burden of proof that the conduct of the non-resident defendant fell within the requirements of the Kentucky long arm statute.\textsuperscript{65} Likewise, the court found that there was insufficient proof in the record that the non-resident company was an agent

\textsuperscript{54} Id. at 251.
\textsuperscript{56} Wright, 839 S.W.2d at 252.
\textsuperscript{58} Wright, 839 S.W.2d at 252.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 253.
of the domestic insurer in order to fall within the purview of the jurisdiction of the Liquidation Act. The court then addressed the argument presented by the Insurance Commissioner that the regulatory scheme of the Liquidation Act gave rise to jurisdiction absent minimum contacts within the state.

Declining to accept the argument that the regulation of the insurance industry, as a matter of public interest, would extend the limits of jurisdiction, the court followed the line of decisions from the United States Supreme Court from *International Shoe Co. v. Washington* through the more recent case of *Burger King v. Rudzewicz*. While acknowledging that extending jurisdiction over a non-resident insurer would facilitate the purpose of the state regulatory scheme, the court stated that the due process clause was not adopted to further the convenience of the state, but to insure that no state would make a binding judgment against a defendant with which the state had no contacts, relations or ties. The court also cautioned against reliance upon talismanic formulas in determining jurisdiction.

In other recent cases, the court of appeals had applied a three part test for jurisdiction set forth in the case of *Southern Machine Co. v. Mohasco Industries, Inc.* While acknowledging such formulas have value, the court emphasized that the facts of each case must be weighed in determining whether the exercise of personal jurisdiction would comport with fair play and substantial justice. Under the facts of this case, the supreme court found issues of convenience and promotion of the public interest were

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66. *Id.*
67. *Id.* at 253, 254.
68. *Wright*, 839 S.W.2d at 254.
69. 326 U.S. 310 (1945).
71. *Id.* at 254 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).
72. *Wright*, 839 S.W.2d at 254.
73. 401 F.2d 374 (6th Cir. 1968). According to this three part test for jurisdiction, the court is required to find the following:
1. The defendant has purposefully availed itself of the privilege of acting in the forum state, or has caused a consequence in that state;
2. The cause of action has arisen from the defendant's activity;
3. The acts of the defendant, or consequences caused by the defendant, must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. *Id.* at 381.
74. *Id.* at 380.
insufficient to overcome the lack of minimum contacts required by the due process clause.\textsuperscript{75}

As mentioned above, the Kentucky Court of Appeals, in four earlier cases, addressed the extent to which the courts of this state can exercise personal jurisdiction over non-residents. In \textit{Halderman v. Sanderson Forklifts Co.},\textsuperscript{76} the court held that a foreign manufacturer of equipment could not be subjected to the jurisdiction of the Kentucky courts in a personal injury action, where it was merely fortuitous that its product found its way into this state.\textsuperscript{77} At no time did the defendant seek to distribute its product directly in Kentucky, nor did it have any contact with any person or entity in this state.\textsuperscript{78} Rejecting the "stream of commerce" doctrine, the court found that the defendant manufacturer did not have sufficient minimum contacts with this forum and that it would be unreasonable for the courts of Kentucky to exercise jurisdiction over it.\textsuperscript{79}

On the other hand, in \textit{Perry v. Central Bank & Trust Co.},\textsuperscript{80} the court upheld the jurisdiction of the Fayette Circuit Court, under the Kentucky long arm statute, to enforce a personal judgment against a Virginia resident. In that case, the non-resident defendant executed a loan guarantee agreement in favor of a Kentucky bank to secure the repayment of a mortgage note executed by his daughter and son-in-law.\textsuperscript{81} In a foreclosure action, a default judgment was entered against the Virginia resident.\textsuperscript{82} He challenged the court's assertion of jurisdiction because he had not been in Kentucky and his signature was solicited by the bank, with the note being sent to him in Virginia.\textsuperscript{83}

The court noted that Kentucky's long arm statute allows its courts to "reach to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants."\textsuperscript{84} Examining the jurisdictional facts in accordance with the three part

\begin{enumerate}
\item \textsuperscript{75} Id. at 384-86.
\item \textsuperscript{76} 818 S.W.2d 270 (Ky. Ct. App. 1991).
\item \textsuperscript{77} Id. at 274.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} 812 S.W.2d 166 (Ky. Ct. App. 1991).
\item \textsuperscript{81} Id. at 167.
\item \textsuperscript{82} Id. at 168.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id. (citing Mohler v. Dorado Wings, Inc. 675 S.W.2d 404, 405 (Ky. Ct. App. 1984)).
\end{enumerate}
test set out in *Southern Mach. Co. v. Mohasco Indus., Inc.*,\(^{85}\) the court determined that the acts of the defendant Perry satisfied due process.\(^{86}\) Citing a factually similar case from the Sixth Circuit, *National Can Corp. v. K Beverage Co.*,\(^{87}\) the court upheld exercise of personal jurisdiction.\(^{88}\) It observed that, while the defendant may not have sought out the Kentucky bank, his act of signing the guarantee agreement certainly caused a consequence in the state since the loan would not have been procured without his signature.\(^{89}\) The court further concluded that his execution of the agreement had a substantial enough connection with Kentucky to make personal jurisdiction reasonable.\(^{90}\) Furthermore, he knew that if the loan were to be in default, he would be looked to for payment.\(^{91}\)

In *Tennessee Farmers Mut. Ins. v. Harris*,\(^{92}\) the court of appeals held that personal jurisdiction over a non-resident insurer was not reasonable since there were insufficient minimum contacts between the non-resident company and the state of Kentucky.\(^{93}\) This case arose from an auto accident that occurred in Kentucky.\(^{94}\) The plaintiffs, who were residents of Tennessee, filed suit in Kentucky against the tortfeasors and obtained a judgment in excess of their insurance coverage.\(^{95}\) They then filed an amended complaint naming their own insurance carrier, Tennessee Farmers Mutual Insurance Company.\(^{96}\) That company objected to the court's jurisdiction arguing that all parties were Tennessee residents; that the insurance policy sued upon was written and delivered in the state of Tennessee; and that the company did not write and was not authorized to do business in Kentucky.\(^{97}\) Indeed, the only connection with Kentucky was the fact that the auto accident had occurred in Kentucky.\(^{98}\)

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85. 401 F.2d 374 (6th Cir. 1968).
86. Perry, 812 S.W.2d at 170.
87. 674 F.2d 1134 (6th Cir. 1982).
88. Perry, 812 S.W.2d at 170.
89. Id. at 169.
90. Id.
91. Id.
93. Id. at 854.
94. Id. at 851.
95. Id.
96. Id.
97. Id. at 852.
98. Id.
After noting that it could find no Kentucky case addressing the issue of whether the courts of this state could exercise personal jurisdiction over a non-resident insurer solely on the basis of an accident occurring here, the court then reviewed decisions from other jurisdictions. It found the weight of authority from other states to be that personal jurisdiction would not be proper. The court then concluded that there were insufficient minimum contacts to justify exercising personal jurisdiction over the Tennessee insurance company under the Kentucky long arm statute. Once again, the court analyzed the defendant's contact with Kentucky in light of the three part test of the Southern Mach. case.

Finally, in Friction Materials Co. v. Stinson, a salesman brought suit to recover commissions from his employer, a Delaware corporation, with its principal place of business in Indiana. The defendant objected to the plaintiff's assertion of long arm jurisdiction arguing that it had no offices or employees in Kentucky; that the plaintiff was an independent contractor who solicited orders for more than one company; and that the plaintiff's sales representative agreement was negotiated and signed in the state of Indiana.

While considering that it would be subject to the jurisdiction of the Kentucky courts if it were to be sued by one of its customers, the defendant maintained that its relationship with the plaintiff arose from a contract executed in Indiana and not from its business dealings with Kentucky customers. Once again, the Kentucky Court of Appeals cited a long line of cases defining the due process requirements for minimum contacts with the forum state. In affirming Kentucky's jurisdiction, the court found that the defendant met the three part test for minimum contacts. Although the contract between the parties may have

99. Id.
100. Id. at 852, 853.
101. Id. at 853, 854.
102. Id. at 854.
104. Id. at 390.
105. Id.
106. Id.
107. Id.
108. Id. at 390, 391.
been negotiated and executed in Kentucky, the defendant reaped substantial commercial benefits in Kentucky as a result of that document. In conclusion, the court stated that it was not unreasonable for the defendant to think that it could be hauled into court in Kentucky over the sales representative agreement.

Although numerous cases have held that Kentucky can exercise jurisdiction under its long arm statute to the full limits permitted by the Due Process Clause, the decision in Wright v. Sullivan Payne Co., is an indication that the court will decline to assert jurisdiction over non-residents unless there is a showing of the required minimum contacts with the state. One factor to which the Court appears to give considerable weight in determining whether jurisdiction would comport with fair play and substantial justice is whether the defendant could have expected to be brought into court into Kentucky as a result of its dealings with the resident plaintiff. A case by case analysis will be followed by the courts.

LIMITATION OF ACTIONS: AMENDED PLEADINGS AND THE RELATION BACK RULE

During 1992, the Kentucky Supreme Court issued several opinions in which it was called upon to determine the timeliness of the filing of civil actions. The relation back rule of amended pleadings set forth in C.R. 15.03 was addressed in two cases

109. Id. at 390.
110. Id. at 391.
111. 839 S.W.2d 250 (Ky. 1992).
112. Ky. R. Civ. P. 15.03 states:

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(3) The delivery or mailing of process to the Attorney General of the Commonwealth, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of paragraph (2) with respect to the Commonwealth or any agency or officer thereof to be brought into the action as a defendant.
decided by the supreme court and in one decision from the court of appeals. In another decision of particular importance to personal injury practitioners, the court, by its interpretation of various statutes, has established a two-year period of limitations for wrongful death actions.

In *Munday v. Mayfair Diagnostic Lab.*,113 a medical negligence action was brought against a partnership which operated a medical laboratory under an assumed name, and against its director.114 After commencement of the action, the plaintiffs learned through discovery that the sole individual defendant was not one of the partners in the lab.115 In light of the decision in *Telemarketing Comm. v. Liberty Partners*,116 which held that a partnership could not sue under an assumed name, the plaintiffs realized that they needed to amend their complaint to join at least one actual partner.117 However, their amended complaint was filed approximately four months after the limitation period for filing the original action had passed.118

In considering whether the amended complaint could relate back to the original complaint in order to toll the running of the statute of limitations, the trial court relied upon the case of *Nolph v. Scott*.119 In that case, also a medical malpractice action, the Kentucky Supreme Court had given C.R. 15.03120 the same restrictive interpretation as the United States Supreme Court had given to the federal rule counterpart in *Schiavone v. Fortune, Inc.*121 The court in *Nolph* held that the party joined by the amended complaint did not have notice of the proceedings within the period provided by law for the commencement of the action against him as required by C.R. 15.03(2).122 Accordingly, the

113. 831 S.W.2d 912 (Ky. 1992).
114. *Id.* at 913.
115. *Id.*
116. 798 S.W.2d 462 (Ky. 1990).
117. *Munday*, 831 S.W.2d at 913.
118. *Id.*
119. 725 S.W.2d 860 (Ky. 1987).
120. *See supra* note 112.
121. 477 U.S. 21 (1986).
122. *Nolph*, 725 S.W.2d at 862. KY. R. Civ. P. 15.03(2) provides:

(2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or
amended complaint was dismissed as being time barred. Following this precedent, the trial court in *Munday* likewise found that the Mayfair partner named in the amended complaint had not received notice of the suit within the statutory time period and dismissed the action.

On appeal, the Kentucky Supreme Court refused to review its prior decisions in *Nolph* and *Telemarketing*, but rather reversed the dismissal on other grounds. Justice Lambert, who had dissented in *Nolph*, wrote the majority opinion holding that the Mayfair defendants were estopped to rely on the defense of limitations due to their failure to comply with KRS 365.015, the assumed name statute. That law requires partnerships doing business under an assumed name to file a certificate with both the Secretary of State and the county clerk revealing the identity of the partners. According to Justice Lambert, the defendants' failure to comply with that law created an estoppel under KRS 413.190(2). This latter statute tolls the period of limitations against anyone who absconds or conceals himself, "or by any other indirect means obstructs the prosecution of the action." The court opined that it had no doubt that the defendants' violation of the assumed name statute may properly be regarded as an obstruction.

Although concurring in the majority opinion, Justice Leibson filed a separate opinion in which he argued that the amended complaint was timely filed according to his interpretation of the relation back rule of C.R. 15.03(2). Having written the dissenting opinion in *Nolph v. Scott*, he took the opportunity of his concurring opinion in this case to level harsh criticism at the "hypertechnical interpretation" of C.R. 15.03(2) employed first by the United States Supreme Court in *Schiavone* and then by the Kentucky

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123. *Munday*, 831 S.W.2d at 913.
124. *Id.*
125. *Id.* at 913, 914.
126. *Id.* at 915.
128. *Munday*, 831 S.W.2d at 915.
129. KY. REV. STAT. ANN. § 413.190(2) (Baldwin 1991).
130. *Munday*, 831 S.W.2d at 915.
131. *Id.* at 916. See supra note 122.
Supreme Court in Nolph. He attributed the decision in Schiavone as “an all-out effort to limit the size of the federal docket” which, he believes, is no reason for Kentucky to follow suit. Indeed, Justice Leibson noted that, in the recent case of Steelvest, Inc. v. Scansteel Service Ctr., the Kentucky court had refused to follow the lead of the United States Supreme Court which had liberalized the standard for summary judgment as a means to accommodate docket control. Nevertheless, despite this impassioned plea for an interpretation of the civil rules to promote the ends of justice, it appears the courts of Kentucky will require the parties added by amendment have notice of the filing of the original complaint within the period provided for commencing the action.

The Kentucky Court of Appeals gave a liberal interpretation to the type of notice that will permit the relation back of an amended pleading under C.R. 15.03(2) in the case of Halderman v. Sanderson Forklifts Co. In that personal injury case, the plaintiff filed suit against a subsidiary corporation a few days before the expiration of the one-year statute of limitations. In accordance with the long arm statute, process was served upon the Secretary of State who in turn mailed a copy of the summons and complaint to the defendant. It was agreed that the original defendant did not receive actual notice of the lawsuit until receipt of the mailing from the Secretary of State, which was several days after the period of limitations had passed. Thereafter, the plaintiff filed an amended complaint adding the parent corporation as a party defendant.

The trial court sustained the parent corporation’s motion for summary judgment upon the grounds that the claim was barred by the statute of limitations. That defendant argued that, since its subsidiary did not receive actual notice of the suit within the

133. Id.
134. Id.
135. 807 S.W.2d 476 (Ky. 1991).
136. Id.
137. 818 S.W.2d 270 (Ky. Ct. App. 1991)
138. Id. at 271.
139. Id.
140. Id.
141. Id.
142. Id.
time provided by law for commencing the action, such notice was insufficient to trigger the relation back provision of C.R. 15.03(2). The court of appeals disagreed holding that the timely commencement of the original action constituted "constructive" notice of the action which would satisfy the rule. Moreover, the court found that the notice to the subsidiary would be imputed to the parent corporation.

Another case in which the Kentucky Supreme Court addressed this relation back rule was Richardson v. Dodson. The issue in that medical negligence case was whether an amended complaint, filed by a proper party after the limitation period had passed, would relate back to the filing of the original complaint by a person who lacked capacity to bring the action. In that case, a son filed suit pro se in his individual capacity for the wrongful death of his mother. The complaint was filed before the expiration of the statute of limitations. Thereafter, he was appointed personal representative of the estate and, prior to the filing of any motion or response from the defense, he filed an amended complaint alleging his status as administrator. This amended complaint, however, was filed after the period of limitation had run.

In an opinion in which all sitting justices concurred, Justice Lambert wrote that the amended complaint would relate back to the original complaint despite the fact that the plaintiff, as originally alleged, had no right to sue for wrongful death. He cited C.R. 15.03(1) which states that a claim in an amended pleading will relate back if it arises out of the same occurrence "set forth or attempted to be set forth in the original pleading." Rejecting the argument that an action brought by one without the right to do so is a nullity, he noted that the plaintiff was the person entitled to be appointed as personal representative, and

143. Id. at 271, 272.
144. Id. at 273.
145. Id.
146. 832 S.W.2d 888 (Ky. 1992).
147. Id. at 889.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id. at 889, 890.
153. Id. at 889 (citing Ky. R. Civ. P. 15.03(1)).
was so appointed. A different result may have been reached had the original plaintiff not been in a class eligible for appointment. Still, Justice Lambert observed that, inasmuch as the purpose of statutes of limitation is served when the defendant is placed on notice of the claim within the period allowed, there was no prejudice to the defendant by allowing the amended complaint to relate back.

The outcome in Richardson v. Dodson, would apparently be the same if decided in accordance with the subsequent ruling from the Kentucky Supreme Court in Conner v. George W. Whitesides Co. In its opinion, the court acknowledged that the net effect of its interpretation of the governing statute, KRS 413.180, would be to provide two years from the date of death for the appointment of a personal representative and the commencement of a wrongful death action.

In Conner, Mrs. Conner died of cancer in August of 1985. Her husband was appointed executor of her estate in September of 1986 and filed suit on the same date. The defense argued that the wrongful death claim was barred by the one-year statute of limitations contained in KRS 413.140(1). The court, in a four

154. Id.
155. Id. at 889, 890.
156. Id. at 890.
157. 834 S.W.2d 652 (Ky. 1992).
158. Id. at 654.
159. Id. at 653.
160. Id.
161. Id. KY. REV. STAT. ANN. § 413.140(1) (Baldwin 1991) provides:
Actions to be brought within one year.
(1) The following actions shall be commenced within one (1) year after the cause of action accrued:
   (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.
   (b) An action for injuries to persons, cattle or other livestock by railroads or other corporations, with the exception of hospitals licensed pursuant to KRS or other corporations, with the exception of hospitals licensed pursuant to KRS Chapter 216.
   (c) An action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation or breach of promise of marriage.
   (d) An action for libel or slander.
   (e) An action against a physician, surgeon, dentist or hospital licensed pursuant to KRS Chapter 216 for negligence or malpractice.
   (f) An action for the escape of a prisoner, arrested or imprisoned on civil
to three decision, disagreed and held that KRS 413.180(2) applied to wrongful death actions. As a result, Mr. Conner's suit as executor of his wife's estate, though filed more than one year after her death, was deemed to be timely. Indeed, the court's interpretation of that statute would have allowed him up to two years from the date of his wife's death to bring the action.

KRS 413.180, also referred to as the Survival Act, was adopted to allow personal representatives to file causes of action owned by individuals who die prior to the running of the period of limitations. This statute has two sections. The first gives the personal representative a year from the date of qualification to bring suit, provided the decedent died within the original limitation period. The second section is unusual in that it deems the personal representative to have qualified on the anniversary of death, if more than one year intervenes between decedent's death and the actual date of appointment. Thus, this latter section, in effect, allows a period of two years from the date of death for the filing of claims that survive.

The issue in the Conner case was whether the survival act should apply to a wrongful death claim. It had been argued previously that this statute was designed to allow a personal representative to proceed with claims that the decedent held at the time of death and which survived for the benefit of the process.

(g) An action for the recovery of usury paid for the loan or forbearance of money or other thing, against the loaner or forbearer of assignee of either.

(h) An action for the recovery of stolen property, by the owner thereof against any person having the same in his possession.

(i) An action for the recovery of damages or the value of stolen property against the thief or any accessory.

162. Id. at 654, 655. Ky. REV. STAT. ANN. § 413.180(2) (Baldwin 1991) provides:

(2) If a person dies before the time at which the right to bring any action mentioned in KRS 413.090 to 413.160 would have accrued to him if he had continued alive, and there is an interval of more than one year between his death and the qualification of his personal representative, that representative, for purposes of this chapter, shall be deemed to have qualified on the last day of the one-year period.

163. Id. at 655.

164. Id.


168. Conner, 894 S.W.2d at 653.
estate. Since a wrongful death action does not accrue until death, other decisions had held that such a cause of action did not survive so as to come within the provisions of KRS 413.180. Indeed, in a persuasive dissenting opinion in the Conner case, Chief Justice Stephens restated this argument. Nevertheless, the majority found it reasonable to conclude that the legislature intended the survival act to apply to wrongful death suits as well as to personal injury actions.

In summary, these cases reflect the willingness of the court to interpret liberally statutes and rules so as to preserve causes of action.

**PRE-TRIAL PROCEDURE**

The extent of pre-trial discovery was the subject of a number of recent decisions before the Kentucky Supreme Court and the Kentucky Court of Appeals. In several of these cases, the litigants employed the Writ of Prohibition in an effort to resolve discovery disputes in the trial court. In McMurry v. Eckert, the defendant doctor in a medical malpractice case obtained an order from the circuit court requiring plaintiffs’ counsel to appear for a deposition and to produce notes which he had taken incidental to a pre-litigation interview with the doctor. The plaintiffs’ counsel filed an original action in the court of appeals under C.R. 76.36, seeking a Writ of Prohibition. Upon denial of that relief, an appeal to the supreme court was filed as a matter of right in accordance with C.R. 76.36(7)(a).

Justice Lambert, writing for the Court, ruled that the attorney’s notes would not constitute a statement of a party which would be discoverable as a matter of right under C.R. 26.02(3)(b).
He characterized these notes as the product of the attorney's investigation which would be entitled to broad protection under the decision in *Hickman v. Taylor*. As a result, the Court held that the circuit court order requiring production of the notes was clearly erroneous. In addition, Justice Lambert wrote that the plaintiffs' counsel would not be required to give his deposition. While in rare or extraordinary circumstances the deposition of a party's counsel might be necessary, the potential for harm to the administration of justice is too great to allow this to be done routinely.

A circumstance in which the deposition of a party's attorney was deemed permissible was presented in the case of *Riggs v. Schroering*. The plaintiff in that case filed a personal injury claim arising out of an auto accident and also joined the defendant's liability carrier, alleging unfair claims settlement practices. The defendant's insurance carrier served a subpoena duces tecum upon plaintiff's counsel directing them to appear at a deposition and to bring with them memos of telephone conversations and other documents supporting their allegations of unfair claims settlement practices. When their motion to quash the subpoena was denied by the trial court, the plaintiff's attorneys filed an original action in the court of appeals seeking a Writ of Prohibition. When that Writ was denied, they appealed to the supreme court. In his opinion, Justice Leibson observed that

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179. *Id.*
180. *Id.* at 831.
181. *Id.* at 830, 831.
182. 822 S.W.2d 414 (Ky. 1992).
183. *Id.*
184. *Id.*
185. *Id.* at 415.
186. *Id.*
the insurance carrier and its adjuster had already responded to
discovery on the same subject matter. Discovery, he noted, is
a two-way street. Based on representations that the subject
matter of the proposed depositions of the plaintiff's attorneys
would not violate that attorney/client privilege, the court upheld
the denial of the Writ of Prohibition.

The failure of a party to utilize the procedural devices to
prevent discovery abuse was a significant factor in the court's
denial of a Writ of Prohibition in the case of Shobe v. EPI Corp.
The plaintiffs in that class action suit were minority shareholders
in a company that entered into an agreement to merge with
another company for the purpose of "going private." In the
course of discovery, the plaintiffs sought various corporate doc-
uments, but the defendants objected alleging attorney/client priv-
ilege and the work product doctrine. However, the defendants
did not seek a protective order or an in camera review of the
documents. The trial court ordered disclosure of the docu-
ments.

The Kentucky Court of Appeals granted a Writ of Prohibition
finding that the trial court abused its discretion. On appeal,
the supreme court reversed. While the court agreed that con-
fidential and privileged information should be protected,
it further found that the parties seeking to invoke such privileges
had the burden of asserting them. The trial court had no
obligation, sua sponte, to hold an in camera review. Thus, the
failure of the trial court to hold a hearing on this discovery issue,
in absence of a request by either party to do so, would not give
rise to such great injustice and irreparable harm to require the
issuance of a Writ of Prohibition. In dissolving the Writ, the

187. Id.
188. Id.
189. Id. at 416.
190. 815 S.W.2d 395 (Ky. 1991).
191. Id. at 396.
192. Id.
193. Id.
194. Id.
195. Id. at 397.
196. Id. at 398.
197. Id. at 397.
198. Id.
199. Id. at 398.
200. Id.
court stated that the trial court should make a determination of the application of the attorney/client privilege and work product doctrine in the event a motion for an *in camera* hearing is requested.\textsuperscript{201}

The discovery and use of a consulting expert's report was the subject of the decision of the Kentucky Court of Appeals in *Morrow v. Stivers*.\textsuperscript{202} In that medical malpractice case, the attorney for the defendant doctor, while deposing one of the plaintiff's trial witnesses, inadvertently came into possession of reports issued by two other doctors who had examined the plaintiff.\textsuperscript{203} Counsel for the defendant doctor sought to admit into evidence the reports and the depositions of these two doctors.\textsuperscript{204} The trial court, however, ruled that the reports were not discovery and therefore were not properly admissible.\textsuperscript{205} The doctor's counsel argued that C.R. 26.02(4)(b), which limits the right to discovery opinions of the opposing party's non-testifying experts, should not apply since these reports were not obtained through discovery procedures.\textsuperscript{206} The court of appeals agreed with the trial court that it did not matter in what manner the defendant came into possession of the reports.\textsuperscript{207} To do so would undermine the purpose of the discovery rule which in part is to encourage pre-litigation consultations.\textsuperscript{208}

**TRIAL PRACTICE**

A number of decisions of particular interest to trial practitioners were rendered during the time period encompassed by this review. Several of these decisions specifically address the ade-
quacy of jury awards and the method of preserving the right to challenge such awards.

In *Cooper v. Fultz*, the supreme court resolved the dispute as to whether the jury's insertion of a "0" in a verdict constitutes an irregular or inconsistent verdict. The jury awarded Cooper over eight thousand dollars in medical expenses, but entered a "0" for mental and physical suffering. Neither party moved the court to send the jury back to reconsider the verdict. As a result, in denying the motion for a new trial based on inadequacy of damages, the court ruled that any objection had been waived.

Upon discretionary review, the supreme court held that a jury verdict setting forth "0" for an item of damages, as opposed to leaving a verdict blank, is not an irregular verdict. Accordingly, the plaintiff did not waive her right to have the adequacy of the verdict considered upon the filing of a C.R. 59.01 motion for a new trial. Thus, the court remanded the matter back to the trial court to consider whether a "0" was an appropriate or adequate award of damages based on the evidence.

The ruling in *Cooper* was followed by the court of appeals in *McVey v. Berman*. Again, the jury in that medical malpractice

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209. 812 S.W.2d 497 (Ky. 1991).
210. *Id.* at 498.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 499.
215. *Id.* at 501; KY. R. CIV. P. 59.01 provides:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

(b) Misconduct of the jury, of the prevailing party, or of his attorney.

(c) Accident or surprise which ordinary prudence could not have guarded against.

(d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

(e) Error in the assessment of the amount of recovery whether too large or too small.

(f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these Rules.

216. *Id.* at 502.
case consciously inserted a “0” as the award for damages for the plaintiff’s permanent impairment of her power to labor.\textsuperscript{218} It also entered a “0” as damages for her husband’s loss of consortium.\textsuperscript{219} Finally, the jury entered a “0” in a separate award for mental pain and suffering, although it had awarded her $10,000 for physical pain and suffering.\textsuperscript{220}

Citing the decision in \textit{Cooper}, the court of appeals held that the trial court was not in error in refusing to order the jury to reconsider its verdict.\textsuperscript{221} The court likewise affirmed the jury’s award as being neither inadequate nor inconsistent.\textsuperscript{222} Finally, the court suggested that it would have been better to give a unified instruction for damages for physical and mental pain and suffering.\textsuperscript{223}

In \textit{Turfway Park Racing Ass’n v. Griffin},\textsuperscript{224} the administratrix of the estate of a four-year old child filed a wrongful death action against the race track.\textsuperscript{225} The parents likewise joined in this suit claiming damages for loss of affection and companionship.\textsuperscript{226} The jury rendered a verdict in favor of the parents for their individual claims in the amount of $375,000.\textsuperscript{227} It likewise awarded $50,000 for the child’s pain and suffering, but entered a “0” for damages for the child’s power to earn money.\textsuperscript{228}

The estate’s motion for a new trial, claiming the inadequacy and inconsistency of the verdict in failing to award any sum for the destruction of the child’s earning power, was overruled by the trial court.\textsuperscript{229} The court of appeals, however, reversed holding that the failure to award some amount of money for the loss of earning power was inadequate.\textsuperscript{230} The court noted that an economist had testified to the child’s potential earning capacity and

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218. \textit{Id.} at 447. \\
219. \textit{Id.} \\
220. \textit{Id.} \\
221. \textit{Id.} \\
222. \textit{Id.} at 449. \\
223. \textit{Id.} at 450. \\
224. 834 S.W.2d 667 (Ky. 1992). \\
225. \textit{Id.} at 668, 669. \\
226. \textit{Id.} at 669. \\
227. \textit{Id.} \\
228. \textit{Id.} \\
229. \textit{Id.} \\
230. \textit{Id.} \\
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that there was no evidence to refute the inference that the child would have had some earnings.231

The Kentucky Supreme Court affirmed the reasoning and decision of the court of appeals, and held that the trial court was clearly erroneous in overruling the motion for new trial.232 The court further ruled that, upon retrial, the jury should be instructed as to the sums which were previously awarded to the parents upon their claims for loss of affection and companionship, as well as the sums which had been awarded to the estate for the child's pain and suffering and for medical and funeral expenses.233

Finally, civil trial practitioners should take note of the decision in Washington v. Goodman.234 In that case, the estate of a black patient filed suit against a white doctor.235 Three black jurors were empaneled.236 Prior to the exercise of peremptory challenges, the plaintiff requested the court to apply the rule announced in Batson v. Kentucky,237 which prohibits the use of peremptory challenges to exclude jurors based upon race.238 The court denied the application of the Batson rule claiming that it applied only to criminal proceedings.239 Thereafter, the defendant used two of his peremptory challenges to strike two of the black jurors.240 A third black juror was removed from the panel by lot prior to deliberation.241 As a result, the verdict was rendered by an all white panel.242

The court of appeals retroactively applied the United States Supreme Court decision in Edmonson v. Leesville Concrete Co., Inc.,243 which had extended the Batson rule to civil cases.244 As a result, the case was remanded to the trial court for a hearing to

231. Id.
232. Id. at 671.
233. Id. at 673.
235. Id. at 399.
236. Id. at 401.
238. Washington, 830 S.W.2d at 400.
239. Id. at 401.
240. Id.
241. Id.
242. Id.
244. Id.
determine whether the plaintiff could establish a prima facie case of discrimination in the exercise of peremptory challenges.\footnote{245. Id. at 402.}

**RES JUDICATA: CLAIM AND ISSUE PRECLUSION**

There may be no other area of law which causes more confusion, not only in the application of the principle itself, but also in the terminology used, than the doctrine of *res judicata*. The term *res judicata*, used in its broadest sense, encompasses two distinct principles which modern writers have labeled "claim preclusion" and "issue preclusion."\footnote{246. For a discussion of the modern terminology used with the doctrine of *res judicata*, see WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, § 44.02, pp. 6-11 (West Publishing, 1981).} Claim preclusion prohibits the relitigation of the same cause of action between the identical parties where there has been a prior final judgment on the merits. Thus, claim preclusion is the modern terminology for what many, in the past, had called *res judicata* in the narrow sense. Issue preclusion, on the other hand, prevents the relitigation of an issue in the same or subsequent litigation. The requirements for issue preclusion are that the issue be the same as in the prior litigation; that it had been actually litigated and decided; and that the prior issue was necessary to the decision in the prior case. The court in the subsequent action will invoke this doctrine if the precluded party had a full and fair opportunity to litigate the issue in the prior action. Finally, issue preclusion can be used offensively, as well as defensively.\footnote{247. See Parklane Hosiery Company v. Shore, 439 U.S. 322 (1979).}

The Kentucky Supreme Court made an attempt, but did not succeed, in clarifying the confusion in the use and terminology surrounding the doctrine of *res judicata* in its decision in *City of Louisville v. Louisville Professional Firefighters Ass’n*.\footnote{248. 813 S.W.2d 804 (Ky. 1991).} In that case, the firefighters' union filed a grievance against the city with the State Labor Relations Board which was established pursuant to the Kentucky Firefighters' Collective Bargaining Act.\footnote{249. Id. at 805.} In an initial suit brought by the firefighters in the Jefferson Circuit Court, the city acknowledged the applicability of the Collective Bargaining Act.\footnote{250. Id.} As a result, the matter was re-
manded to the Labor Relations Board for further proceedings.\textsuperscript{251} When the matter was brought back before the Jefferson Circuit Court on appeal from the decision of the Board, the city reversed its position and argued that the Collective Bargaining Act did not apply.\textsuperscript{252}

The Kentucky Supreme Court, in an opinion written by Justice Spain, held that the city was barred by the doctrine of \textit{res judicata} from arguing that the Labor Relations Act did not apply.\textsuperscript{253} Even though the Jefferson Circuit Court, in that first action, had concluded that it did not have jurisdiction and had referred the matter back to the Board, the court held that the trial court’s decision on the issue would be binding.\textsuperscript{254}

Unfortunately, the terminology used by the court does not make it clear whether the decision could be described as being based on claim preclusion or issue preclusion. Justice Spain wrote that the city was “barred under the doctrine of \textit{res judicata} and waiver from asserting the issue” of the application of the labor act.\textsuperscript{255} He further added that the city “is collaterally estopped from relitigating the issue.”\textsuperscript{256} Since all the elements for issue preclusion were present, it would seem that the basis of the court’s holding would be that doctrine. However, the court apparently deemed it necessary to add that, although the Jefferson Circuit Court had dismissed the first case without prejudice due to lack of jurisdiction, it had nevertheless reached a decision on the “merits” with regard to the application of the labor act.\textsuperscript{257} Since issue preclusion does not require a judgment on the merits, but only that the issue be fully litigated in the prior action, there was no need for the Court to find that a ruling on the merits had been made. In short, the court could have helped to clarify the confusion surrounding the doctrine of \textit{res judicata} had it simply ruled that this was a clear case of issue preclusion.

The Kentucky Court of Appeals addressed the issue of offensive use of issue preclusion in the case of \textit{Board of Educ. of

\textsuperscript{251} Id. at 806.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 808.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
Covington v. Gray. Mr. Gray alleged that he had been forced to resign his teaching position by the Board of Education. He thereafter filed a claim for unemployment benefits. The Kentucky Unemployment Insurance Commission found that Gray had not voluntarily resigned.

In a separate and subsequent breach of contract action, Gray attempted to use the finding of the Kentucky Unemployment Insurance Commission to preclude the school board from arguing that he had voluntarily resigned, as opposed to being forced to resign. Thus, Gray was attempting to use issue preclusion offensively. Citing the Parklane Hosiery case, the Court held that the plaintiff could not invoke issue preclusion to prevent the defendant board of education from arguing that he had voluntarily resigned. Noting the informal and relaxed nature of the proceedings before the Commission, the court found that the school board had not had the opportunity to fully and fairly litigate the issue of the plaintiff’s resignation before that body and that it would simply be inequitable to apply offensive issue preclusion in the breach of contract action.

INJUNCTION

The constitutional doctrine of separation of powers was one of the considerations weighed by the Kentucky Supreme Court in deciding whether to approve the issuance of a temporary injunction against a sitting governor in the case of Commonwealth ex rel. Cowan v. Wilkinson. In that case, the Franklin Circuit Court, upon motion of the Attorney General, issued a temporary injunction prohibiting then Governor Wallace G. Wilkinson from being sworn in as a member of the Board of Trustees of the University of Kentucky pursuant to an executive order which he issued appointing himself to a vacancy on that board. The court of appeals dissolved the circuit court’s order and the Attorney
General sought review and reinstatement of the injunction pursuant to C.R. 65.09.267 The supreme court, with Justice Wintersheimer writing the majority opinion, affirmed the action of the court of appeals and held that the circuit court had abused its discretion in issuing the temporary injunction.266

The court found that the Attorney General had not met the burden necessary for issuance of a temporary injunction.269 In reviewing the propriety of the injunction in this case, the court stated that temporary injunction is an extraordinary remedy issued only where absolutely necessary to maintain the status quo pending a trial on the merits.270 A party seeking this relief must show that his or her rights are or will be violated and that they will suffer immediate and irreparable harm without the issuance of the injunction.271 In deciding whether to issue such an order, the court must evaluate the evidence in light of both substantive and equitable principles.272 It must also consider whether the public interests will be harmed by the injunction or whether the status quo will be maintained.273 Finally, the court must consider the likelihood that the party seeking the injunction will succeed on the merits.274

The court found that the Attorney General had not met the necessary burden of proof for the issuance of such extraordinary relief.275 At the outset, Justice Wintersheimer expressed doubt as to whether the Attorney General had standing to bring this action.276 He cited the case of Maupin v. Stansbury277 for the proposition that a party seeking an injunction must allege the

267. Id. Ky. R. Civ. P. 65.09(1) provides:
Any party adversely affected by an order of the Court of Appeals in a proceeding under Rule 65.07 or Rule 65.08 may within five (5) days after the date on which such order was entered, move the Supreme Court to vacate or modify it. The decision whether to review such order shall be discretionary with the Supreme Court. Such a motion will be entertained only for extraordinary cause shown in the motion.
268. Commonwealth ex rel. Cowan, 828 S.W.2d at 615.
269. Id.
270. Id. at 612.
271. Id.
272. Id.
273. Id.
274. Id. at 615.
275. Id.
276. Id. at 613.
abrogation of a concrete personal right. However, this issue clearly was not the basis for the court's decision and was adequately answered in Justice Leibson's dissent in which he set forth a number of reasons why the Attorney General would have standing to seek injunction under such circumstances.

The more persuasive reasons for denying the injunction were that the Attorney General failed to prove the probability of immediate and irreparable harm and the likelihood of his success on the merits. What irreversible harm that would result from the governor's assumption of a seat on the Board of Trustees was not clearly established. Moreover, the court indicated that, from its review of the applicable statutes and case law, it could find no clear authority which would prohibit the governor from appointing himself to such a position. In short, the court expressed doubt that the Attorney General would succeed at a trial of the merits of this case, and thus was unwilling to reinstate the injunction.

Another case in which the supreme court was asked, pursuant to C.R. 65.09, to review an interlocutory order of the court of appeals involving injunctive relief, was the case of Cypress Mountain Coal Corp. v. Brewer. That case provides a good example of the various procedural mechanisms available to litigants in seeking injunctive relief and in seeking review of the grant or denial of injunctive relief in both the court of appeals and the supreme court. The plaintiffs were owner operators of coal trucks and alleged that the defendant coal company had breached a contract for coal hauling services. The Perry Circuit Court granted a mandatory temporary injunction ordering the coal company to employ the trucking services of the plaintiffs, despite the fact that the company was under contract with another entity for coal hauling services. Thus, the defendant was placed in a "Catch 22" situation in that it was ordered by the trial court to

278. Commonwealth ex rel. Cowan, 828 S.W.2d at 613.
279. Id. at 616-619.
280. Id. at 613.
281. Id. at 615.
282. Id.
283. Id.
284. 828 S.W.2d 642 (Ky. 1992).
285. Id. at 643.
286. Id.
breach one contractual obligation in order to satisfy the plaintiffs' alleged agreement.

In vacating the injunction, the court held that the trial court had abused its discretion.\textsuperscript{287} The plaintiffs had failed to prove that they would suffer immediate and irreparable damage or that they had no adequate remedy at law.\textsuperscript{288} The court stated that the plaintiffs could recover adequate compensation in their breach of contract action.\textsuperscript{289} The plaintiffs' argument that it would be difficult for them to calculate their damages at law was deemed insufficient to support the extraordinary remedy of injunction.\textsuperscript{290}

**DEFAULT JUDGMENT**

Default judgment was the subject of three cases decided by the Kentucky Court of Appeals in 1991. These cases demonstrate the court's acceptance of default judgment even though this procedure is not favored and trial on the merits is preferred.

In *S.R. Blanton Dev. Inc. v. Investors Realty and Management Co.*,\textsuperscript{291} a judgment by default in the amount of thirty-one thousand, six hundred dollars was entered in favor of the plaintiff in a suit over real estate commissions.\textsuperscript{292} When the defendants, who were served on August 13, failed to file a timely response, the trial court signed a default judgment on September 12, a mere ten days after an answer was due.\textsuperscript{293} On September 21, the defendants filed a motion to set aside the judgment alleging in support thereof that they did not receive the summons and that they had valid defenses to the claim.\textsuperscript{294} The circuit court refused to vacate the judgment.\textsuperscript{295}

The court of appeals noted that the trial court is vested with broad discretion in such matters and its decision will not be overturned unless that discretion has been abused.\textsuperscript{296} The court further stated that, in order to set aside a default judgment

\textsuperscript{287} Id. at 644.
\textsuperscript{288} Id.
\textsuperscript{289} Id. at 645.
\textsuperscript{290} Id. at 645, 666.
\textsuperscript{291} 819 S.W.2d 727 (Ky. Ct. App. 1991).
\textsuperscript{292} Id. at 729.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 730.
pursuant to a motion under C.R. 55.02, the defendants must show: (1) a valid excuse for default; (2) a meritorious defense to the claim; and, (3) absence of prejudice to the non-defaulting party. In that case, the court agreed that the defendants had not satisfactorily explained their default since clear and convincing evidence is required to overcome the record of a properly served summons. Moreover, there was proof that the plaintiff had incurred expenses which could not be recouped if the default were vacated. Accordingly, although the defendants may have had several legal defenses to the claim, the court concluded that the lower court did not err in refusing to grant the defendants' relief.

The same conclusion was reached in Perry v. Central Bank & Trust Co. In that case, default judgment was entered against both defendants. One defendant claimed no knowledge of the suit until he received the motion for default judgment. The other defendant attributed her failure to respond to poor legal advice. In holding that it was not error or an abuse of discretion for the trial court to enter the default judgment, the court of appeals expressed its belief that the defendants had not exercised due diligence and that their legal defenses were weak. The court intimated that if the defendants had truly meritorious defenses, the issue would have been much closer.

Finally, in Cianciolo v. Lauer, the court held that default judgment would bar the party in default from asserting in a subsequent, independent action a claim that would have been deemed a compulsory counter-claim. Lauer had received a default judgment against Cianciolo on an account for boarding

298. S.R. Blanton Dev. Inc., 819 S.W.2d at 729.
299. Id.
300. Id. at 729, 730.
301. Id. at 730.
303. Id. at 168.
304. Id. at 170.
305. Id.
306. Id.
307. Id.
309. Id. at 727.
horses. The district court refused to set aside the judgment. Thereafter, Cianciolo filed a negligence action against Lauer in circuit court alleging improper care of the horses. The court affirmed the dismissal of the negligence claim on the grounds that it would have been a compulsory counter-claim to the original suit on account. The court ruled that a party in default loses both the right to defend and the right to assert a compulsory counter-claim in a later action.

PREJUDGMENT AND POSTJUDGMENT INTEREST

The right to recover prejudgment interest was examined by the Kentucky Supreme Court in *Nucor Corp. v. General Elec. Co.* In this procedurally complex product liability case, a jury returned a verdict for compensatory property damages in an amount in excess of seven-hundred thousand dollars and for prejudgment interest of over $1.5 million dollars. However, the trial court set aside the verdict for prejudgment interest ruling that this was an issue to be decided by the court. The trial judge further decided that such interest was not warranted under the facts of the case.

On review, the supreme court upheld the decision of the trial court. Writing for the majority, Justice Leibson reaffirmed the right to recover prejudgment interest on unliquidated claims under the appropriate circumstances. He stated that it is now accepted as a matter of course that consequential damages are recoverable in tort and that, on occasion, prejudgment interest may be an appropriate part of consequential damages. Furthermore, the court concluded that, since the right to prejudgment interest is based on equitable principles, the trial court is best suited to weigh the various considerations.

310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. 812 S.W.2d 136 (Ky. 1991).
316. *Id.* at 139.
317. *Id.* at 140.
318. *Id.*
319. *Id.* at 144.
320. *Id.* at 143.
321. *Id.*
In determining that prejudgment interest was not appropriate in this case, the trial court considered a number of facts including that the claim was unliquidated; that the amount of the claim was not reasonably ascertained until the jury verdict; and that the plaintiffs had not requested such interest damages until long after the case had been filed.\textsuperscript{322} Likewise the court cited the plaintiff's own delay in bringing the case to a conclusion as one of several factors which it weighed.\textsuperscript{323} The supreme court held that the trial court did not abuse its discretion in deciding that prejudgment interest was not appropriate.\textsuperscript{324}

In \textit{Grange Mut. Casualty Co. v. Hollon},\textsuperscript{325} the court of appeals considered the right of a judgment creditor to recover interest after an unsuccessful appeal from a favorable, but allegedly inadequate, judgment.\textsuperscript{326} The court held that the running of post-judgment interest was not tolled by the appeal.\textsuperscript{327} Moreover, the post-appeal tender of the principal amount of the award was deemed to be insufficient, and the plaintiffs were entitled to interest from the date of the original judgment.\textsuperscript{328} The court concluded that if the plaintiffs were entitled to interest, the tender of less than the whole amount, including interest, was ineffective.\textsuperscript{329} The court stated that the judgment debtor could avoid liability for interest on the judgment only by making an unconditional tender of the award or by depositing the award into court subject to the plaintiffs' unrestricted right of withdrawal.\textsuperscript{330}

Two other cases concerning postjudgment interest were decided by the court of appeals in 1992. In \textit{Thurman v. Commonwealth Cabinet for Human Resources.},\textsuperscript{331} the court, while upholding the award of interest on a lump sum judgment for child support arrearage, commented that the trial court could have assessed

\begin{itemize}
\item \textsuperscript{322} \textit{Id.} at 144.
\item \textsuperscript{323} \textit{Id.}
\item \textsuperscript{324} \textit{Id.} at 145.
\item \textsuperscript{325} 816 S.W.2d 663 (Ky. 1991).
\item \textsuperscript{326} \textit{Id.} at 664.
\item \textsuperscript{327} \textit{Id.} at 666.
\item \textsuperscript{328} \textit{Id.} at 665.
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} \textit{Id.} at 666.
\item \textsuperscript{331} 828 S.W.2d 368 (Ky. Ct. App. 1992).
\end{itemize}
interest from the due date of each payment. Finally, in Powell v. Board of Educ. of Harrodsburg, the court refused to apply the general interest on judgment statute, KRS 360.040, to a judgment against a state agency.

APPELLATE PROCEDURE

The perfection and prosecution of any appeal requires careful attention to the rules of appellate procedure. Although the doctrine of substantial compliance was adopted by the amendment of C.R. 73.02(2) in 1985, there are still many pitfalls of which the practitioner must be aware. Several recent decisions exemplify this need for caution.

Where discretionary review is granted by the supreme court, the failure of the prevailing party in the court of appeals to file a cross-motion for discretionary review precludes that party from arguing issues which were either rejected or not addressed by the court of appeals. This was the result in Perry v. Williamson.

332. Id. at 371.
334. Id. at 942; KRS § 360.040 provides:

A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

KY. REV. STAT. ANN. § 360.040 (Baldwin 1983).
335. KY. R. CIV. P. 73.02(2). The rule provides:

(2) The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or denial of the motion for discretionary review,

(b) Striking of pleadings, briefs, record or portions thereof,

(c) Imposition of fines on counsel for failing to comply with these rules of not more than $500, and

(d) Such further remedies as are specified in any applicable Rule.

If an appeal has not been docketed, the parties, with the approval of the trial court, may dismiss the appeal by stipulation in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

336. 824 S.W.2d 869 (Ky. 1992).
In that case, the plaintiff, a licensee, recovered damages from the defendant land owners for injuries from being struck by a fallen tree limb. In the court of appeals, the defendant successfully argued that the jury instructions were improper. When the plaintiff filed a motion for discretionary review with the supreme court, the defendants failed to file a cross-motion. As a result, the supreme court refused to consider certain questions presented to the court of appeals by the defendants, such as whether they were entitled to a directed verdict; whether the trial court committed error in giving a comparative negligence instruction; and whether the trial court committed error in admitting evidence and in instructing upon certain medical expenses. These issues were either rejected by the court of appeals or were not addressed. Without considering these issues, the supreme court reversed the decision of the court of appeals and ordered the jury verdict reinstated. Thus, the defendants in the trial court lost the right to argue viable issues before the supreme court.

On the other hand, the failure to file a cross-motion for discretionary review was not considered fatal in the unusual circumstances presented in Commonwealth ex rel. Cowan v. Telcom Directories Inc. In that case, the Attorney General filed suit and obtained a summary judgment against the defendant for violation of the Kentucky Consumer Protection Act as a result of mail solicitations. The court of appeals reversed upon the grounds that the state courts lacked jurisdiction due to federal preemptions. On review, the supreme court held that federal law had not preempted state law. At that point, the Attorney General argued that the defendant could not argue the merits of the summary judgment since it had not filed a cross-motion for review on that point. The supreme court disagreed, reasoning

337. Id. at 870.
338. Id.
339. Id. at 871.
340. Id.
341. Id.
342. Id. at 876.
343. 806 S.W.2d 638 (Ky. 1991).
344. Id. at 640.
345. Id.
346. Id. at 641.
347. Id. at 642.
that such a cross-motion was not required in light of the fact that the court of appeals had made the determination that it lacked jurisdiction over the matter. 348 Accordingly, the case was remanded to the court of appeals for consideration of the propriety of the trial court's summary judgment. 349

Despite the foregoing cases, there remains some confusion as to when an appellate court will consider an issue not raised by the parties. In *Mitchell v. Hadl*, 350 the supreme court, while acknowledging that it ordinarily confines itself closely to deciding only those issues presented by the parties, proceeded to dispose of the case by ruling on an issue which had not been argued by the litigants. 351 In this malpractice suit, the plaintiff complained that the defendant surgeon had negligently inflicted emotional distress upon him by diagnosing cancer when in fact the plaintiff did not have that disease. 352 A summary judgment for the doctor was granted by the trial court but reversed by the court of appeals. 353 In the supreme court, the parties briefed and argued the applicability of the physical contact requirement for the tort of negligent infliction of emotional distress. 354 However, the supreme court, on its own, disposed of the case, reversing with instructions to reinstate the summary judgment on the separate grounds that the plaintiff had no sustainable cause of action. 355 Again, the court admitted that it was departing from its normal practice and addressed this issue on its own initiative. 356 The court commented that when facts reveal a fundamental basis for a decision which has not been presented by the parties, it has the duty to address the issue in order to avoid a misleading application of the law. 357

The supreme court has applied the substantial compliance rule to the failure of the appellant to pay the required filing fee with

348. *Id.*
349. *Id.*
350. 816 S.W.2d 183 (Ky. 1991).
351. *Id.* at 184.
352. *Id.*
353. *Id.*
354. *Id.* at 185.
355. *Id.* at 185, 186.
356. *Id.* at 185.
357. *Id.*
the Notice of Appeal as required by C.R. 73.02(1)(b). In Foxworthy v. Norstam Veneers, Inc., the appellant mailed his Notice of Appeal to the circuit court clerk but failed to include the required payment of the filing fee. Although C.R. 73.02(1)(b) states that the notice shall not be docketed or noted as filed without such payment, the court declined to consider the failure to pay the fee to be either jurisdictional or fatal. The court cited the 1985 amendment to C.R. 73.02(2) which limits the sanction of dismissal to the failure to timely file a notice of appeal, cross-appeal or motion for discretionary review while giving the court the discretion to impose lesser sanctions for other violations. In this case, the dismissal was set aside and the appeal was allowed to proceed on the merits. The court, however, did direct that counsel for the appellants show cause as to why they should not be required to pay a fine and court costs.

The litigants were not so fortunate in two other cases before the court of appeals. In Lake Village Water Ass'n v. Sorrell, the court of appeals directed the trial court to order the appellant to pay reasonable attorney's fees and court costs incurred by the appellee in the prosecution of the appeal. In doing so, the court interpreted C.R. 73.02(4) as giving it inherent authority to impose attorney's fees and expenses if an appeal is frivolous.

358. Ky. R. Civ. P. 73.02(1)(b) provides:
(b) If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a) (i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is filed, and the notice shall not be docketed or noted as filed until such payment is made.
359. 816 S.W.2d 907 (Ky. 1991).
360. Id.
361. Ky. R. Civ. P. 73.02(1)(b).
362. Foxworthy, 816 S.W.2d at 908.
363. Ky. R. Civ. P. 73.02(2).
364. Foxworthy, 816 S.W.2d at 908.
365. Id. at 910.
366. Id.
368. Id. at 421.
369. Ky. R. Civ. P. 73.02(4). This rule provides:
(4) If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.
370. Sorrell, 815 S.W.2d at 421.
The court deemed this appeal to be frivolous when the amount awarded against the appellants was "a paltry $1,600.00" and where there clearly was evidence to support the judgment.371

In Louisville & Jefferson County. v. Mr. Maid, Inc.,372 the court of appeals considered the appellee's failure to file a position statement in a special appeal to be a confession of error resulting in reversal of the judgment.373 The court applied the penalty provision of C.R. 76.12(8)(c),374 which admittedly appears to apply to briefs on appeal, to the position statement required by C.R. 76.05(3)(B)(i)375 in special appeal cases.376

CONCLUSION

If any common theme in the area of civil procedure can be discerned from the decisions rendered in the last two years, it is that our courts prefer to afford litigants the full opportunity to present their claims, avoiding strict interpretation of procedural rules that would deny a hearing on the merits. This was particularly evident in the Kentucky Supreme Court decisions on summary judgment, limitation of actions and the relation back of amended pleadings. Substance is clearly favored over form in our jurisdiction.

371. Id.
373. Id. at 680.
374. Ky. R. Civ. P. 76.12(8)(c). The rule provides:
   (c) If the appellee's brief has not been filed within the time allowed, the court may:
      (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse
      the judgment if appellant's brief reasonably appears to sustain such action; or (iii)
      regard the appellee's failure as a confession of error and reverse the judgment
      without considering the merits of the case.
375. Ky. R. Civ. P. 76.05(3)(B)(i) provides:
   (i) A concise position statement of no more than three (3) pages in length setting
      forth the position and contentions of the party and including citations of authority
      in regard to the issues set forth in the prehearing statement.
376. Id.
SURVEY OF KENTUCKY FAMILY LAW CASES

by Lowell F. Schechter*

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* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University; B.A., New York University (1965); J.D., Harvard (1969).
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INTRODUCTION

This article surveys family law decisions rendered by the Kentucky Supreme Court and the Kentucky Court of Appeals during the first three years of this decade: January 1990 through December 1992. Part 1 of this Article briefly highlights the most significant developments throughout this area of the law. Part 2 contains a much more detailed discussion of the decisions involving the economic incidents of marriage and divorce.¹

PART 1. HIGHLIGHTS

The Kentucky Supreme Court overturned two traditional common law rules. In the companion cases of Gentry v. Gentry² and Edwardson v. Edwardson,³ the supreme court reversed the prohibition against antenuptial agreements in contemplation of divorce, upholding the validity of such agreements if entered into freely, knowingly and voluntarily and if not unconscionable at the time of execution. However, the supreme court reserved the power to modify or refuse to enforce agreements which, though not unconscionable at the time of execution, had become unconscionable by the time of attempted enforcement. In Hoye v. Hoye,⁴ the supreme court abolished the traditional tort of intentional interference with the marital relation.

The Kentucky Supreme Court upheld the constitutionality of two relatively recent legislative innovations. In Waggoner v. Waggoner,⁵ the court upheld the constitutionality of Kentucky Revised Statute ("KRS") § 161.700(2),⁶ which exempts contributions to the Kentucky Teacher's Retirement System from division as marital property, against "special legislation" and "equal protection" challenges from a teacher's ex-spouse. In King v. King,⁷ the court upheld the constitutionality of KRS § 405.021⁸ granting

¹. A detailed discussion of the cases involving child custody has been omitted due to space limitations, but is available upon request from the author.
². 798 S.W.2d 928 (Ky. 1990).
³. 798 S.W.2d 941 (Ky. 1990).
⁴. 824 S.W.2d 422 (Ky. 1992).
⁵. 846 S.W.2d 704 (Ky. 1992).
⁶. KY. REV. STAT. ANN. § 161.700(2) (Baldwin 1990).
⁷. 828 S.W.2d 630 (Ky. 1992).
⁸. KY. REV. STAT. ANN. § 405.021 (Baldwin 1990). This section provides: "(1) the circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so."
reasonable visitation rights to grandparents in the face of a "right to family autonomy" challenge by a mother and father who were living together in an intact nuclear family and who were both strongly opposed to grandparent visitation. Nevertheless, the parents had been ordered to allow the child to visit the grandparent twice a week.9

On the other hand, in Commonwealth v. Wasson,10 the supreme court declared KRS § 510.100,11 which punishes "deviate sexual intercourse with another person of the same sex," unconstitutional for violating "right of privacy" and "equal protection" guarantees in the Kentucky Constitution. While the Wasson decision's immediate effect was in the area of criminal law, the court's strong endorsement and broad reading of a state constitutional "right to privacy" could have significant impact in the family law area.

Meanwhile, the supreme court and the court of appeals rendered a large number of decisions dealing with the economic incidents of divorce. In the area of property division, most of the decisions involved either the proper interpretation and application of KRS § 403.19012 in determining whether assets should be characterized as marital or nonmarital13 or the appropriateness of the method used for determining the value of marital assets.14

In the area of spousal maintenance, most of the decisions concerned initial awards of maintenance under the standards set out in KRS § 403.200.15 However, three 1990 Kentucky Supreme Court decisions, Combs v. Combs,16 Cook v. Cook,17 and Williams

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9. King, 828 S.W.2d at 633.
10. 842 S.W.2d 487 (Ky. 1992).
v. Williams,18 dealt with modification of maintenance. In Combs and Cook, motions for modification were brought by the payor on the basis of the recipient spouse’s cohabitation, while in Williams the payor sought modification on the recipient’s receipt of social security payments generated by the payor’s contributions to the social security system. In Combs, a unanimous special supreme court panel allowed modification of a judicial award of maintenance, agreeing with the trial court’s finding that the cohabitation had created a new financial resource for the recipient and, therefore, justified modification.19 In Cook, a divided supreme court refused to allow modification of a contractual agreement to pay maintenance where the recipient and her new intimate partner were not actually living together.20 And in Williams, a divided court refused to allow modification of a pre-1972 property settlement agreement based on the recipient’s receipt of social security payments.21

Arguably the most significant decisions concerning economic issues came in the area of child support, where the court of appeals rendered two decisions, McKinney v. McKinney22 and Smith v. Smith,23 interpreting key concepts contained in the new child support guideline legislation, KRS §§ 403.210-403.213.24 McKinney imposed a requirement that a parent be found to be acting in “bad faith” before a parent could be found “voluntarily underemployed” under KRS § 403.212(d) and child support calculated on the basis of “potential income.”25 Smith interpreted the term of “extraordinary needs” of the child set out in KRS § 403.211(3) very restrictively, forbidding a trial court from deviating above the guidelines to provide extra funds for musical instruction for an especially talented child.26

   16. 787 S.W.2d 260 (Ky. 1990).
   17. 798 S.W.2d 955 (Ky. 1990).
   18. 789 S.W.2d 781 (Ky. 1990).
   19. Combs, 787 S.W.2d at 262.
   20. Cook, 798 S.W.2d at 957.
   21. Williams, 789 S.W.2d at 782.
   25. McKinney, 813 S.W.2d at 829.
The court of appeals decision in Glidewell v. Glidewell\textsuperscript{27} is significant because it is one of very few Kentucky appellate decisions dealing with the rights of cohabitants. In Glidewell, the court of appeals ruled that in a division of property, a female cohabitant had a right to recover for her financial contributions to the acquisition of the property, but she had no right to receive any property on the basis of domestic or household work performed during the cohabitation relationship.\textsuperscript{28}

The supreme court and court of appeals also rendered a number of significant decisions in the area of child custody. The supreme court in Quisenberry v. Quisenberry\textsuperscript{29} held that KRS § 403.340,\textsuperscript{30} which governs modification of custody, required the petitioner in any contested modification case where the petitioner was trying to remove the child from the custodial parent's home against the custodial parent's wishes, to prove that the child was in serious danger in that home.\textsuperscript{31} In Wilson v. Messinger,\textsuperscript{32} the supreme court applied Quisenberry to deny a change in custody to a non-custodial father who sought a modification after the mother, who had custody of the divorced couple's teenage daughter, decided to move out-of-state and the daughter, who had deep roots in her local community, objected.\textsuperscript{33}

The court of appeals rendered two decisions in 1992, Squires v. Squires\textsuperscript{34} and Chalupa v. Chalupa,\textsuperscript{35} dealing with the issue of joint custody. In upholding the trial court's award of joint custody in Squires, the court of appeals was highly supportive of joint custody,\textsuperscript{36} and in reversing the trial court's award of sole custody in Chalupa, the court of appeals went a step further, insisting that trial courts consider joint custody first.\textsuperscript{37} The Squires decision was appealed to the Kentucky Supreme Court where it

\textsuperscript{27} 790 S.W.2d 925 (Ky. Ct. App. 1990).
\textsuperscript{28} Id. at 927.
\textsuperscript{29} 785 S.W.2d 485 (Ky. 1990).
\textsuperscript{30} KY. REV. STAT. ANN. § 403.340 (Baldwin 1990).
\textsuperscript{31} Quisenberry, 785 S.W.2d at 487-489.
\textsuperscript{32} 840 S.W.2d 203 (Ky. 1992).
\textsuperscript{33} Wilson, 840 S.W.2d at 203 (citing Quisenberry, 785 S.W.2d 485 (1990)).
\textsuperscript{35} 830 S.W.2d 391 (Ky. Ct. App. 1992).
\textsuperscript{37} Chalupa, 830 S.W.2d at 393.
rendered a 6-1 decision upholding the award of joint custody.\textsuperscript{38} While the supreme court expressed general support for joint custody awards, it stopped short of endorsing Chalupa's call for considering joint custody first.\textsuperscript{39}

In two other custody cases, \textit{Sumner v. Roark}\textsuperscript{40} and \textit{Burns v. Fitch},\textsuperscript{41} the court of appeals was called upon to resolve virulent custody contests, arising in both cases when the death of the mother generated bitter, prolonged litigation over child custody between the father and the mother's surviving relatives.

In \textit{Sumner v. Roark}, the court of appeals upheld the circuit court's decision giving preference to the father over other relatives and the supreme court denied discretionary review.\textsuperscript{42} In \textit{Burns v. Fitch}, the court of appeals reversed the circuit's decision in favor of the father and remanded the case back to the circuit court. However, the Kentucky Supreme Court has granted review of the court of appeals decision,\textsuperscript{43} further prolonging custody litigation which began back in November of 1986.\textsuperscript{44}

Finally, in \textit{Likins v. Logsdon},\textsuperscript{45} the supreme court refused to allow a custodial mother to change the children's name from that of their father, requiring the parent in a contested case to present "objective and substantial evidence" of "just cause" and "significant detriment" to the child before allowing a name change.

\textsuperscript{38} Squires, No. 92 SC-289-DG (Ky. Apr. 23, 1993).
\textsuperscript{39} Id. at 11. Justice Lambert's majority opinion, which was strongly supportive of the joint custody alternative, construed KRS § 403.270(4) to mean that a court should award joint custody in a case if the court was reasonably satisfied that the positive aspects outweighed the negative for the child. Justice Lambert stressed that a judge should not refrain from making a joint custody award because of antagonism between the parents at the time of the divorce if the parents were emotionally mature and the judge believed they would be able to cooperate in the future. \textit{Id.} at 8. Justice Leibson, in dissent, accused the majority of unjustifiably ignoring recent social science research which showed that in most cases joint custody was "not a problem solver, but a pernicious problem causer," and stated his belief that joint custody should only be awarded when the parents were \textit{presently} capable of cooperating and not on the basis of the judge's belief that they would be able to do so in the future. \textit{Id.} at 2-4 (Leibson, J., dissenting).
\textsuperscript{40} 836 S.W.2d 434 (Ky. Ct. App. 1992).
\textsuperscript{42} \textit{Sumner}, 836 S.W.2d at 434-39.
\textsuperscript{44} Id.
\textsuperscript{45} 793 S.W.2d 118 (Ky. 1990).
PART 2. SURVEY OF DECISIONS, 1990-1992

I. THE VALIDITY OF AGREEMENTS BETWEEN THE PARTIES

A. Antenuptial Agreements

One of the most dramatic changes in Kentucky case-law came in November of 1990 when the Kentucky Supreme Court in two cases, Gentry v. Gentry and Edwardson v. Edwardson, finally overturned the rule set forth in Stratton v. Wilson, that antenuptial agreement provisions made in contemplation of divorce were void and unenforceable as contrary to public policy which disfavored divorce.

1. Gentry v. Gentry

In Gentry, the Kentucky Supreme Court overruled Stratton when it held that an antenuptial agreement was valid and not contrary to public policy.

In its reasoning for overruling Stratton, the court noted that since the public policy on divorce has changed since 1916, the Stratton decision must be reexamined in light of changes in society and the law since then. Stratton was written at a time when divorce was uncommon, while now divorce is so common that it might be prudent even for parties entering marriage with

46. 798 S.W.2d 928 (Ky. 1990).
47. 798 S.W.2d 941 (Ky. 1990).
48. 185 S.W. 522 (Ky. 1916).
49. In Stratton, the court, while accepting the argument that antenuptial provisions in contemplation of divorce were themselves invalid and unenforceable, refused to accept the further proposition, which had been accepted in some other jurisdictions, that the inclusion of any provision in contemplation of division necessarily rendered the entire antenuptial agreement void and unenforceable. Instead, the court held that a valid provision in contemplation of death was severable from an invalid provision in contemplation of divorce. Id.
50. 798 S.W.2d 928 (Ky. 1990). The Gentry case arose out of a marriage between Tom and Kathy, both of whom had been married before. At the time of the marriage, Tom had a net worth of approximately $1,500,000, while Kathy had almost no assets of her own. The antenuptial agreement dealt only with the property of the parties; there were no provisions governing support obligations. Under the terms of the agreement, Tom and Kathy both renounced all claims to the property their spouse owned at the time of the marriage and to any property their spouse acquired after the marriage. At the time of divorce, Kathy attacked the validity of the antenuptial agreement. Id. at 930-31.
51. Id. at 933-34.
52. Id. at 934.
the intention of making a life-long commitment to consider and to plan for the possibility that their marriage might end in divorce.\textsuperscript{53} Given changing social conditions, it is now perceived that agreements which provide for the possibility of divorce do not necessarily promote or encourage divorce.\textsuperscript{54} Furthermore, the court noted that most other jurisdictions which had recently considered the question had recognized a change in public policy relative to divorce and had chosen to enforce antenuptial agreements in divorce situations.\textsuperscript{55}

The Kentucky legislature's decision in 1972 to do away with the traditional system of "fault" divorce and adopt the Uniform Marriage and Divorce Act "no-fault" approach,\textsuperscript{56} as a response to and a reflection of changing social attitudes towards divorce, further strengthened the argument that the more recent out-of-state decisions upholding such agreements more accurately reflected current public policy towards divorce and antenuptial agreements than the 1916 Kentucky Court decision in \textit{Stratton}.\textsuperscript{57}

The majority opinion in \textit{Gentry} is significant, not only for removing \textit{Stratton}'s absolute prohibition against antenuptial agreements in contemplation of divorce, but also for setting out the standards which would now govern the making of such agreements. The agreement must be executed freely, knowingly and voluntarily with full disclosure of the parties assets.\textsuperscript{58} An agreement obtained through fraud, duress, mistake, or through misrepresentation or non-disclosure of material facts will not be valid.\textsuperscript{59} The agreement must not be unconscionable at the time of its execution\textsuperscript{60} or at the time of its enforcement.\textsuperscript{61} If substantial changes in facts and circumstances between the time of execution and the time of enforcement would make it unfair and unreasonable to enforce the agreement as written, the court could modify or refuse to enforce the terms of the agreement.\textsuperscript{62}

\textsuperscript{53.} Id.
\textsuperscript{54.} Id. at 933.
\textsuperscript{56.} See \textit{KY. REV. STAT. ANN.} § 403.110 (Baldwin 1990).
\textsuperscript{57.} \textit{Gentry}, 798 S.W.2d at 933-35.
\textsuperscript{58.} Id. at 936.
\textsuperscript{59.} Id. (relying on Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982).
\textsuperscript{60.} Id.
\textsuperscript{61.} Id.
\textsuperscript{62.} Id. The court justified reserving this power to review for unconscionability at the
2. Edwardson v. Edwardson[^63]

In Edwardson, Justice Lambert, in addressing an antenuptial agreement dealing with support, echoed many of the arguments made by Special Justice Sheehan in Gentry for overruling Stratton, pointing to the rising tide of divorce[^64], the judicial decisions in other jurisdictions to abandon the prohibition against antenuptial agreements in contemplation of divorce[^65], and the legislative changes in Kentucky itself, where restrictive "fault" grounds had given way to more liberal "no fault" grounds[^66]. Justice Lambert added that there was a vast difference between the status of women at the time of Stratton and today[^67]. In 1916, it may have been logical to restrict antenuptial agreements to protect women, who did not have the right to vote, who might not have the protection of married women's property acts, and

\[^63\] 798 S.W.2d 941 (Ky. 1990). In the divorce from her first husband, Marcella had been awarded $75 per week maintenance, the payment of which was to be terminated upon her remarriage. Id. at 942-43. In the antenuptial agreement entered into by Marcella and her second husband, Arthur agreed that should he and Marcella divorce, he would pay her $75 per week maintenance for her life or until her remarriage. Id. at 943. It seems clear that the intent of this provision was to insure that Marcella would receive that same amount of support she was getting after her first marriage ended, in the event her second marriage also ended in divorce. Arthur also agreed that upon divorce, he would maintain medical/hospitalization insurance for Marcella for her life or until her remarriage. At the time of divorce, Arthur attacked the validity of this antenuptial agreement. Id.

\[^64\] Id. at 943.

\[^65\] Id. at 944. In surveying this case-law, Judge Lambert cited with apparent approval the Georgia Supreme Court's reasoning in Scherer v Scherer, 292 S.E.2d 662 (Ga. 1982), that the change to no-fault divorce was evidence that there was no longer a strong public policy against divorce and that, even if there was a public policy against divorce, there was no empirical evidence to show that antenuptial agreements in contemplation of divorce in fact encouraged or incited divorce. Id.

\[^66\] Id. at 943. See KY. REV. STAT. ANN. § 403.110 (Baldwin 1990).

\[^67\] Edwardson, 798 S.W.2d at 944.
who generally had second-class legal status. Given changes in the law since 1916, no such protection was required today.

Turning from the explanation of why *Stratton* should be overruled to the explication of the rules to replace it, the *Edwardson* decision is significant in two respects. First, in terms of the matters that can be dealt within an antenuptial agreement, the court in *Edwardson* took a major step beyond *Gentry*. In *Edwardson*, the antenuptial agreement dealt specifically with the payment of maintenance and Justice Lambert's opinion expressly recognized the validity of provisions regarding maintenance.

Second, in terms of the standards governing the making of such agreements, Justice Lambert's opinion in *Edwardson* echoed that of Special Justice Sheehan in *Gentry*. Justice Lambert also stressed the broad discretion of trial courts both to invalidate agreements not fairly arrived at and to modify agreements which become unconscionable. Trial courts should require the exercise of utmost good faith by the spouses, full disclosure of all material facts, including any circumstances which might affect the terms of the contract, and such terms must be "fair, reasonable, just, equitable and adequate in view of the conditions and circumstances of the parties...."

Thus, the decision in *Edwardson* represents a judicial balancing act with the court, on one hand, giving parties who enter into an antenuptial agreement a broad license to negotiate both property and support provisions in contemplation of divorce while, on the other hand, reserving broad power of review for the courts to strike down these provisions if they are not fairly arrived at or if they are unconscionable.

B. Separation Agreements

1. *Burke v. Sexton*

In *Burke v. Sexton*, the Kentucky Court of Appeals held unconscionable a separation agreement, which was drawn up by the

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68. *Id.*
69. *Id.* at 945-46.
70. *Id.* at 945. *Gentry* required that the agreement must be executed freely without material omission or misrepresentation and the agreement must not be unconscionable at the time enforcement is sought. *Gentry*, 798 S.W.2d at 936.
71. *Edwardson*, 798 S.W.2d at 945-46.
72. *Id.* at 946 (quoting Clark v. Clark, 192 S.W.2d 968, 970 (1946)).
73. See *Edwardson*, 798 S.W.2d 941 (Ky. 1990).
husband's attorney while the wife was unrepresented by counsel.\textsuperscript{75}

In holding the agreement to be unconscionable, the court of appeals determined that the husband's actions constituted "fraud affecting the proceedings" and that "[t]o allow the original decree to stand would be a miscarriage of justice..."\textsuperscript{76} The court pointed out that the husband had presented the wife with an agreement which was not only lopsided in his favor, but which contained waiver of notice provisions which may have prevented her from participating in the action.\textsuperscript{77} The terms of the agreement were so clearly to the wife’s detriment that the court believed there was overreaching on the husband's part to the point of being unconscionable.\textsuperscript{78}

2. \textit{Brown v. Brown}\textsuperscript{79}

In \textit{Brown v. Brown}, the Kentucky Supreme Court held that the parties to a property settlement agreement which had been incorporated into a divorce decree could effectively modify the agreement without court approval.\textsuperscript{80}

The court found that the statutory provision in question, KRS § 403.250, neither expressly nor impliedly precluded the parties from drafting their own modification agreement.\textsuperscript{81} Additionally,

\begin{itemize}
\item \textsuperscript{75} Id. at 292. The agreement, ending an 18 year marriage provided, among other things, that: (1) Ray would get the only major marital asset, the marital home; (2) Carol would pay an $880 marital debt; (3) Carol waived any claim to maintenance or to child support for the couple's 15 year old son; and, (4) Carol waived service of process and notice of any further proceeding including the divorce. \textit{Id.} at 291.
\item \textsuperscript{76} Id. at 292.
\item \textsuperscript{77} Id. at 291. The court also cited Carol's testimony that after she had signed the agreement Ray told her he was dropping the divorce action; the fact that the couple had continued to live together during the pendency of the divorce proceedings; and Ray's admission that he and Carol had indeed tried to reconcile after he filed the petition for divorce as further evidence that Ray's actions may have prevented Carol from disputing the terms of the agreement in a timely manner. \textit{Id.} at 291-92.
\item \textsuperscript{78} Id. at 292.
\item \textsuperscript{79} 796 S.W.2d 5 (Ky. 1990).
\item \textsuperscript{80} Barry Brown's agreement to pay Margaret maintenance of $200 per week until the age of 65 had been incorporated into the dissolution decree. Five years later, the trial court found that Barry lacked the financial ability to pay and suggested that the parties try to work something out. The parties then entered into a written agreement, apparently without the assistance of counsel, requiring that Barry only pay when the net worth of the business exceeded $50,000. Margaret later sued, relying on the original agreement and challenging the validity of the modification. \textit{Id.} at 8.
\item \textsuperscript{81} Id. The relevant portion of KRS § 403.250 reads:
\end{itemize}
the court's judicial policy of encouraging divorce settlements and discouraging unnecessary post-judgment divorce litigation favored upholding such agreements.82

II. ECONOMIC INCIDENTS OF DIVORCE

A. Property Division

1. Characterization of Property

Characterization of property is generally governed in the first instance by KRS § 403.190(2),83 which sets forth the general rule that all property acquired by either spouse subsequent to the marriage is marital property and then lists five specific exceptions to this general rule.84 KRS § 403.190, however, may not be a "model of clarity"85 and the courts have been called on repeatedly to interpret the meaning of the various exceptions.

(a) Mercer v Mercer86

In Mercer, the Kentucky Supreme Court ruled that accumulated interest on a nonmarital savings account constituted marital property under KRS § 403.190(2)(e).87
The husband’s inheritance of $20,000, which had been deposited in a savings institution separate from all other marital funds, was clearly nonmarital property. During the twenty year marriage, however, the original $20,000 deposit earned $40,000 in interest and the parties disputed whether this $40,000 in interest should be characterized as marital or nonmarital property.

In reversing the court of appeals, the supreme court held that the $40,000 accumulation was marital property. Justice Wintersheimer, writing for the majority, based the reversal on two separate grounds involving two different phrases contained in § 403.190(2)(e).

The first ground rested on interpretation of the initial phrase used in § 403.190(2)(e), which states that exception (e) applies to “the increase in value of property.” Justice Wintersheimer held that the earning of interest on property was quite separate and distinct from an increase in the value of the property itself and that the $40,000 in interest earned on the principal deposited in the savings account did not constitute an “increase in value” of that principal under the language of the § 403.190(2)(e) exception.

The second ground for reversal lay in the application of the requirement contained in the § 403.190(2)(e) exception “that such

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88. Mercer, 836 S.W.2d at 898.
89. Id.
90. Id. at 900.
91. See id. at 898-900.
92. KY. REV. STAT. ANN. § 403.190(2)(e) (Baldwin 1990).
93. Mercer, 836 S.W.2d at 898-99. Justice Wintersheimer cited the Kentucky Court of Appeals decision in Brunson v. Brunson, 569 S.W.2d 173 (Ky. Ct. App. 1978), and the Kentucky Supreme Court decision in Sousley v. Sousley, 614 S.W.2d 942 (Ky. 1981), as precedential support for the proposition that under KRS § 403.190(2)(e), income, even if produced from nonmarital property, constitutes marital property. Mercer, 836 S.W.2d at 899. The Supreme Court in Sousley, in turn, noted that KRS § 403.190 was based on § 307 of the Uniform Marriage and Divorce Act and cited the Commissioner’s notes to § 307, which clearly showed that the drafter of the Model Act did not intend the phrase “increase in value” to encompass income. Sousley, 614 S.W.2d at 944. Going beyond simple citation of precedent, Justice Wintersheimer pointed to a functional difference between an increase in the value of principal and the earning and accumulation of interest on principal:

Income may be used by the parties at any time. As an example, the amount of interest must be included in gross income for tax purposes, but when an asset increases in value, the amount of the increase in value is not necessarily used by the parties and is not included in gross income for purposes of taxation. Mercer, 836 S.W.2d at 899.
increase did not result from the efforts of the parties." 94 The trial court and court of appeals had disagreed over the issue of whether the increase was a result of the joint marital efforts of the parties. 95 In holding that the increase was a result of the joint efforts of the parties, Justice Wintersheimer held that the court of appeals did not give sufficient regard to the trial court’s findings of fact that there was, in fact, a joint effort in regard to the accumulation of the interest. 96

The problem with Justice Wintersheimer’s holding is that the trial judge did not find any direct effort of the parties in managing or reinvesting this money, but instead relied on indirect action, such as prudent housekeeping and payment of the income taxes on the interest from marital funds. If these indirect activities are allowed to satisfy the “through the efforts of the parties” test, then in almost every case it is possible to argue that the increase in value in separate property is marital property “through the efforts of the parties.”

(b) Calloway v Calloway 97

In Calloway v Calloway, the Kentucky Court of Appeals examined two gifts, one from the husband’s parents and one from the wife’s parents, and determined to whom the gifts were being made and how they should be treated. 98 The court of appeals held that a gift by third parties to both spouses should be treated as marital property and the entire amount of the gift is subject to equitable distribution by the court. 99 The court of appeals gave two reasons for holding that, in spite of the language of KRS § 403.190(2)(a) which appears to exclude property acquired by gift from the definition of marital property, 100 a third party gift to both spouses would be considered

95. Mercer, 836 S.W.2d at 899.
96. One of the trial court’s findings of fact was that the nonmarital property of the husband was allowed to accumulate interest untouched during the marriage in large part due to the wife’s “intelligent management of the marital home.” Id.
98. During the marriage, Mr. Calloway’s parents provided a piece of land valued at approximately $10,000 on which Mr. and Mrs. Calloway built their marital home, and Mrs. Calloway’s mother provided a race car valued at approximately $7,000 which the couple operated jointly at various racing events. Id. at 892.
99. Calloway, 832 S.W.2d at 893.
marital property subject to equitable distribution. First, such a holding was consistent with the Kentucky legislature's general intent that jointly owned property acquired during the marriage would be subject to equitable distribution by the courts. 101 Second, while there was no Kentucky case law on point, such a holding was consistent with a limited number of decisions in other jurisdictions which had dealt with the characterization of gifts to the marital couple under the Uniform Marriage and Divorce Act language. 102

(c) Underwood v. Underwood 103

In Underwood v. Underwood, the question before the court of appeals was whether a father's forgiveness of a debt his son had incurred in purchasing the father's business was a gift to the son and, therefore, non-marital property. 104 Judge Huddleston noted that the legislature, in KRS § 403.190(3), created the presumption that property acquired after a marriage is marital property 105 and that the court of appeals in Browning v. Browning 106 had stated that this presumption could only be overcome by clear and convincing evidence. 107 Proof that one party had received property through a gift could overcome the presumption and forgiveness of a debt could, in theory, constitute such a gift. However, the intent of the donor was the crucial factor, and in this case, the court did not believe that the debt in question was forgiven simply out of "disinterested generosity" on the part of the father. 108 The court found it was not a gift because the amended sales contract stated that Tom, in consideration for his father's forgiveness of the debt, would continue to employ his father, at a mutually agreed upon salary, to assist in running the insurance agency. 109

101. Calloway, 832 S.W.2d at 893.
102. Id. (citing Forsythe v. Forsythe, 558 S.W.2d 675 (Mo. Ct. App. 1977)).
104. In 1987, John Underwood purchased his father's insurance agency for $75,000 which was to be paid off over time. Ten years later, Tom and his father amended the original sales contract to provide for the forgiveness of the debt at the rate of $10,000 per year. Id. at 441.
105. See Ky. REV. STAT. ANN. § 403.190(3) (Baldwin 1990).
107. Underwood, 836 S.W.2d at 441.
108. Id. at 442-43.
109. Id.
One other part of Judge Huddleston's opinion needs mention because it raises the possibility of changing the burden of proof placed on a party who is claiming that property acquired after the marriage is nonmarital property. While Judge Huddleston recognized that ever since Browning v. Browning, numerous court of appeal opinions had stated that a party who claimed property was nonmarital had to rebut a presumption that such property was marital property by clear and convincing evidence, he felt compelled to question the continued use of the clear and convincing evidence standard. He noted that recently, in Burns v. Fitch, the Kentucky Supreme Court had decided that the clear and convincing evidence test must be used to demonstrate parental unfitness before children could be removed from the custody of their natural parents. Comparing the property issue in Underwood to the child custody issue in Burns, Judge Huddleston argued that the division of property did not warrant the same high standard of proof because the division of property did not rise to the same level of importance as the termination of parental rights.

It remains to be seen whether Judge Huddleston's call in Underwood for a shift to a preponderance of the evidence test will be transformed into a rule of law in some future court decision.

(d) Sims v. Sims

In Sims v Sims, the court of appeals struggled with the proper application of the Brandenburg formula for determining the respective marital and nonmarital shares in two properties. The first was the Southway Drive house, purchased with a combina-

110. See id. at 441 n.1.
111. 551 S.W.2d 823 (Ky. Ct. App. 1977).
112. Underwood, 836 S.W.2d at 441 n.1.
113. 782 S.W. 618 (Ky. 1989).
114. Underwood, 836 S.W.2d at 441 n.1.
115. Id. In point of fact, the supreme court decision in Burns did not go so far as to involve termination of parental rights, but rather only removal from the custody of the parent. See Burns, 782 S.W.2d 618 (Ky. 1989).
117. The Brandenburg formula is stated as follows:

[T]here is to be established a relationship between the nonmarital contribution and
tion of marital and nonmarital property, and the second was the Crab Orchard Drive cabin, built with funds obtained from a mortgage on the first property.

The question before the court of appeals was how to take the new mortgage on the Southway Drive house and resultant construction on the Crabtree Orchard property into account in determining marital and nonmarital shares in each of the two properties. The court of appeals held that in order to achieve the equitable results sought in Brandenburg, it was necessary to consider the purpose of the mortgage as well as its impact on the equity invested in each parcel. 118 Given that the loan on the Southway Drive property was used in its entirety to improve the Crab Orchard Drive property, it should be considered a transfer of equity from the first property to the second, 119 and the equity transferred from the first property should be considered partially marital equity and partially nonmarital, in the same 63% to 37% proportion as the overall marital and nonmarital shares in the first property. 120

(e) Mullins v. Mullins 121

The dispute in Mullins arose out of substantial improvements made to a house with marital funds, where the house in which the couple was living was owned by a third party, the husband's father, Jesse. 122 The court of appeals upheld the denial of recovery to the wife for her share of marital funds expended on the improvements. The wife was not entitled to recover for unjust

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the total contribution, and between the marital contribution and the total contribution. These relationships, reduced to percentages, shall be multiplied by the equity in the property at the time of distribution to establish the value of the nonmarital and marital properties.


119. Id.

120. Id.

121. 797 S.W.2d 491 (Ky. Ct. App. 1990).

122. Paula Barnett Mullins and Robert K. Mullins spent the first two years of the marriage living rent-free with Robert's parents and then the next three years living rent-free in a new house, built on land owned by Robert's father, Jesse. While Jesse spent approximately $12,000 in putting up the house, Paula and Robert expended over $12,500 in marital funds in finishing the interior. However, there was no deed, gift or contract between Jesse and the couple giving ownership or a share in ownership to the couple in return for their contribution to the house. Id. at 492.
enrichment because when she contributed to the improvements, she knew that title to the property rested with Jesse and that she was living rent free in return for the improvements.\textsuperscript{123} The wife could not argue estoppel, because there was no evidence that the father-in-law had made any promises or taken any action to make the wife believe that she was getting ownership to the property.\textsuperscript{124}

(f) \textit{Fry v. Kersey}\textsuperscript{125}

In \textit{Fry v. Kersey}, the court of appeals considered the question of the characterization of a pension plan in the context of the wife's appeal to reopen a five year old divorce decree to allow allocation of the husband's pension plan.\textsuperscript{126} The court of appeals ruled that under the supreme court's holding in \textit{Ping v. Denton},\textsuperscript{127} if Helen Fry had an interest in Bobby Kersey's pension plan at the time of the 1986 divorce decree, and the trial court had not disposed of the interest at that time, she would still retain that interest.\textsuperscript{128} The operative factor in determining whether Helen Fry had obtained an interest in the pension at the time of the 1986 divorce was whether vesting of the pension had occurred.\textsuperscript{129} In the instant case there was no evidence before the court as to whether or not vesting had occurred.\textsuperscript{130} Even if Helen Fry might still have had an interest in the pension, there were no "reasons of an extraordinary nature"\textsuperscript{131} justifying granting a Ky. R. Civ. P. 60.02 motion to reopen the 1986 decree given that Helen Fry did not: (i) claim she was unaware of the pension; (ii) explain why she failed to raise the issue at the time of divorce; (iii) bring up

\textsuperscript{123.} Id. at 493.
\textsuperscript{124.} Id.
\textsuperscript{125.} 833 S.W.2d 392 (Ky. Ct. App. 1992).
\textsuperscript{126.} When Helen Fry and Bobby Kersey were divorced in 1986, the trial court distributed the parties other marital assets, but did not allocate Bobby Kersey's pension plan. It seems that Helen Fry never raised the issue of the pension to the trial court, though it is unclear why she failed to do so. Five years after the issuance of the divorce decree, Fry filed a Ky. R. Civ. P. 60.02(f) motion to reopen the 1986 final decree. \textit{Id.} at 393.
\textsuperscript{127.} 562 S.W.2d 314 (Ky. 1978).
\textsuperscript{128.} Fry, 833 S.W.2d at 393.
\textsuperscript{129.} \textit{See Ratcliff v. Ratcliff}, 585 S.W.2d 292 (Ky. Ct. App. 1979) and Foster v. Foster, 589 S.W.2d 223 (Ky. Ct. App. 1979).
\textsuperscript{130.} Fry, 833 S.W.2d at 393.
\textsuperscript{131.} \textit{See Ky. R. Civ. P. 60.02.}
the issue at meetings with the domestic relations commissioner after the divorce; nor (iv) give any excuse for waiting five years before finally broaching the topic.\footnote{132}

The one troublesome point in this opinion is the court's unquestioning reliance on the two 1979 court of appeals decisions, \textit{Ratcliff} and \textit{Foster}, for the proposition that a pension must be vested before it can qualify as marital property subject to distribution. In 1986, the Kentucky Court of Appeals, in \textit{Poe v. Poe},\footnote{133} after conducting a very thorough and highly critical review of the prior case-law, ruled that a non-vested military pension qualified as "property" subject to division upon dissolution.

It is unclear why the court of appeals in \textit{Fry} did not cite \textit{Poe}. However, it is unfortunate that the vesting issue was not fully explored in \textit{Fry}, given the importance of pensions as major assets in many divorces and the absence of any definitive supreme court ruling answering the question of when one spouse gains a protectible interest in the other spouse's pension.

\textbf{(g) Waggoner v Waggoner}\footnote{134}

In December of 1992, the supreme court issued a definitive ruling concerning the treatment of one specific category of pension benefits, Kentucky Teacher Retirement System (KTRS) benefits. By a vote of 6-1, the court upheld the constitutionality of KRS § 161.700(2),\footnote{135} which provides that KTRS benefits should not be classified as marital property nor be considered as an economic circumstance during the division of property in a dissolution action.\footnote{136}

The court of appeals had held that the KRS § 161.700(2) exemption, given only to teachers' pension benefits, violated the prohibition against "special laws" contained in § 59 of the Ken-

\begin{footnotesize}
\begin{itemize}
\item 132. \textit{Fry}, 833 S.W.2d at 394.
\item 133. 711 S.W.2d 849 (Ky. Ct. App. 1986).
\item 134. 846 S.W.2d 704 (Ky. 1992).
\item 135. Ky. REV. STAT. ANN. § 161.700(2) (Baldwin 1990).
\item 136. Roberta Waggoner had contributed to the Teacher Retirement System for 36 years by the time she filed for a dissolution in October, 1988. Her husband, William Waggoner, moved to discover the value of the retirement benefits she had accumulated, but his motion was denied by the trial court on the grounds that the information was irrelevant to the dissolution proceedings because KRS § 161.700(2) prohibited not only the division, but even the consideration of these benefits as an economic circumstance. William then challenged the constitutionality of KRS § 161.700(2), asserting that it violated sections 1, 2, 3 and 59 of the Kentucky Constitution, as well as the Fourteenth Amendment of the United States Constitution. \textit{Waggoner}, 846 S.W.2d at 706.
\end{itemize}
\end{footnotesize}
The Kentucky Constitution and denied the equal protection of the law guaranteed in both state and federal constitutions.\textsuperscript{137} The supreme court rejected the argument that the exemption of teacher's pensions violated § 59's requirement that "where a general law can be made applicable, no special law shall be enacted."\textsuperscript{138} The test to be applied to see whether the pension law passed constitutional muster under § 59 had been set forth in \textit{Schoo v. Rose}\textsuperscript{139} and required that the legislation "(1) apply equally to all in a class and (2) there must be distinctive and natural reasons inducing and supporting the classification."\textsuperscript{140} The pension law met both prongs of this test because (1) it applied equally to all teachers within the Commonwealth, and (2) there was good reason to treat teachers differently from other state employees.\textsuperscript{141}

The supreme court also rejected the argument that KRS § 161.700(2) violated the Equal Protection Clause. The same rationality test is applied under the state and federal constitutions; that is, the law will be upheld if it was rationally related to a legitimate government objective,\textsuperscript{142} and KRS § 161.700(2) met this test. Protection of teachers upon retirement was a legitimate government objective. As teachers were the only public employees who would not receive social security benefits upon retirement and who would have to rely solely on their state retirement benefits, preserving the integrity of these KTRS benefits by prohibiting their distribution as marital property upon divorce was a rational means towards the legitimate end of adequately protecting teachers.\textsuperscript{143}

Justice Leibson argued in his dissent that teachers as a class failed the § 59 test for special legislation. While it would be appropriate to treat teachers as a separate class for education-

\textsuperscript{137} \textit{Waggoner}, 846 S.W.2d at 706.

\textsuperscript{138} Ky. CONST. § 59, cl. 29.

\textsuperscript{139} 270 S.W.2d 940 (Ky. 1954).

\textsuperscript{140} \textit{Id.} at 941.

\textsuperscript{141} \textit{Waggoner}, 846 S.W.2d at 707-708. Teachers were the only state employees who were exempted from the Social Security program and, therefore, forced upon retirement to rely entirely on their state pension benefits. The teacher pension legislation could be justified on another basis, as an incentive to attract and retain teachers. \textit{Id}.

\textsuperscript{142} \textit{Id.} at 708 (citing \textit{McGowan v. State of Maryland}, 366 U.S. 420 (1961) and \textit{Kentucky Ass'n of Chiropractors, Inc. v. Jefferson Co. Medical Soc'y}, 549 S.W.2d 817 (Ky. 1977)).

\textsuperscript{143} \textit{Id.} at 708.
related purposes, it was purely arbitrary to treat them as a separate class for the purposes of division of marital property in dissolution actions. 144

It should also be noted that while the court asserted that the KRS § 161.700(2) exemption is justified by the protection it extends to teachers, the exemption may in fact hurt almost as many teachers as it helps. KRS § 161.700(2)'s grant to the teacher of the right to have pension contributions excluded from marital property is balanced by KRS § 403.190(4)'s grant of the same right of exclusion to the teacher's spouse. 145 Thus, where the spouse has accumulated greater pension benefits than the teacher, during the course of their marriage, the teacher stands to lose under the legislation supposedly designed to protect the teacher. For, while the teacher's benefits will be exempt from division or consideration, the spouse's more substantial benefits will also be excluded from division or consideration. 146

2. Tracing of Nonmarital Property

Chenault v. Chenault 147

In Chenault, the supreme court redefined its approach to the issue of tracing nonmarital property. When Ruby Chenault mar-

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144. Justice Leibson also attacked the majority's justification for the classification that teachers were unique in not being entitled to social security benefits. Many teachers earned income from other sources and would be entitled to social security benefits based on these other earnings. Many non-teachers did not qualify for social security, but still would not get the same special treatment as teachers in marital dissolutions. Moreover, in the instant case, Roberta, while not entitled to social security based on her own work, nevertheless was protected by her husband's contributions to the social security system. Under federal law, Roberta, as a divorced spouse of a 'sufficiently longstanding marriage who was not entitled to her own social security, would begin receiving a distribution from William's social security plan at the age of 62. Id. at 709-10 (Leibson, J., dissenting).

145. KRS § 403.190(4) states:

If the retirement benefits of one (1) spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be....

KY. REV. STAT. ANN. § 403.190(4) (Baldwin 1990).

146. This loss may be very substantial in the typical case of a woman teacher, who has taken a number of years off to raise children and who has been married to a man employed in the private sector at a higher salary and with higher yearly pension accumulations.

147. 799 S.W.2d 575 (Ky. 1990).
ried in 1971, she entered the marriage with a home valued at $14,000, at least $21,000 in cash, and twenty-seven shares of Standard Oil of California stock. 148 Fifteen years later, at the time of dissolution of the marriage, the house had been sold, but Ruby had $91,329 in cash and securities and fifty shares of Standard Oil stock. 149

Ruby was unable to produce sufficient documentary evidence to trace any of the assets she owned in 1986 back to the assets she had brought into the marriage in 1971. 150 Thus, both the trial court and the court of appeals ruled that all of the assets were marital property subject to equitable distribution. 151 However, the Kentucky Supreme Court reversed, concluding that the court would adhere to the general requirement of tracing, but would “relax some of the draconian requirements heretofore laid down.” 152

Given that Ruby had presented unchallenged evidence of ownership of the $14,000 house, $10,000 in cash and the Standard Oil stock, and given that she had very little income during the marriage with which to accumulate totally new assets, the court was willing to conclude that these assets claimed as nonmarital property were indeed represented in her current asset portfolio and that they should be assigned to her as nonmarital property. 153

3. Valuation of Property

In both Clark v. Clark 154 and Drake v. Drake, 155 Judge Howard of the court of appeals considered issues arising out of the valuation of medical practices.

(a) Clark v. Clark 156

In Clark, the court of appeals held that a corporate agreement requiring the use of book value in valuing a professional medical

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148. Id. at 577.
149. Id. The Standard Oil stock had split several times during the marriage.
150. Id. at 577-78.
151. Id. at 578.
152. Id. at 579.
153. Id.
156. 782 S.W.2d 56 (Ky. Ct. App. 1990). Clark also deals with the issue of maintenance. See infra text accompanying notes 213 - 221.
corporation was not binding on the trial court in a dissolution proceeding. In upholding the trial court's use of a fair market value approach, Judge Howard noted that Kentucky courts had not adopted any single approach as the best method for valuing such assets and pointed out that even where a partnership agreement specified a method of valuation, the value calculated was only a presumptive value as far as the courts were concerned.157

The court of appeals also held that the trial court was correct in including goodwill in its valuation, citing both precedential authority in Kentucky158 and the growing trend across the country.159 Judge Howard approved of the "capitalization of excess earning method" utilized by the trial court in valuing the goodwill.160 Under this method, the goodwill value is based "on the amount that the earnings of the professional spouse exceed those which would have been earned by a professional with similar education, experience, and skill as an employee in the same general area."161

(b) Drake v. Drake162

In Drake, the court of appeals held that a buy-sell agreement, which set the value of or the method of valuing shares in a professional medical corporation, was not binding on the trial court in a dissolution proceeding, but rather was only one factor to be weighed with other factors in determining value.163 The court of appeals also held that, per Clark, goodwill was an asset subject to distribution and that the award of maintenance should not preclude the consideration of goodwill in property distribution.164

157. Id. at 59 (citing Weaver v. Weaver, 324 S.W.2d 915 (1985)).
158. Id. (citing Heller v. Heller, 672 S.W.2d 945 (Ky. Ct. App. 1984)).
159. Id.
160. Id.
161. Id.
162. 809 S.W.2d 710 (Ky. Ct. App. 1991). Drake also deals with the issue of maintenance. See infra text accompanying notes 222-226.
163. Id. at 713.
164. Id. The trial court had indicated that even if there was goodwill, goodwill in a professional practice should not be awarded when maintenance was awarded. The trial court evidently believed that the calculation of both goodwill and maintenance would be based on the doctor's future earning capacity and that this would constitute taxing him twice on the same item. Judge Howard found the trial court in error because, as explained in Clark, the capitalization of excess earning method of determining goodwill looks at past earnings, not future earnings. Id.
4. Equitable Distribution of Property

*Dotson v. Dotson*165

*Dotson v. Dotson* is significant as the only case found during the survey period in which the court of appeals reversed a trial court for an abuse of discretion in making an equitable distribution of property under KRS § 403.190(1).166

*Dotson* involved a marriage between Bonita, a forty-six year old successful businesswoman, and David, a twenty-four year old janitor with an eighth grade education. The couple spent most of their fifteen year marriage not working, but rather living off the income from Bonita's business. The trial court, relying heavily on its finding that David did little to contribute to the acquisition of the marital property, awarded him less than $30,000 of $200,000 in marital property, or only fifteen percent of the marital estate.167

The court of appeals reversed, holding that the trial court had erred in applying KRS § 403.190(1) in two ways.168 It had placed too much emphasis on the financial contribution of each party and not given enough weight to non-financial contributions to the marriage.169 More importantly, it had failed to take into account the other factors required by the statute: (i) value of the property set aside to each spouse; (ii) duration of the marriage; and (iii) economic circumstances of each spouse.170

5. Modification of a Property Agreement

*Wagner v. Wagner*171

At the dissolution of their twenty-four year marriage in 1976, Dale and Lois Wagner had agreed to share their most prized marital possession, priority to purchase two season tickets to

168. Id. at *3.
169. Id.
170. These factors militated for a much more balanced division of assets, given that: (1) Bonita had far more separate property than David; (2) they had been married a long time; and (3) David's financial outlook, given his eighth grade education and limited job skills, was bleak. Id. See Ky. REV. STAT. ANN. § 403.190(1)(b)-(d) (Baldwin 1990).
University of Kentucky basketball games. When after eleven years of ticket-splitting, Lois was late in sending her check in payment, Dale unilaterally terminated the agreement. Lois brought suit seeking to enforce the agreement. The trial court, apparently acting on the belief that divorced parties should not be tied to each other indefinitely, ordered that the tickets be shared only through the 1991-92 season and awarded Dale the priority rights thereafter.

The court of appeals reversed, holding that it was an abuse of discretion for the trial court to end a freely-arrived-at agreement and award an admittedly valuable property interest to one of the parties, without giving a sound reason for choosing that party.

B. Maintenance

1. Denial of Maintenance

The four cases below deal with the question of whether a trial court abused its discretion when it denied maintenance.

(a) Perrine v. Christine

In Perrine v. Christine, the trial court denied maintenance to Patricia Christine, a woman in her late fifties who had been a traditional homemaker raising four children during her thirty-four year marriage, and who was now virtually "unemployable" outside the home. The denial was based on the fact that she had been awarded property with an after-tax value of $533,000 which would generate enough income to meet her needs.

172. Id. at 820.
173. Id.
174. Id.
175. Id.
176. Id. at 820-21.
177. 833 S.W.2d 825 (Ky. 1992).
178. Id.
179. The trial court found that Patricia's reasonable needs, given the couple's previous life-style, could be met by the sum of $46,000 per annum. Patricia was awarded liquid assets with an after-tax value of $533,000 as well as the $200,000 marital home. The trial court believed that Patricia could earn 9% per annum if she invested her $533,000 in securities with minimum risk and that $533,000 invested at 9% would yield the sum of $47,000 per annum. Id. at 826, 827.
The court of appeals reversed the trial court on the grounds that the trial court had calculated Patricia's rate of return on her property at an unrealistically high level and that in order to have sufficient income to meet her needs, Patricia would need to prematurely liquidate her $260,000 share of her husband's accrued pension and deferred compensation benefits with Ashland Oil, creating a substantial tax penalty contrary to her long-term financial best interests. As a consequence, the court of appeals directed the trial judge, upon remand, to award Patricia maintenance until William retired in 1993. A divided supreme court reversed the court of appeals and reinstated the trial court's termination of maintenance. Justice Combs' majority opinion found that there was evidence presented to the trial court justifying its choice of a rate of return, so the trial court's findings were not "clearly erroneous." Justice Combs also rejected the idea that the trial court had abused its discretion by, in effect, forcing Patricia to liquidate the Ashland Oil accounts and thus imposing on her a significant tax burden she would not otherwise have to endure. The trial court was not forcing Patricia to do any such thing. The trial court had simply, and reasonably, concluded that she could fully meet her needs out of income while keeping intact $533,000 in investment principal. Whether she chose to liquidate the Ashland Oil assets or adopt some other alternative was totally within her discretion.

Justice Wintersheimer, dissenting, emphasized that while Patricia was awarded substantial assets, she had no earning capacity and was admittedly unemployable. He noted that the court of appeals had found that Patricia had a life expectancy of 24.7 years and he stressed that Patricia, who had no capacity to earn an income and no other hope of building up her assets, should not be forced to invade her principal or deplete her current assets.

The different conclusions reached by Justice Combs, writing for the majority, and Justice Wintersheimer, dissenting, may be explained by a difference in priorities. The majority opinion

180. Id. at 827.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id. at 828 (Wintersheimer, J., dissenting).
186. Id. (Wintersheimer, J., dissenting).
emphasizes a fundamental principal of judicial administration: upholding a trial court determination unless there is clear error or abuse of discretion. Justice Wintersheimer's dissent emphasizes a basic family law policy of ensuring adequate financial protection for a long-term spouse with no earning capacity of his/her own.

(b) Schmitz v. Schmitz

In Schmitz v. Schmitz, the trial court denied maintenance to Kelly Schmitz, a young college graduate who had worked as the primary "breadwinner" during her six-year marriage to help support her husband, Marcus, through three years of medical school and a neurosurgical residency. The trial court found that Kelly had sufficient income to support herself and refused her request for "reimbursement" for her "investment" in her husband's medical training.

The court of appeals upheld the denial of maintenance. The court recognized that in Lovett v. Lovett, the supreme court had held that a spouse's professional degree and license could be considered in awarding maintenance, but found Lovett's holding inapplicable to the facts of this case. In Lovett, the wife did not have sufficient property or earning capacity to satisfy her needs and, therefore, was entitled to maintenance under KRS § 403.200(1)'s threshold test while, in the instant case, Kelly was earning enough to support herself and did not meet this threshold test. The court of appeals concluded that KRS § 403.200(1) was simply not broad enough to cover every unjust situation.
In *Leitsch v. Leitsch*, the trial court denied maintenance to William Leitsch, who at the end of an eleven year marriage was suffering from muscular dystrophy and was no longer able to work, on the basis that financial and personal assistance from family and friends could bridge the gap between William's $1,300 monthly income and his $1,900 monthly needs. The court of appeals reversed the trial court decision, holding that the failure to award William a sufficient sum to meet his needs without having to rely on the generosity of family and friends was clearly an abuse of discretion. The court pointed out that *Atwood v. Atwood* and other Kentucky decisions had interpreted the concept of the need of the petitioner, not as requiring merely the bare minimum necessary to survive, but in a relative fashion dependent on the standard of living established during the marriage. In the Leitsch marriage, the parties had established a comfortable lifestyle, one "that allowed William to maintain his dignity despite his deteriorating and disabling physical condition," and the trial court's denial of maintenance would deprive William of his dignity.

In *Dotson v. Dotson*, the trial court denied maintenance to David Dotson, a forty year old man who had not worked for the last thirteen years of his fifteen year marriage to a successful businesswoman, on the basis that David was only forty, had no
apparent health problems, and had not proved that he was unable to support himself through appropriate employment.\textsuperscript{206}

The court of appeals reversed, holding that even if David, a middle-aged man with an eighth grade education, a very limited work history, and few marketable skills could find a job, he would not be able to support himself in the comfortable lifestyle to which the couple had become accustomed.\textsuperscript{207} The court of appeals also found the trial court guilty of gender discrimination, punishing David for being a man "content to live off his wife," rather than fulfill his proper male role in the work place.\textsuperscript{208}

2. Appropriate Appropriateness of Maintenance Awards

In three other decisions—\textit{Clark v. Clark},\textsuperscript{209} \textit{Drake v. Drake},\textsuperscript{210} and \textit{Underwood v. Underwood}\textsuperscript{211}—whose property division aspects have been discussed above,\textsuperscript{212} the court of appeals upheld the award of substantial, long-term maintenance. \textit{Clark} and \textit{Drake} both involved lengthy marriages between husbands, who were doctors, and wives, who had become full-time homemakers.

(a) \textit{Clark v. Clark}\textsuperscript{213}

In \textit{Clark}, the couple was married for twenty years. During the first four or five years after marriage, while Thomas Clark worked as an intern and resident, his wife, Lorene, worked as a teacher and secretary to help supplement the family's income.\textsuperscript{214}

\textsuperscript{206}The trial court added that David, content to live off Bonita's income, had enjoyed a marital sinecure for the past 13 or 14 years, and must now look to earn his own living. \textit{Id.} at *1, *2.

\textsuperscript{207}\textit{Id.} at *3. The Court pointed to Bonita's testimony at trial that when David had worked as a janitor during the first two years of the marriage, his earnings had been so insignificant that "we would just put it in a cabinet drawer, and we would just use it like petty cash." \textit{Id.} at *3, *4.

\textsuperscript{208}\textit{Id.} at *4. "We are convinced, had the trial court been presented with a middle-aged woman with an eighth grade education and no job and no job prospects, who had devoted sixteen of her best years to a successful businessman twenty years her senior, that a substantial award of permanent maintenance would have been indicated and ordered." \textit{Id.} at *4, *5.

\textsuperscript{209}782 S.W.2d 56 (Ky. Ct. App. 1990).

\textsuperscript{210}809 S.W.2d 710 (Ky. Ct. App. 1991).

\textsuperscript{211}836 S.W.2d 439 (Ky. Ct. App 1992).

\textsuperscript{212}See, respectively, text accompanying notes 156-161, 162-164 and 103-115.

\textsuperscript{213}782 S.W.2d 56 (Ky. Ct. App. 1990).

\textsuperscript{214}\textit{Id.} at 57.
For the next fifteen or sixteen years, Lorene was primarily a homemaker. At the time of the divorce, Dr. Clark was earning in excess of $100,000 per year as an OB-GYN specialist.

The court of appeals upheld the trial court's order that Thomas pay Lorene $2,500 per month for twenty years or until death and remarriage. Judge Howard, noting that "maintenance determinations are within the sound discretion of the trial court" and that, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge," found no such abuse of discretion.

While the Kentucky legislature, in enacting KRS § 403.200, had adopted the Uniform Marriage and Divorce Act's concept of "rehabilitative maintenance," limiting maintenance to the amount necessary to allow the spouse to gain self-supporting skills, the Kentucky courts had not strictly adhered to this concept in a number of situations. In particular, in regard to marriages where one spouse was a professional and the other a homemaker, the Kentucky courts had held that: (1) "it is especially acceptable for the trial court to consider the impact of the divorce on the nonprofessional's standard of living and award the appropriate amount that the professional spouse can afford," and (2) while "the trial court should not automatically grant a monetary award simply because one spouse contributed to the other spouse obtaining a professional degree ... these efforts should be considered and compensated especially if the spouse's incomes or salaries are uneven."

215. Id. at 58.
216. Id. at 60 (citing Platt v. Platt, 728 S.W.2d 542 (Ky. Ct. App. 1987)).
217. Id. (citing Platt, 728 S.W.2d 542 and Moss v. Moss, 639 S.W.2d 370 (Ky. Ct. App. 1982)).
218. Id. at 61.
219. Id. For example, where there was a long term marriage, the dependent spouse was near retirement age, the discrepancy in incomes was great, or the prospects for self-sufficiency were poor (citing GRAHAM & KELLER, KENTUCKY DOMESTIC RELATIONS LAW 344).
220. Clark, 782 S.W.2d at 61 (citing McGowan v. McGowan, 663 S.W.2d 219 (Ky. Ct. App. 1983)).
221. Id. Applying these principles to the facts in Clark, Judge Howard found that: (1) the Clark marriage had lasted close to 20 years, during which time both parties had come to enjoy a very comfortable standard of living, and (2) Mrs. Clark's ability to support herself was limited by the facts that she was not currently working because she was taking care of the couple's young daughter, there were no teaching positions in her field available in their community, and the income from a teaching job, were one available,
(b) *Drake v. Drake*\(^{222}\)

In *Drake*, Barbara Drake had worked as a teacher, helping to support her husband, Lewis, through both pre-med courses and medical school before the family moved back to Murray upon Lewis' completion of his residency.\(^{223}\) At the end of the twenty year marriage, Barbara was primarily a homemaker, while Lewis was earning in excess of $160,000 per year as an obstetrician.\(^{224}\)

The court of appeals upheld the trial court's order that Lewis pay Barbara $3,500 per month for the first year, followed by $2,500 for the next sixteen years.\(^{225}\) The court noted that Barbara was unable to secure a teaching position in Murray, and that even if she found a teaching job her income would still be much lower than her husband's and would not enable her to maintain the standard of living achieved during the later years of the marriage.\(^{226}\)

c) *Underwood v. Underwood*\(^{227}\)

In *Underwood*, where the husband earned $46,000 per year and the wife was only capable of earning $11,000 to $12,000, the court of appeals rejected the wife's challenge to the trial court's award of $1,350 per month maintenance as inadequate, finding no abuse of discretion in light of the large distribution of property the wife had received.\(^{228}\)

3. **Modification of Maintenance**

Three 1990 court decisions, *Combs v. Combs*,\(^{229}\) *Cook v. Cook*,\(^{230}\) and *Williams v. Williams*\(^{231}\) concerned the modification of maintenance.

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\(^{222}\) 809 S.W.2d 710 (Ky. Ct. App. 1991).
\(^{223}\) Id. at 712.
\(^{224}\) Id. at 714.
\(^{225}\) Id.
\(^{226}\) Id.

\(^{228}\) Id. at 444. While the trial court awarded a substantially smaller amount of maintenance in *Underwood* than had been awarded in either *Clark* or *Drake*, the award in *Underwood* was not at all inconsistent with those two awards given that: (1) the husband in *Underwood* had income of only $46,000 while the doctor-husbands in *Clark* and *Drake* both had income in excess of $100,000; and (2) the wife in *Underwood* was receiving a larger property distribution than either of the wives in *Clark* and *Drake*.

\(^{229}\) 787 S.W.2d 260 (Ky. 1980).
\(^{230}\) 798 S.W.2d 955 (Ky. 1980).
\(^{231}\) 789 S.W.2d 781 (Ky. 1990).
(a) Combs v. Combs

In Combs v. Combs, the issue of modification due to the recipient's cohabitation reached the court for the first time and was heard by a panel of special justices. While the court suggested that it was distasteful to ever require one "to subsidize a former spouse in his or her subsequent cohabitation," it did not adopt the rule that cohabitation automatically terminated maintenance. Instead, it upheld the trial court's suspension of maintenance on the more narrow grounds that cohabitation which resulted in the recipient having a new "financial resource" might be sufficient grounds for termination.

The court went on to advance a six-factor test to be utilized by lower courts to determine whether the cohabitation in question constituted a sufficient change in circumstances to make continued maintenance "unconscionable." The six factor test includes: (1) the duration of the relationship; (2) the economic benefit of the relationship to the cohabitating ex-spouse; (3) the intent of the cohabitating parties, especially whether the cohabiting ex-spouse was avoiding remarriage to keep maintenance and whether the parties intended to establish a "lasting relationship;" (4) the nature of the living arrangements; (5) the nature of the financial arrangement, especially as to whether the cohabitants were pooling assets or engaged in a joint financial effort; and (6) the likelihood of a continuation of the relationship.

The court's description of these six factors, however, left it unclear as to precisely how they were to be weighed in making a decision on termination. The court's analysis seems to suggest

232. 787 S.W.2d 260 (Ky. 1990).
233. Id. This issue had been addressed by the court of appeals on two previous occasions, in Williams v. Williams, 554 S.W.2d 880 (Ky. Ct. App. 1977) and in Lydic v. Lydic, 664 S.W.2d 941 (Ky. Ct. App. 1984).
234. Since a member of the supreme court was a party in the case, he and all other members of the court recused themselves. The Combs case was heard by a Special Panel, composed of seven male attorneys, and the Panel's decision was issued as an Opinion of the Court.
235. Combs, 787 S.W.2d at 262 (quoting Judge Miller's dissenting opinion in Lydic v. Lydic, 664 S.W.2d 941, 943 (Ky. Ct. App. 1984)).
236. Id. at 261. See KY. REV. STAT. ANN. 403.250(2), (11) (Baldwin 1990).
237. Id. at 262.
238. Id. at 262-63.
that proof of some of the factors, such as lengthy duration\textsuperscript{239} and receipt of economic benefits from the cohabitant,\textsuperscript{240} were indeed necessary conditions for any modification.

\textit{(b) Cook v Cook\textsuperscript{241}}

The issue before the court in \textit{Cook} was whether the recipient’s conduct fulfilled the contractual condition where payments would be terminated upon “cohabitation with a non-relative adult male.”\textsuperscript{242}

The majority of the supreme court found the fact that Ms. Cook and Mr. Spradling were not “living together” critical in rejecting Mr. Cook’s motion to terminate maintenance because the contract specified termination of maintenance upon “cohabitation.”\textsuperscript{243} The court reasoned that an indispensable element of cohabitation requires the couple live together.\textsuperscript{244} Justice Lambert, joined by Justice Combs, in dissenting,\textsuperscript{245} argued that requiring “living together” as an indispensable element of cohabitation was

\begin{itemize}
\item 239. “A showing of substantially changed circumstances under KRS § 403.250(1) based upon cohabitation, necessarily involves proof of some permanency or long-term relationship.” \textit{Id}.
\item 240. “The relationship must be such to place the cohabitating spouse in a position which avails that spouse of a substantial economic benefit. The scope and extent of the economic benefit should be closely scrutinized. If the ‘cohabitation’ does not change the cohabitating spouse’s economic position, then reduction should not be permitted.” \textit{Id}.
\item 241. 798 S.W.2d 955 (Ky. 1990).
\item 242. \textit{Id.} at 957 (quoting ¶ 5 of the Property Settlement Agreement which was incorporated into the decree of dissolution of the marriage of the appellant and appellee). The evidence presented at trial showed that Patsy Cook and a non-relative adult male, Mr. Spradling, enjoyed an extremely close, as well as intimate relationship, closer perhaps than many married couples. They spent a part of almost every day together and they ate dinner together as often as four or five times a week. He stopped by her home every day to check on her house and her son; she regularly washed his clothing. He also had loaned her money, let her use his credit cards, bought a van for her use (which he had put in joint names), and given her an engagement ring. Evidently, they had even shared a joint checking account before sharing sexual favors. Having engaged in a sexual relationship with each other, they did so to the exclusion of all others. However, they always maintained separate residences and resided in these separate households. \textit{Id}.
\item 243. \textit{Cook}, 798 S.W.2d at 957.
\item 244. \textit{See id}. Furthermore, the precise language used in the agreement was that maintenance would terminate if Patsy began cohabitation with “a non-relative adult male.” The addition of the condition that the cohabitation be with a non-relative adult showed that the parties were not thinking in terms of prohibiting sexual relationships, “because surely the agreement was not meant to condone sexual relations with an adult kinsman,” but were, instead, intending to prohibit living together in the same household. \textit{Id} at 956-57.
\item 245. \textit{Id.} at 957-58.
\end{itemize}
not consonant with current social realities and would encourage fraud and evasion of parties' consensual undertakings.\textsuperscript{246}

It should be noted that while the majority opinion twice dismissed the Special Panel's decision in \textit{Combs} as inapplicable to \textit{Cook} given the factual differences between the two cases,\textsuperscript{247} Justice Lambert strongly endorsed the Panel's six-factor test,\textsuperscript{248} praising the \textit{Combs} decision as "a balanced, progressive approach to deciding whether relief from maintenance is justified."\textsuperscript{249}

\textbf{(c) Williams v. Williams}\textsuperscript{250}

In \textit{Williams}, the issue before the supreme court was whether the payor of maintenance was entitled to a credit or set-off for the amount of social security benefits received by the recipient of maintenance, due to the payor's participation in the social security system.\textsuperscript{251} The supreme court decided that there was no set-off under such circumstances since the husband did not lose any of his own social security benefits due to the payments to the wife, and if the parties had intended for the husband's support obligation to decrease when the wife began receiving social security benefits, they could have expressed this intention in the settlement agreement.\textsuperscript{252} Once the wife had been married to the husband for the requisite number of years, she was statutorily entitled to social security benefits upon reaching retirement age.\textsuperscript{253} Therefore, the social security benefits could be considered a property right the ex-wife had acquired by virtue of her contributions to the marriage, separate and distinct from any support obligation the ex-husband might have.\textsuperscript{254}

\textbf{C. Child Support}

1. Application of Child Support Guidelines

\textit{McKinney v. McKinney}\textsuperscript{255} and \textit{Smith v. Smith}\textsuperscript{256} involve the interpretation and application of key concepts, "voluntary un-
employment” and “extraordinary needs” contained in the 1990 child support guideline legislation,\textsuperscript{257} while Keplinger v. Keplinger\textsuperscript{258} and Redmon v. Redmon\textsuperscript{259} deal with the propriety of more general deviations from the guidelines.

(a) McKinney v. McKinney\textsuperscript{260}

The issue before the court of appeals in McKinney was whether the husband’s refusal to return to a higher paying job from which he had been laid off constituted “voluntary underemployment” under KRS § 403.212(2)(d).\textsuperscript{261} While the language of the statute contained no express requirement that the obligor’s choice to remain out of work or in a lower paying job had to be in bad faith before courts could look to potential, rather than actual, income in determining child support, the court of appeals believed such a requirement must be implied in fairness to the obligor.\textsuperscript{262} The court of appeals refused to overrule the trial court’s finding that the husband had not acted in bad faith, but out of legitimate concerns about uprooting his new family and about again being laid off should he return to his old job.\textsuperscript{263}

(b) Smith v. Smith\textsuperscript{264}

The question in Smith was whether private music lessons for an especially talented child could qualify as an “extraordinary

\textsuperscript{256} 845 S.W.2d 25 (Ky. Ct. App. 1992).
\textsuperscript{258} 838 S.W.2d 566 (Ky. Ct. App. 1992).
\textsuperscript{259} 823 S.W.2d 463 (Ky. Ct. App. 1992).
\textsuperscript{260} 813 S.W.2d 828 (Ky. Ct. App. 1991).
\textsuperscript{261} The relevant statutory language contained in KRS § 403.212(2)(d) reads:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income,... Potential income shall be determined based upon employment potential and probable earnings level based on the obligor’s recent work history, occupation qualifications, and prevailing job opportunities and earnings levels in the community.

\textsuperscript{262} McKinney, 813 S.W.2d at 829.

The statute would make sense only when one purposely terminated his employment or changes to employment with lower pay with an intent to interfere with his support obligations. If an individual’s employment situation changes because of circumstances beyond his control or is reasonable in light of all the circumstances, then it would be unfair to find him to be voluntarily underemployed. KRS § 403.212(2)(d) must therefore be interpreted to include a bad faith requirement.

\textsuperscript{263} Id.
\textsuperscript{264} 845 S.W.2d 25 (Ky. Ct. App. 1992).
expense" under KRS § 402.311(3)(b).\textsuperscript{265} The statute allows deviation from the child support guidelines for "[a] child's extraordinary educational, job training, or special needs."\textsuperscript{266} The court of appeals, overruling the trial court, held that the statute did not encompass private music lessons in its definition of "extraordinary educational needs."\textsuperscript{267}

While the court of appeals opinion reads as if the court were compelled by the language of the statute to narrowly interpret the concept of "extraordinary educational expense," the language used throughout KRS § 402.311 supports a much broader interpretation of trial court authority to deviate from the guidelines to meet the needs of specially talented, as well as specially handicapped, children. KRS § 402.311(3)(b) is not limited to "extraordinary education needs," but also includes "extraordinary job training" and other "extraordinary special needs," either of which might be used to support the award for music lessons.\textsuperscript{268} Furthermore, KRS § 403.311(3)(g) gives the court even broader authority to consider: "[a]ny similar factor of an extraordinary nature specifically identified by the court which would make the application of the guidelines inappropriate."\textsuperscript{269}

(c) Redmon v Redmon\textsuperscript{270}

The question in Redmon was whether a father who had no income because of his imprisonment should be relieved of his

\textsuperscript{265} Id.


\textsuperscript{267} Smith, 845 S.W.2d at 26.

As used in the statute, we believe 'extraordinary education needs' refers to those things not ordinarily necessary to the acquisition of a common school education but which become necessary because of the special needs of a particular student. While we may be of the opinion that a parent ought to seek to maximize a child's talents, we do not think the statute was intended to change the common law of this jurisdiction which requires a parent to provide only primary and secondary education. See Miller v. Miller, 459 S.W.2d at 83.

\textsuperscript{268} Id. at 26.


\textsuperscript{269} Other statutory provisions supporting a broad, remedial interpretation of court powers include KRS § 402.311(2), which states that trial courts, as long as they give written findings, can deviate from the guidelines whenever their application "would be unjust or inappropriate" and KRS § 402.311(4) which provides that "[e]xtraordinary" as used in this section shall be determined by the court in its discretion. See Ky. Rev. Stat. Ann. § 402.311 (Baldwin 1990).

\textsuperscript{270} 823 S.W.2d 463 (Ky. Ct. App. 1992).
obligation to provide child support. The court of appeals upheld the trial court's refusal to recalculate Charles' support obligation under the guidelines based on his lack of income. The guidelines allowed deviation where their application would be unjust or inappropriate, and it would be unjust to the children to allow their father to escape his support obligation because his own misdeeds had placed him behind bars.

(d) Keplinger v. Keplinger

In Keplinger, the main issue on appeal was the trial court's almost complete disregard of the statutory guidelines set forth in KRS § 403.212. While the husband normally would be expected to pay $770 per month support for his three children under the guidelines, the trial court stated that "this court still believes that setting child support correctly will never be a science, but shall always remain an art," and ordered the husband to pay only $520 per month.

The court of appeals reversed and remanded, holding that the trial court had erred in at least three respects. First, a trial court can deviate from the statutory guidelines only upon a finding that a specific ground for deviation listed in the statute had been met. Here the trial court seemed to disregard the guidelines for its own reasons. Second, the court of appeals, citing McKinney, held that it was error to impute potential income to the wife who had quit a $4.05 per hour job to pursue college, absent a showing that she was acting in "bad faith." Third, it was inappropriate to discount the husband's $30,000

271. Id. at 466.
272. Id. at 465.
273. "We see no reason to offer criminals a reprieve from their child support obligations when we would not do the same as for an obligor who voluntarily walks away from his job." Id. at 466. In addition, Charles, in his motion to modify, had not claimed to be indigent nor had he stated that he had no property with which to satisfy his support obligation. It was possible that even if Charles had no income, he had sufficient assets to meet his support obligation. Id.
275. See id.
276. Id. at 567.
277. Id. at 568.
278. Id.
279. 813 S.W.2d 828 (Ky. 1991). See supra text accompanying notes 260-263.
280. Keplinger, 839 S.W.2d at 568.
income because he was subject to lay-offs, since he had made $30,000 annually in the previous three years, despite recurring layoffs.\footnote{Id. at 569.}

2. Agreement to Provide College Education

\textit{Stevens v. Stevens}\footnote{798 S.W.2d 136 (Ky. 1990).}

In \textit{Stevens}, the issue before the supreme court was whether a provision in a settlement agreement which provided that the husband intended to pay for the daughter's college education, but would reach an agreement in the future with regard to the specifics, was enforceable.\footnote{Id. at 137.} A divided supreme court reversed the court of appeals and held the provision binding, even though it merely expressed an agreement to reach a more definite agreement at a later date, since it clearly expressed the husband's intention to provide his daughter with a college education.\footnote{Id. at 139.}

\section*{III. ECONOMIC INCIDENTS OF COHABITATION}

\textit{Glidewell v. Glidewell}\footnote{790 S.W.2d 925 (Ky. Ct. App. 1990).}

In \textit{Glidewell}, the court of appeals addressed the issue of property division of a couple who had cohabitated for fifteen years but had never married.\footnote{756 S.W.2d 149 (Ky. Ct. App. 1988) (rejecting the argument that performance of domestic and household work produced any rights analogous to those of a spouse and that to imply such rights would be reinstituting by judicial fiat common law marriage which by express public policy is not recognized).} The court of appeals, based on \textit{Murphy v. Bowen},\footnote{756 S.W.2d 149 (Ky. Ct. App. 1988) (rejecting the argument that performance of domestic and household work produced any rights analogous to those of a spouse and that to imply such rights would be reinstituting by judicial fiat common law marriage which by express public policy is not recognized).} reversed the decision of the trial court awarding the cohabitant one-half the property acquired during the relation-
ship. The court held that the cohabitant was entitled to claim a share only in that property where she had made a direct financial contribution to its acquisition and she was entitled only to a share proportional to her financial contribution.

CONCLUSION

Surveying the entire body of family law opinions issued by the Kentucky courts over the past three years, one uncovers some inconsistencies in reasoning, as well as results.

On the court of appeals level, it seems incongruous that a court which has so liberally interpreted a restrictive spousal support statute in order to go beyond meeting the "basic needs" of dependent spouses, has been so restrictive in interpreting a very liberal child support statute and refusing to go beyond meeting the "basic needs" of children.

Focus on the supreme court decisions reveals an ongoing internal conflict within the court between those Justices who see their role more in terms of "doing justice" in individual cases by protecting dependent spouses and children, and those Justices who see their role more in terms of "fairly administering the law" as a whole by providing uniform rules, reducing litigation and preventing abuse of the appeals process.

288. Glidewell, 790 S.W.2d at 927.
289. "Thus, under Murphy ... the trial court clearly erred in considering Elizabeth's contributions in maintaining the household in dividing the property accumulated during the cohabitation." Id.
290. It should be noted that while the Glidewell Court insisted, in theory, on a monetary contribution, in practice it did not examine all too closely the actual extent of Elizabeth's monetary contribution. See Graham & Keller, Kentucky Domestic Relations Law, T 1.06, 4 (Cumulative Service 1991). The Glidewell Court did not rule out awarding a plaintiff cohabitant a half share in the situation where the plaintiff could produce evidence of an express agreement to pool assets or engage in a joint venture.
292. Compare, e.g., Justice Wintersheimer's majority opinion in Williams: "The proper application of any legal principle is governed by the facts of a particular case... [T]his case involves social security benefits the wife has earned a right to receive by virtue of her marital relationship," Williams v. Williams, 789 S.W.2d 781, 782 (Ky. 1990), with Justice Leibson's dissenting opinion:

It may be that the result in this case is more equitable than a contrary result. But it is more important to provide stability in this area of the law than it is to try to do equity case by case. Thus, I respectfully disagree with what I regard as a result oriented decision (perhaps suitable for this case), supported by reasoning
Forecasting on the basis of past experience, it seems inevitable that there will continue to be a relatively large number of property decisions being appealed, given continuing disputes over the technical issues of defining "marital property," valuing marital property, and "tracing" non-marital property. There are also likely to be more child support cases coming before the appeals courts as parties test the terms of the new child support statute, especially on the issue of the permissible grounds for deviation from the child support guidelines.

that leaves us with the same uncertainty we started with. Williams, 789 S.W.2d at 782-83 (Leibson, J., dissenting).

Compare also Justice Wintersheimer's dissenting opinion with Justice Combs' majority opinion in Perrine v. Christine, 833 S.W.2d 825, 827 (Ky. 1992).

293. With regard to tracing, the supreme court stated in Chenault that "we shall adhere to the general requirement that nonmarital assets be traced into assets owned at the time of the dissolution, but relax some of the draconian requirements heretofore laid down." Chenault v. Chenault, 799 S.W.2d 575, 579 (Ky. 1990). However, court did not spell out any details about the new "relaxation" policy, what "rules" are affected and just how far are they being "relaxed," and the resultant uncertainty may provide an additional stimulus for litigation.
SURVEY OF KENTUCKY TORT LAW: 1991-92

by E. André Busald* and Howard L. Tankersley**

This article will attempt to highlight important changes in Kentucky tort law, analyze and criticize those changes where necessary and attempt to explain what the practitioner can expect as a result of these developments. Primarily, this paper will rely on Kentucky case law for the basis of this discussion. Statutory law will be discussed as well.

This paper will not attempt to discuss every statute and case affecting the area of tort law. For example, the interrelated areas of insurance law1 and civil procedure2 will not be discussed. Other related areas that do not reflect major developments, or that are

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1. See, e.g., Jones v. Bituminous Casualty Corp., 821 S.W.2d 798 (Ky. 1991) (holding prompt notice clause of insurance policy not breached by six and one half month delay between date of occurrence and date of notice; failure of prompt notice did not result in forfeiture absent prejudice); Kentucky Farm Bureau Mut. Ins. Co. v. McKinney, 831 S.W.2d 164 (Ky. 1992) (holding truck driver and her unborn child were entitled to coverage under uninsured motorist policy as they were “occupying” insured vehicle at the time of accident, even though at time of accident, truck driver was flagging traffic around scene of disabled vehicle; Kentucky Central Ins. Co. v. Kempf, 813 S.W.2d 829 (Ky. Ct. App. 1991) (holding statute governing uninsured motorist coverage requires insured to obtain a judgment from uninsured driver before uninsured benefits may be claimed from insurer); Coots v. Allstate Ins. Co., Nos. 91-SC-929-TG, 92-SC-162-TG, 1993 WL 75977 (Ky. Mar. 18, 1993) (overruling Kempf and announcing a procedure under which a party may put the uninsured carrier on notice to waive any subrogation interest against the tortfeasor or pay the tortfeasor’s policy limits to protect its interest against the tortfeasor’s carrier).

more applicable to different areas of the law, will also not be discussed.3

The purpose of this article is to present an overview of what I consider important developments in the area of tort law during the years 1991 and 1992. I also hope to impress upon the reader that tort law in Kentucky is far from stagnant. It is constantly developing and remains an exciting field in which to practice and to study. In the words of Justice Leibson, "[t]he common law is not a stagnant pool, but a moving stream. It seeks to purify itself as it flows through time."4

CAUSATION AND APPORTIONMENT

The survey period saw the deciding of two very important cases in the area of causation. The Kentucky Supreme Court in Britton v. Wooten engaged in a very important discussion of causation. Bass v. Williams addressed apportionment and abolished the sudden emergency instruction.

Britton v. Wooten

In 1991, Kentucky abolished the ancient tort concept that criminal acts of third parties relieve an original negligent party from liability.5 The Kentucky Supreme Court, in Britton v. Wooten,6 rejected the argument that the act of an arsonist who set fire to refuse which was negligently stacked against a tenant's

3. See, e.g., Sallee v. GTE, 839 S.W.2d 277 (Ky. 1992) (holding fireman's rule does not bar recovery by a paramedic against utility company where condition created by utility company which resulted in the paramedic's injury was not the entity that engaged the paramedic's services); Turfway Park Racing Ass'n v. Griffin, 834 S.W.2d 667 (Ky. 1992) (holding that parents of child in wrongful death action entitled to retrial on child's destroyed power to earn money, and that jury should be informed of damages previously awarded); Hoye v. Hoye, 824 S.W.2d 422 (Ky. 1992) (holding tort of intentional interference with marital relation abolished); Ford Motor Co. v. Fulkerson, 812 S.W.2d 119 (Ky. 1991) (holding evidence of design change in product liability action admissible); Mitchell v. Hadl, 816 S.W.2d 183 (Ky. 1991) (holding that doctor's informing patient that in the doctor's opinion, the patient suffered from cancer, after performing exploratory surgery but before learning that the biopsy revealed no cancer, was not tortious, that in fact the doctor was duty bound to fully inform the patient of his reasonably formed opinion).


5. Britton v. Wooten, 817 S.W.2d 443, 449 (Ky. 1991) ("This archaic doctrine has been rejected everywhere."). See RESTATEMENT (SECOND) OF TORTS § 302B (1965).

6. 817 S.W.2d 443 (Ky. 1991).
building relieved the tenant from liability for the fire when the tenant had stacked the refuse against the wall in violation of a local safety ordinance.\(^7\)

At issue was whether the acts of an arsonist were a superseding cause relieving the negligent tenant from liability.\(^8\) In the earlier case of *House v. Kellerman*,\(^9\) the Kentucky Supreme Court held that questions of whether an action is a superseding or intervening cause is one for the court.\(^10\) In *Britton*, the court distinguished *House* on its facts;\(^11\) but seemed to approve of its handling of the question of causation.\(^12\)

The *House* court suggested that not only should superseding cause be a question of law; but also causation should be as well.\(^13\) Causation, as defined by the Restatement (Second) of Torts, and adopted in Kentucky\(^14\) is defined in terms of negligence. Where a party's negligence is a substantial factor in bringing about the event that resulted in the harm, causation is established and only then can that party be held accountable.\(^15\)

The *Britton* court in deciding that the criminal acts of the alleged arsonist were not a superseding cause, in fact could not be a superseding cause, stated:

> if the boxes and trash were piled high against the masonry wall in such a manner as to permit a fire started in the refuse access up the masonry wall to the inflammable roof of the building, undoubtedly this was a proximate cause, or a substantial factor,

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7. Id. at 448-49.
8. Id. at 449.
9. 519 S.W.2d 380 (Ky. 1975).
10. Id. at 382.
11. Britton, 817 S.W.2d at 448.
12. Id.
13. House, 519 S.W.2d at 382, n.2 ("As a matter of fact, there is much to be said for the proposition that basic causation itself should be treated as a question of law, the jury deciding only the issues of negligence.").

> What Constitutes Legal Cause

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

15. Deutsh, 597 S.W.2d at 144 (citing RESTATEMENT (SECOND) OF TORTS § 431, cmt. a (1965)).
in the destruction of the building regardless of how the fire started.16

Britton’s holding is that even if the acts of an arsonist set the fire, that criminal act was not a superseding cause relieving the tenant from liability. In so deciding, the supreme court held that if the tenant was negligent, then in this set of circumstances, that negligence was a substantial factor too.17 The court here seemed to be willing to decide substantial factor as a matter of law.18

The Britton case will allow practitioners to argue to the court that it is the trial judge who should decide the issue of causation. The jury, in such cases where causation has been determined as a matter of law, would then be required to merely determine amounts of responsibility, that is, apportion fault.19

This causation, substantial factor, argument is most important in areas where the defendant’s negligence is not concurrent with the plaintiff’s, but has occurred some time prior to the event that caused the harm. Where, for example, two cars are involved in a collision, one crossing left of center, and one speeding and not keeping a lookout ahead, it is usually an easy question for the jury that both parties were negligent. The issue of whether either actions were or were not a substantial factor is not normally an issue they ponder. But, where as in Britton, a party was negligent (for example, a violation of a statute) for some amount of time before the second act of negligence (some physical event) occurred, that both parties were negligent is secondary in the jury’s mind to whether one act was “more substantial” than the other. To require a jury to determine whether a party’s negligence was also a substantial factor in the event that led to the harm, may be asking them to award damages only against the party that was more negligent. To some, the word substantial might mean more than 50 per cent. If a jury engages in this analysis, they are deciding their verdict in contravention of the concept of pure comparative negligence, which Kentucky has strongly adopted.20 Theoretically, under pure comparative negli-

16. Britton, 817 S.W.2d at 448. (Emphasis added).
17. Id.
18. Id.
20. Id.
gence, a plaintiff may recover a damage award even if the jury decides that the plaintiff was 99 per cent at fault.\textsuperscript{21}

To allow a jury to define for themselves what is substantial may have precluded in many instances what would have been a just and lawful recovery for many plaintiffs. If trial judges are permitted, as did the supreme court justices in \textit{Britton}, to make the determination that a party's action is a proximate cause, perhaps fewer speculative claims will be tried. And perhaps more of the cases that are tried, where both parties have contributed to the plaintiff's injuries, will not be improperly decided on the basis that the plaintiff was "more substantially" at fault than the defendant.

\textit{Bass v. Williams}

The Kentucky Court of Appeals delved more directly into the area of causation in the 1992 case of \textit{Bass v. Williams}.\textsuperscript{22} This case sought to abolish the sudden emergency instruction. The sudden emergency rule states that where one is confronted with an emergency situation, not caused by her own negligence, and she is required to make a choice between alternate courses of conduct in an attempt to remove herself from peril, the fact that she chose the "wrong" alternative does not necessarily mean that she was negligent.\textsuperscript{23}

At the \textit{Bass} trial, the jury was instructed as to the defendant's general and specific duties toward the plaintiff.\textsuperscript{24} But after the enumeration of these duties, the jury was given the standard sudden emergency instruction.\textsuperscript{25} This instruction stated that if

\begin{itemize}
  \item \textsuperscript{21} See 57B \textit{Am. Jur. 2d, Negligence} § 1141 (1992), citing Lamborn v. Phillips Pacific Chemical Co., 575 P.2d 215 (1978), which upheld a verdict in which a plaintiff was held 99\% negligent, the defendant 1\% negligent, the plaintiff recovering 1\% of $350,000.
  \item \textsuperscript{22} 839 S.W.2d 559 (Ky. Ct. App. 1992).
  \item \textsuperscript{23} Feck's Administrator v. Bell Line, Inc., 144 S.W.2d 483 (Ky. 1940).
  \item \textsuperscript{24} \textit{Bass}, 839 S.W.2d at 561-62.
  \item \textsuperscript{25} The instruction given was as follows:
    That if immediately before the accident, Geraldine Williams suddenly and unexpectedly encountered ice on the highway, which caused her to lose control of her automobile, and caused it to move into the left lane, and if the emergency thus presented was not caused or brought about by the failure of Geraldine Williams to perform any of her duties set forth above, she was required thereafter to exercise only such care as an ordinarily prudent person would exercise under the same conditions and circumstances.
\end{itemize}

\textit{Bass}, 839 S.W.2d at 561.
the defendant was responding to an emergency not brought about by her failure to exercise any one of her general or specific duties, then her only duty was to exercise the care an ordinarily prudent person would under those circumstances. The jury found no negligence on the part of the defendant. The plaintiff/appellant successfully argued before the lower appeals court that to instruct that the defendant had a duty to exercise reasonable care under the circumstances and then further qualify that instruction with an "out" in case of an emergency, lessens the import of the general instructions. Further, it does not allow the jury to find as is required under comparative fault, a finding of "liability for any particular injury in direct proportion to fault."

As the Kentucky Court of Appeals found when it determined that the doctrine of last clear chance should be abolished, so too this court held that sudden emergency was subsumed within comparative fault. When a jury is allocating fault in "direct proportion" to negligence, to qualify an act that may be determined to be negligence is to not allow the jury to take into account all factors. As the appeals court here found, whether or not the defendant was experiencing an emergency is a factor that the jury will determine within the scope of the circumstances. "Facts giving rise to a perceived sudden emergency are the same facts already before the jury." To suggest that a particular set of circumstances, such as an emergency, should somehow be treated differently than any other set of circumstances is to defeat the purpose of comparative fault.

PREMISES LIABILITY

Perry v. Williamson

Perry v. Williamson addressed the trespasser, invitee, licensee distinction in premises liability actions. Although the
actual issue presented was whether the jury instructions were proper,\textsuperscript{34} the question of the duty owed and the blurred distinction of the labels “trespasser,” “invitee” and “licensee” was analyzed.\textsuperscript{35}

The duty owed by parties in a negligence action was strongly articulated in \textit{Gas Service Co. v. City of London}.\textsuperscript{36} “The duty to exercise ordinary care commensurate with the circumstances is a standard of conduct that does not turn on and off depending on who is negligent.”\textsuperscript{37} Said the \textit{Perry} court, “[t]he labels, ‘trespasser,’ ‘licensee,’ or ‘invitee,’ are not in and of themselves answers to what reasonable care requires in the circumstances.”\textsuperscript{38}

The plaintiff Perry as all agreed, was a licensee, as she was responding to inquiry by the daughter of the landowners, the Williamsons, for Jehovah’s Witness literature.\textsuperscript{39} She was injured when a dead limb fell from a tree on the Williamson’s property, injuring her.\textsuperscript{40}

However, to the supreme court, her designation as licensee was much less important than the landowner’s actual knowledge of the condition of the tree.\textsuperscript{41} The Williamsons had been warned of its danger by a person in the tree business and about the danger of falling limbs.\textsuperscript{42} The landowners had actual knowledge the tree was dead as it had not leafed out the previous spring and summer.\textsuperscript{43} They knew limbs had fallen off prior to Ms. Perry’s injury.\textsuperscript{44}

It is hornbook law that the only duty a landowner owes to a licensee is to make the premises as safe as they appear or to warn about dangerous conditions known only to the landowner.\textsuperscript{45} The court, in finding for the plaintiff and reinstating the trial court’s judgment, was in the final analysis, merely deciding the case within this framework. But its articulation that the care

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at 870.
  \item \textsuperscript{35} \textit{Id.} at 875-76.
  \item \textsuperscript{36} 687 S.W.2d 144 (Ky. 1985).
  \item \textsuperscript{37} \textit{Id.} at 148.
  \item \textsuperscript{38} \textit{Perry}, 824 S.W.2d at 875.
  \item \textsuperscript{39} \textit{Id.} at 870.
  \item \textsuperscript{40} \textit{Id.}
  \item \textsuperscript{41} \textit{Id.} at 875.
  \item \textsuperscript{42} \textit{Id.} at 874.
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} \textit{Restatement (Second) of Torts} § 342 cmt. e (1965).
\end{itemize}
owed is always and merely commensurate with the circumstances,\textsuperscript{46} gives strength to a future argument that regardless of what labels might require in a premises liability action, the facts may exist for imposing some sort of recovery.

\textit{North Hardin Developers v. Corkran}

\textit{North Hardin Developers v. Corkran}\textsuperscript{47} was a premises liability action in which the label assigned the plaintiff did work to deny recovery. Five year old Rachel Corkran was kicked in the head by a horse and seriously injured.\textsuperscript{48} The horse farm on which Rachel was trespassing had been recently introduced to the adjacent two subdivisions and was owned by the developer of the subdivisions.\textsuperscript{49} A Kentucky statute precludes liability against a landowner where the injured party is a trespasser.\textsuperscript{50} However, the term trespasser as defined by statute explicitly excludes one who "comes within the scope of the 'attractive nuisance' doctrine."\textsuperscript{51}

A previous Kentucky Supreme Court case had adopted the Restatement definition of attractive nuisance.\textsuperscript{52} In pertinent part it states that a landowner will be held liable for injuries to children trespassers if

the condition is one of which the possessor knows or has reason to know and which he realized or should realize will involve an unreasonable risk of death or serious bodily harm to such children...\textsuperscript{53}

The narrow issue the court was asked to decide was whether Rachel Corkran's trespass would bar recovery against the horse farm.\textsuperscript{54} The court held it did.\textsuperscript{55} The court majority held that since

\begin{itemize}
  \item \textsuperscript{46} Perry, 824 S.W.2d at 875 ("The traditional classifications, 'trespasser,' 'licensee' and 'invitee,' are simply convenient classifications for defining certain basic assumptions appropriate to the duty of the party in possession in the circumstances.").
  \item \textsuperscript{47} 839 S.W.2d 258 (Ky. 1992).
  \item \textsuperscript{48} Id. at 259.
  \item \textsuperscript{49} Id.
  \item \textsuperscript{52} Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968) (following the definition of attractive nuisance set out in \textit{Restatement (Second) of Torts} § 339 (1965)).
  \item \textsuperscript{53} \textit{Restatement (Second) of Torts} § 339 (1965).
  \item \textsuperscript{54} \textit{North Hardin Developers}, 839 S.W.2d at 259.
  \item \textsuperscript{55} Id. at 262.
\end{itemize}
Rachel was a trespasser and since the evidence at trial showed
that the horse that kicked Rachel was not known to be violent,56
the landowner having no reason to know the horse was danger-
ous, Rachel did not fall within the attractive nuisance exception
to the definition of trespasser and recovery was denied.57

The Kentucky Court of Appeals, which was reversed by the
supreme court, recognized that keeping the herd of horses may
in fact not constitute a risk of unreasonable harm;68 but deter-
mined that the fact that the horses were recently introduced
into an area known to be populated with small children may be
a special circumstance the jury should take into account when
assessing liability, if any.59 The lower court was willing to relax
the stricture of the labels “trespasser” and “attractive nuisance”
based upon the circumstances of the case.

Justice Leibson, in dissent on the supreme court, agreed.60
Justice Leibson cited to the case of Perry v. Williamson,61 which
he had authored some seven months earlier, in which he sug-
gested that the labels “trespasser”, “invitee”, or “licensee” should
not always be the determinative factor when assessing premises
liability. “Ordinarily keeping animals on your property is a
natural condition which is not included within the parameters of
the attractive nuisance doctrine. But no rule should be applied
blindly regardless of circumstances.”62

Though Perry arguably sought to blur the distinction between
the labels of those who enter upon property and suffer injury
and leave such determinations largely to the jury,63 North Hardin
dealt a blow to any such movement away from the rigid structure
of convenient labels. However, although the facts of North Hardin
presented an easy question with which the court majority was
able to play the label game, there still exists the idea that liability

56. Id. at 259.
57. Id. at 261.
58. Id. at 259.
59. At the trial court level, the case was dismissed on a summary judgement motion
filed by the developer. See North Hardin Developers, 839 S.W.2d at 259, for the pertinent
quotations from the court of appeals.
60. North Hardin Developers, 839 S.W.2d at 862-63 (Leibson, J., dissenting).
61. 824 S.W.2d 869 (Ky. 1992). See supra notes 33-46 and accompanying text for a
more detailed analysis of the Perry decision.
62. North Hardin Developers, 839 S.W.2d at 262 (Leibson, J., dissenting) (emphasis in
original).
63. See supra notes 33-46 and accompanying text.
in all cases should be allocated commensurate with the circumstances. In this regard the Perry reasoning is not to be dismissed.

STATUTES OF REPOSE

_Perkins v. Northeastern Log Homes_

The late 1990 case of _McCollum v. Sisters of Charity_ held that a statute that places a five year cap on the institution of negligence or malpractice actions against physicians, surgeons, dentists and hospitals was unconstitutional. The court found the statute to be a statute of repose.

Upon the expiration of a certain date, regardless of whether a person is aware that he or she may have a cause of action, a statute of repose bars that potential claim. Such statutes are enacted most frequently to protect the manufacturing and construction industries. These statutes prohibit liability claims a set number of years after the manufacture of a product or construction of a site. Thus, a party might become aware that a product is defective six years after purchase, but a five year statute of repose would negate the claim before it arose.

A repose statute differs from a statute of limitations in that limitation statutes only limit the amount of time a plaintiff can bring a suit after the cause of action accrues, that is after he or she knew or should have known of an injury.

Sections 14, 54, and 241 of the Kentucky Constitution, the open courts provisions, provide respectively that all courts in the Commonwealth will be open to every person for any injury.

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64. See Gas Service Co. v. City of London, 687 S.W.2d 144, 148 (Ky. 1985) ("The duty to exercise ordinary care commensurate with the circumstances is a standard of conduct that does not turn on and off depending on who is negligent.").

65. 799 S.W.2d 15 (Ky. 1990).

66. Id. at 19. The statute declared unconstitutional was KY. REV. STAT. ANN. § 413.140(2) (Baldwin 1992).

67. Id. at 18.

68. Id.


70. _McCollum_, 799 S.W.2d at 18.

71. Section 14 of the Kentucky Constitution states:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

_KY. CONST. § 14._
that the General Assembly has no power to limit a recovery,\textsuperscript{72} and that damages are recoverable for wrongful death.\textsuperscript{73} In short they prohibit the limiting of any person's legal remedies. The statute struck down in \textit{McCollum}\textsuperscript{74} was held to so violate the open courts provisions.

Based upon similar reasoning, the supreme court in \textit{Perkins v. Northeastern Log Homes}\textsuperscript{75} struck down a statute which had a similar effect. It precluded a cause of action that was not discovered within a certain time period. The statute found to be a statute of repose was entitled "Action for damages arising out of injury."\textsuperscript{76} It provides in pertinent part:

(1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection, or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement.\textsuperscript{77}

The Kentucky Supreme Court addressed the statute's constitutionality because the question was certified to it by the United States District Court for the Western District of Kentucky.\textsuperscript{78} In March of 1986, plaintiff Perkins discovered that she suffered from non-Hodgkin's Lymphoma, a form of cancer, and that there might

\textsuperscript{72} Section 54 of the Kentucky Constitution states:

The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries resulting in death, or for injuries to person or property.

\textit{KY. CONST. \$ 54}.

\textsuperscript{73} Section 241 of the Kentucky Constitution states:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing same.

\textit{KY. CONST. \$ 241}.

\textsuperscript{74} \textit{KY. REV. STAT. ANN. \$ 413.140(2)} (Baldwin 1992).

\textsuperscript{75} 808 S.W.2d 809 (Ky. 1991).

\textsuperscript{76} \textit{KY. REV. STAT. ANN. \$ 413.135} (Baldwin 1992).

\textsuperscript{77} \textit{Id}.

\textsuperscript{78} Ky. R. Civ. P. 76.37 provides a process by which a federal court, upon motion by it or the parties, may certify to the Kentucky Supreme Court, a question of state law determinative of the issue pending in federal court.
be a connection between her home and the disease.79 Mr. and Mrs. Perkins had purchased a log home kit from defendant Northeastern Log Homes in 1977.80 Mrs. Perkins alleged in her complaint that her disease was a result of exposure to a preservative known as “Woodlife,” which was applied to the logs of her home.81 Construction was completed on the home in November of 1978.82 The Perkins lived there until June of 1989.83 Under the statute in question, Mrs. Perkins’s claim would clearly have been precluded, since she did not discover her cancer and its possible connection to the defendants until some eight years after her initial exposure.84

The Kentucky Supreme Court had addressed the very same statute some four times previous to the Perkins decision. In 1973, the court held the statute’s application unconstitutional for the first time. Saylor v. Hall85 held the statute to be a violation of sections 14, 54 and 241 of the Kentucky Constitution. Said the court,

it is not within the power of the legislature ..., to cut off an existing remedy entirely, since this would amount to a denial of justice, and, manifestly, an existing right of action cannot be taken away by legislation which shortens the period of limitation to a time that is already run.86

In 1982, although not overruling Saylor, the court held in Carney v. Moody87 that the statute was applicable and that it precluded an action for injuries occurring in 1978 as a result of defective construction that took place in 1971.88 The Carney Court held that in determining the applicability of such a statute of limitation (as it was termed by the court), the court must determine if the statute will preclude a cause of action that existed prior to the enactment of the 1891 constitution.89 Since a negli-

79. Perkins, 808 S.W.2d at 810-11.
80. Id. at 811.
81. Id.
82. Id. at 810.
83. Id. at 811.
84. Id.
85. 497 S.W.2d 218 (Ky. 1973).
86. Id. at 225.
87. 646 S.W.2d 40 (Ky. 1982).
88. Id. at 40.
89. Id.
gence action against a builder did not exist in 1891, no legal remedies guaranteed by the Constitution were being limited.\(^{90}\)

_In re Beverly Hills Fire Litigation_,\(^{91}\) a 1984 decision, spoke to, but did not decide, the constitutionality of the statute. The case dealt with allegedly defective wiring installed at the Beverly Hills Supper Club, which burned to the ground.\(^{92}\) The court held that the statute had no applicability to the _Beverly Hills_ action because it was essentially a products liability action.\(^{93}\) However, said the court, if the case were construed otherwise the statute would amount to "special' legislation in violation of the Kentucky Constitution, § 59."\(^{94}\)

The fourth time the Kentucky Supreme Court addressed the statute was in 1986 in the case of _Tabler v. Wallace_.\(^{95}\) The court found its application unconstitutional as a violation of Section 59 of the Constitution, as it amounted to special legislation lacking "a rational justification for creating a special class and conferring special privileges ... on that class ..."\(^{96}\)

Almost immediately after _Tabler_ was decided, the General Assembly amended the statute to its present form, adding the term, "construction components," ostensibly to confer immunity on materialmen as well as builders, and extended the discovery period from five to seven years.\(^{97}\)

The _Perkins_ Court, in expressly overruling _Carney_, specifically adopted the _Saylor_ Court's reasoning. "We subscribe to the law as stated in _Saylor v. Hall_,"\(^{98}\) and held that the statute works to preclude a cause of action before it is discovered a cause of action might exist. _Carney_ was soundly criticized. "The protection afforded to jural rights is not limited definitively to fact situations existing in the year 1891."\(^{99}\)

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\(^{90}\) Id. at 41.

\(^{91}\) 672 S.W.2d 922 (Ky. 1984).

\(^{92}\) The Beverly Hills Supper Club fire was a Northern Kentucky (Southgate) tragedy that took 165 lives. For a thorough account of the incident, see ROBERT G. LAWSON, _BEVERLY HILLS: THE ANATOMY OF A NIGHTCLUB FIRE_ (1984).

\(^{93}\) In _re Beverly Hills_, 672 S.W.2d at 923.

\(^{94}\) Id. "The purpose of [section 59] is to prevent special privileges, favoritism and discrimination in order to ensure equality under the law." Hayes v. State Property and Buildings Comm'n., 731 S.W.2d 797, 804 (Ky. 1987).

\(^{95}\) 704 S.W.2d 179 (Ky. 1986).

\(^{96}\) Id. at 187.

\(^{97}\) See _supra_ notes 76-77 and accompanying text.

\(^{98}\) Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 815 (Ky. 1991).

\(^{99}\) Id. at 816.
Thus, said the Perkins court, Kentucky Revised Statute 413.135, is unconstitutional. Not only does it violate Kentucky's open courts provisions, it is special legislation, not withstanding the fact that all within the building industry are allegedly covered. In order for the statute to avoid the section 59 special legislation trap, it would have to impose a "statute of repose for every conceivable cause of action in tort ...."100 But even then, such would be an even clearer violation of the open courts provisions.101

It is unlikely that in the very near future, given the supreme court's strong voice on this issue, that statutes of repose will be enacted or that Kentucky Revised Statute 413.135 will be amended to preclude any causes of action against those in the building industry. But as the court recognized, Kentucky is in the minority in refusing to give special protection to its construction industry.

Recognizing that a majority of states have upheld the construction industry's statute of repose against attack on constitutional grounds, our obligation is to comply with the letter and spirit of the Kentucky Constitution. If that places us in a statistical minority, we can only commiserate with the citizens of other states who do not enjoy similar protection.102

CONCLUSION

The years 1991 and 1992 saw few restrictions on an injured party's right to sue. In the area of comparative fault, the law is perhaps moving toward a place where juries need not mull over what is or is not substantial and simply apportion responsibility and award damages, if any. In premises liability actions the labels "trespasser," "licensee" and "invitee" may have less importance when it comes to assessing negligence; the circumstances rather than the status of the injured party is becoming more important. However, the label "attractive nuisance" still seems to carry some weight. And finally, statutes of repose were once again struck down on constitutional grounds.

100. Id. at 817.
101. Id.
102. Id. at 818.
THE KENTUCKY RULES OF EVIDENCE: TROJAN HORSE OR IMPROVEMENT OVER COMMON LAW?

by John Marshall Dosker*

I. INTRODUCTION

'Wretched countrymen,' he cried,  
'What monstrous madness blinds your eyes? ...  
Perchance, who knows? - these planks of deal  
A Grecian ambuscade conceal,  
Or 'tis a pile to o'erlook the town,  
And pour from high invaders down,  
Or fraud lurks somewhere to destroy:  
Mistrust, mistrust it, men of Troy!'

An effort to reduce the Kentucky common law of evidence to the form of a collection of statutorily enacted "rules" was initiated by the Evidence Rules Study Committee appointed by the Kentucky Bar Association in the late 1980's.² The stated objective of the Study Committee, chaired by Professor Robert G. Lawson, of the University of Kentucky College of Law, was to develop rules for use in the courts of the Commonwealth of Kentucky, "striving for uniformity with the Federal Rules of Evidence and to propose a departure from the Federal Rules only for good

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1. H.A. Guerber, Myths of Greece and Rome, 333-35, (American Book Company 1921) (1893) quoting the Poet Virgil (Connington's Translation) quoting Laocoon, a Trojan priest who implored the residents of the ten year besieged city of Troy to leave the wooden horse alone or untold evil would befall them. Laocoon's warnings fell on deaf ears. The Trojan people saw the horse as a monument to their hard-won triumph over the Greeks and dragged the colossal horse into the heart of their city. That night, the Greek fleet returned from hiding behind a nearby island and the Trojan warriors within the wooden horse opened the gates of Troy. The once mighty city fell.

2. 1990 Ky. Acts ch. 88; the Supreme Court of Kentucky has the power to prescribe rule of practice and procedure for the court of justice under Section 116 of the Kentucky Constitution. The substantive law aspects of evidence law fall under the domain of the General Assembly.
reason." The Committee reasoned that uniformity between the state and federal rules would minimize the possibility of forum shopping and promote judicial efficiency.

Rather than propose general rules of evidence law that "would necessitate years of appeals to flesh out," the Committee prepared official commentary for each rule to be used in application and construction of that rule. The Study Committee cited as contributing sources: the official notes of the Advisory Committee on the Federal Rules, the reports of the Congressional Committees which considered the Federal Rules, and cases construing the Federal Rules. The purpose of the commentaries is to provide a brief description of the rule to which it relates, explain differences between the state and federal rules, and provide comparisons between pre-existing law and the new rules. The commentaries, which were prepared by the Evidence Rules Study Committee, may be used as an aid in construing the provisions of the rules, but are not binding on the courts of the Commonwealth because they were neither adopted nor approved by the Kentucky Supreme Court.

The 1990 General Assembly adopted the Kentucky Rules of Evidence (KRE) as proposed by the Evidence Rules Study Committee, contingent upon adoption by the Kentucky Supreme Court. Although the rules were passed in 1990, they did not go into effect until July 1, 1992. The delay in implementing the legislation was intended to permit the bench and bar to study the new rules and suggest changes to the supreme court before they actually became law. As addressed below, several significant changes were made during the comment period.

This article discusses the substantive and procedural provisions of the new Kentucky Rules of Evidence that change, or substantially modify, the pre-existing Kentucky common law of evidence.

4. Id.
5. Id. at Prefatory note 2.
6. Id.
7. Id.
8. KY. R. EVID. 1104.
10. KY. R. EVID. 101. (The Kentucky Rules of Evidence are found in the "Rules" section of KY. REV. STAT. ANN.).
Several of the changes occasioned by comment of the bench and bar will also be discussed. The Kentucky Rules of Evidence will change the way civil and criminal cases are tried and could, potentially, change the outcomes of trials. One's opinion of the relative success or failure of the drafting process, as with the final rules themselves, may well depend upon the areas of law in which one practices and the clients one represents. Only experience will demonstrate whether these rules truly, "facilitate the search for the truth."\(^{11}\)

The Kentucky Rules of Evidence are now the law of the land. The rules supersede contrary provisions in the Kentucky Rules of Criminal and Civil Procedure and are determinative of all issues concerning the admissibility of evidence in the trials of civil and criminal cases.\(^{12}\)

II. PROCEDURAL PROVISIONS

A. When Do The Kentucky Rules of Evidence Apply?

The KRE apply to all criminal and civil actions and proceedings originally brought on for trial on or after July 1, 1992, and to pretrial motions or matters originally presented to the trial court for decision upon or after that date.\(^{13}\) Of course, this only becomes an issue if a determination of the actions, proceedings, motions or matter requires an application of evidence principles.\(^{14}\) However, no evidence shall be admitted against a criminal defendant in proof of a crime committed prior to July 1, 1992, unless that evidence would have been admissible under evidence principles in existence prior to the adoption of the rules.\(^{15}\)

Trials which began, but were not completed prior to the effective date of enactment, are governed by common law evidence principles in existence prior to the adoption of the new rules.\(^{16}\) Also, cases tried or resolved without trial under pre-existing

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14. Id.
15. Id.
16. Id.
evidence rules must be retried or reconsidered under the same rules if retrial or reconsideration becomes necessary. 17

B. When Don't The Kentucky Rules of Evidence Apply?

The limitations and exceptions to the general rule of applicability to actions and proceedings are found in Rule 1101.18 The rules specifically enumerate that they do not apply: where a judge is deciding a question of fact preliminary to the admission of evidence under KRE 104; to preliminary hearings; proceedings before grand juries; summary contempt proceedings; extradition or rendition; preliminary hearings in criminal cases; judge sentencing; granting or revoking probation; issuance of criminal summonses and search warrants; warrants for arrest; and proceedings governing bail. 19

Could it be accidental that the rules don't apply to most criminal proceedings? What rules did the Study Committee think should apply at those vital steps in criminal proceedings? According to the official commentary, "To a large extent the provision follows preexisting rules or practice, with respect to grand juries and small claims for example." 20 However, this new rule appears directly in conflict with Commonwealth v. Peacock, 21 wherein the Supreme Court held that, in all cases involving bail pending appeal, "the court shall conduct an appropriate adversary hearing to determine the propriety of such request." 22

An "adversary hearing" is, by definition, one where due process guarantees are protected and only admissible evidence is introduced. 23 The wisdom and constitutionality of placing certain proceedings outside the Rules of Evidence is questionable, as is the contention by the Study Committee that the rules follow "pre-

17. Id. See also Cooper et al., supra note 3, at J-11.
20. Cooper et al., supra note 3, at J-103.
21. 701 S.W.2d 397 (Ky. 1985).
22. Id. at 398.
23. Id. See also Young v. Russell, 332 S.W.2d 629, 633 (Ky. 1960) (held that "an order admitting defendant to bail after indictment could be vacated after bail was taken by the court in which the prosecution was pending so as to recommit the defendant, but that evidence on the hearing to admit to bail was limited to legal evidence and excluded use of the grand jury transcript and other hearsay.").
existing rules and practice with respect to grand juries." 24 Hopefully, the changes encompassed within the new rules do not forebode additional efforts to reduce precious due process, or other constitutional rights, of citizens accused of crimes in Kentucky or citizens seeking redress in our civil justice system.

III. SIGNIFICANT SUBSTANTIVE LAW CHANGES

A. Adverse Party May Require Entire Document Be Admitted or Offer Additional Relevant Evidence

New Rule 106 states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." 25

This new rule is an expansion of pre-existing law found in the Kentucky Rules of Civil Procedure relative to depositions. 26 The purpose of the new rule is to give parties the means to avoid misleading first impressions caused by the introduction of evidence out of context. 27 The rule gives parties the right to introduce the remainder of a writing or recorded statement that has been partially introduced, or to introduce another whole writing or recorded statement related to the one already partially or wholly admitted into evidence. 28 The right of the adverse party to this type of contemporaneous introduction of evidence is to be determined by the trial judge on the basis of fairness. 29 The rule in no way circumscribes the right of an adversary to develop the matter on cross-examination or as part of his case-in-chief. 30

B. Federal Law or Law of Another State May Control

Kentucky courts have concurrent jurisdiction with federal courts over many matters which involve the application of federal law. 31

24. COOPER ET AL., supra note 3, at J-103.
25. KY. R. EVID. 106.
26. KY. R. CIV. PRO. 32.01(d).
27. COOPER ET AL., supra note 3, at J-10, J-11.
28. Id.
29. Id.
30. Id., quoting FED. R. EVID. 106 advisory committee's note.
31. E.g., Civil claims under (RICO), The Racketeer Influenced and Corrupt Organiza-
or the substantive law of another state. To the extent that such matters are affected by the operation of a presumption created or recognized by federal law or the controlling law of another state, the impact of that presumption will hereafter be governed by federal law or the law of the other state rather than Kentucky law. In other words, presumptions created by federal law or the controlling law of another state, will supersede the KRE in such cases. This rule is new to Kentucky law and has the potential, depending upon the federal or state presumption involved, to alter the outcome of the case. Research into the applicable law will be necessary in each such case to determine whether any controlling legal presumptions exist.

C. Evidence of Character or Other Crimes

The Kentucky Rules of Evidence dealing with character evidence and evidence of other crimes are substantially identical to existing law with one notable exception. As always, evidence of the character of the accused may not be introduced by the prosecution, unless and until the accused elects to offer evidence of his good character, which opens the door to the prosecution to offer evidence of bad character in rebuttal.

The new rule also addresses the admissibility of character evidence of victims of crimes in certain situations. Normally, the character of a crime victim is not relevant to the issues necessary to prove the prima facie elements of a criminal case. However, sometimes the conduct of a crime victim is relevant,


34. Ky. R. Evid. 404.


37. Evidence law is generally indifferent to what kind of person is victimized by crime.
in defense to a criminal charge, to prove the doing or the absence of the doing of an act.\textsuperscript{38}

Rule 404 authorizes the use of such evidence under an approach similar to that of character evidence of an accused. Specifically, the prosecution is denied the right to introduce such evidence in its case-in-chief.\textsuperscript{39} If, however, the accused chooses to defend, by offering evidence of the victim's bad character or history of doing or not doing something, the prosecution is then permitted to rebut any evidence of a victim's character offered by the accused, if its probative value outweighs its potential for prejudice.\textsuperscript{40}

In homicide cases, the prosecution is permitted to introduce evidence of a victim's character for peacefulness to rebut any evidence that the victim was the initial aggressor.\textsuperscript{41} The reasoning given by the Study Committee for the special rule regarding homicide cases was a perceived need for evidence to rebut claims of self-defense because of the unavailability of testimony from the victim.\textsuperscript{42}

Rule 404 also contains a requirement, new to Kentucky law, requiring the prosecution in a criminal case to give "reasonable pre-trial notice" of its intention to offer evidence of other crimes, wrongs, or acts under subsection 2 of the rule.\textsuperscript{43} If the prosecution fails to give notice, the trial court can either exclude the evidence or grant the accused a continuance or other remedy, as necessary, to avoid unfair prejudice to the accused.\textsuperscript{44}

\textsuperscript{38} See, e.g., Thacker v. Commonwealth, 816 S.W.2d 660 (Ky. Ct. App. 1991) (evidence of prior incestual acts between the defendant and the victim admissible); Schambon v. Commonwealth, 821 S.W.2d 804 (Ky. 1991) (emancipated child's testimony concerning her parent's living conditions, discipline practices and nudity habits properly admitted in physical and sexual abuse prosecution).

\textsuperscript{39} See, e.g., Holbrook v. Commonwealth, 813 S.W.2d 811 (Ky. 1991) (reversible error for prosecutor to ask defendant's mother whether she was afraid of the defendant and then whether she had good reason to be afraid).

\textsuperscript{40} See e.g., Dunbar v. Commonwealth, 809 S.W.2d 852 (Ky. 1991) (not error to allow prosecution in robbery and murder case to show evidence that defendant stole the murder weapon from a pawn shop); see also, Epperson v. Commonwealth, 809 S.W.2d 835, 842 (Ky. 1990) (the defendant was not unduly prejudiced and it was not an abuse of discretion when trial judge determined the probative value of evidence of other crimes (admitted to show identity) outweighed prejudicial effect, when curative limiting admonition given to jury).

\textsuperscript{41} \textit{Id}.

\textsuperscript{42} COOPER ET AL., supra note 3, at J-23.

\textsuperscript{43} KY. R. EVID. 404(c).

\textsuperscript{44} \textit{Id}.
D. New Method of Proving Person’s Character

The prior rule in Kentucky regarding proving character was “general reputation in the community.” The testimony concerning specific incidents of bad conduct, for example, “What did you see Joe do,” or lay opinions of character, “What do you think of Joe,” were inadmissible. The new rule in Kentucky follows the Federal Rules of Evidence and is significantly different from pre-existing Kentucky law.

In proving a person’s character, or character trait, testimony of general reputation and lay opinions are now admissible evidence. The credibility of a character witness was previously open to attack on cross-examination, to the same extent as other witnesses, with respect to the commission of particular acts of misconduct by the person about whom the character witness had testified, but the witness could only be asked if he had “heard” of the commission of such acts. Under the new rule, the cross-examiner is allowed to ask a witness about their knowledge of any type of specific acts pertinent to the witness’ testimony on direct examination which were committed by the person whose character was the subject of the examination.

The new rule limits this type of inquiry on cross-examination to matters for which the examiner has a factual basis for the subject of the inquiry. This “good faith” requirement is designed to prevent abuse of the cross-examination offered by the previous sentence of the rule and it codifies pre-existing case law.

The new rules retain the exception that when a person’s character or a character trait is an element of the case, for example, defamation or competency of a driver in a negligent entrustment of motor vehicle case, the general prohibition against the use of particular acts to prove character is removed.

45. ROBERT G. LAWSON, KENTUCKY LAW HANDBOOK § 2.15, at 31 (2d Ed. 1984).
46. See Barnett’s Adm’r v. Brand, 201 S.W. 331 (Ky. 1918); LAWSON, supra note 45, at 32; see also 31 AM. JUR. 2D Expert and Opinion Evidence § 2 (1989).
47. KY. R. EVID. 405(a).
49. KY. R. EVID. 405(b).
50. COOPER ET AL., supra note 3, at J-27.
51. Id.
52. Steele v. Commonwealth, 232 S.W. 646 (Ky. 1921).
53. KY. R. EVID. 405(c).
E. Admissibility of Habit Evidence

Proposed Rule 406 of the KRE would have made evidence of the habits of a person, or routine practice of an organization, whether corroborated by witnesses and other evidence or not, relevant to prove that the conduct of a person or an organization on a particular occasion was in conformity with the habit or routine practice. This proposed rule would have made a significant change from pre-existing Kentucky common law and would have opened the door to previously excluded evidence.

Under the proposed rule, if a criminal defendant had been alleged by anyone (even without corroborating testimony or other evidence) to be in the "habit" of robbing liquor stores; or a business defendant was in the "routine practice" of defrauding consumers; or any other person was alleged to regularly engage in any other remotely relevant bad conduct, the evidence may have been admissible.

Proposed Rule 406 together with KRE 104 (regarding "preliminary" questions of admissibility to which the KRE does not apply) might have made otherwise inadmissible evidence admissible to prove a defendant was acting out of "habit" or "routine practice" on the date and time in question. Such possible scenarios were good reason to deviate from the Federal Rules of Evidence and reject proposed Rule 406.

F. Testimonial Privileges

Article V of the Kentucky Rules of Evidence sets out several privileges that were heretofore statutory: the Attorney-Client Privilege; the Husband-Wife Privilege; the Religious Privilege; the Counselor-Client Privilege; the Psychotherapist-Patient Privilege. Several of these privileges modify the pre-

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55. See Baker v. Hancock, 772 S.W.2d 638 (Ky. Ct. App. 1989); LAWSON, supra note 45, § 2.25 at 48-50.
56. COOPER ET AL., supra note 3, at D-3.
57. Id.
58. KY. R. EVID. 503, formerly codified at KY. REV. STAT. ANN. § 421.210(4).
60. KY. R. EVID. 505, formerly codified as KY. REV. STAT. ANN. § 421.210(4).
61. KY. R. EVID. 506, formerly codified as KY. REV. STAT. ANN. § 421.216.
existing Kentucky law and should be looked at very carefully. The Kentucky Rules of Evidence do not recognize a Physician-Patient Privilege.

G. Competency of Infant Witnesses

Under prior Kentucky law, a party had to demonstrate the competence of a child to (a) understand the nature and consequences of taking an oath to tell the truth; (b) accurately observe and recall events; and (c) accurately recount those events, before the child was allowed to give testimony.63 The burden was on the proponent of the testimony to demonstrate a child's competence before offering his or her testimony.64 KRE 601 provides that "Every person is competent to testify except as otherwise provided in these rules or by statute."65 Now, a person is disqualified to testify as a witness, only if the trial court determines that he (1) lacks the capacity to perceive accurately the matters about which he proposes to testify; (2) lacks the capacity to recollect facts; (3) lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or (4) lacks the capacity to understand the obligation of a witness to tell the truth.66

Although a subtle distinction, rule 601 does change Kentucky law by creating a presumption of competence for all witnesses. Unless the trial judge grants a hearing on a motion to determine competence or raises the issue sua sponte, a child, like any other witness, would be administered an oath and would commence testifying without a prior determination of competency.67 The provision contemplates that the trial judge will have wide discretion in making competency determinations and that his decisions will be overturned on appeal only upon a showing of abuse of discretion.68 The position of the new Kentucky Rules of Evidence is a middle ground between pre-existing Kentucky law, whereby children of tender years were presumed incompetent

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63. See, e.g., Whitehead v. Stith, 105 S.W.2d 834 (Ky. 1937); Hendricks v. Commonwealth, 550 S.W.2d 551, 554 (Ky. 1977).
64. Id. See also Leahman v. Broughton, 244 S.W. 403 (Ky. 1922).
65. KY. R. EVID. 601(a).
66. KY. R. EVID. 601(b).
67. COOPER ET AL., supra note 3, official commentary to Rule 601(b), at J-50, J-51.
68. Id.
until a showing of competence through *voir dire* examination, and the Federal Rules of Evidence, which contain no minimal standards of competency. 69 Under the Federal Rules, the issue is treated as one of credibility rather than of competence, although some federal courts have continued to assume that trial courts have discretion to determine competency of witnesses. 70

**H. Repeal of the Dead Man's Statute**

In conjunction with the adoption of KRE 601, the Kentucky dead man's statute 71 was repealed, effectuating a major change from pre-existing law. When applicable, the dead man's statute operated to prevent testimony about three phenomena: verbal statements, transactions, and acts or omissions to act by or between the witness and the deceased. 72

Although originally intended to protect the estates of descendants, incompetents, and infants, the dead man's statute did not do so. 73 The repeal of the statute will end the injustices of the common law caused by excluding certain testimony of beneficiaries in insurance litigation. 74 The repeal of the Dead Man's Statute is a dramatic change in Kentucky evidence law.

**I. Impeachment of Witnesses With Character Evidence**

Proposed rule 60875 would have effected a significant change in the Kentucky common law on impeachment of witnesses with

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69. *Id.*
70. *See, e.g.*, United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982).
72. *Lawson, supra* note 45, at § 11.05, 369-70; *Stovall's Ex'r v. Slaughter*, 268 S.W.2d 943, 945 (Ky. 1954).
73. *Cooper et al., supra* note 3 at J-50. The drafters concluded that such statutes "fail to serve the ends of justice and should be abandoned."
74. *See, e.g.*, Johnson v. Mutual Benefit Health & Accident Ass'n., 229 S.W.2d 758 (Ky. 1950) (beneficiary, the only person with the insured on the day of his death, could not testify to insured's actions which showed a "normality of mind" against defense of suicide); Metropolitan Life Ins. Co. v. Trunick's Adm'r, 54 S.W.2d 917 (Ky. 1932) (in action to recover life insurance proceeds, beneficiaries could not testify about insured's physical appearance and after he applied for the policy against defense that insured made false statements in the application); Aetna Life Ins. Co. v. Prater's Adm'x, 83 S.W.2d 17 (Ky. 1935) (in disability insurance policy action, beneficiary could not testify about insured's physical condition and inability to work even though recovery under the policy was dependent upon testimony from the insured's widow).
character evidence. Traditionally, a witness could be impeached by showing that he had a bad reputation for truth or veracity in the community, but lay opinion evidence of character was improper. The proposed rule retained impeachment by reputation evidence, but added impeachment by personal (lay) opinion of reputation in the community, an obviously dangerous proposition for criminal defendants and other litigants. Fortunately, proposed Rule 608 was modified to merely codify the common law rule rather than expand it as proposed.

J. Impeachment of Witness By Prior Convictions

Rule 609 changes Kentucky law relative to impeachment with evidence of prior crimes. As of July 1, 1992, there is a ten year time limit on prior convictions calculated from the date of conviction, unless the Court determines that the probative value of the conviction substantially outweighs its prejudicial effect. Also, under KRE 609(a), the impeaching party is prevented from disclosing the specific felony for which the witness has been convicted, unless the witness denies the existence of a conviction. For example, if a witness (defendant or otherwise) is asked, "Have you ever been convicted of a felony?" and the witness answers, "No," the witness may be impeached with proper evidence of a specific felony conviction, subject to the ten year limit of subsection (b) of the rule. However, the witness has the right to "disclose the identity" of the crime if he or she so chooses. For example, the witness could answer, "Yes, but..." and attempt to explain why the conviction is not relevant to his or her prosecution or does not reflect on their truth or veracity as a witness.

The Study Committee believed that by allowing those criminal defendants, who choose to waive their Fifth Amendment rights

76. Ky. R. Civ. Pro. 43.07; see also Borders v. Commonwealth, 67 S.W.2d 960 (Ky. 1934).
77. For example, regardless of one's good reputation in the community, individuals could testify about isolated instances of conduct by the defendant or litigant.
79. Ky. R. Evid. 609(b); Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991) (reversible error to admit evidence of 22 year old conviction).
80. Id.
81. Ky. R. Evid. 609(b).
and testify on their own behalf, to initiate disclosure of the identity of the crime would "minimize the possibility of prejudice inherent in this type of impeachment." 82

K. Expert Opinion Testimony

Rule 703 defines what kind of information an expert may rely on as the basis for opinion testimony. 83 The rule substitutes "reasonably" for "customarily" in determining whether an expert may rely on otherwise inadmissible evidence in the formulation of opinions. 84 The standard under the rule is evidence of the type "reasonably relied upon by experts in the field." 85 The new rule requires trial judges to determine whether experts are acting "reasonably" in relying on specific data. 86 An expert may rely on information which is not otherwise admissible in evidence, but experts must base their opinions on generally accepted medical concepts. 87 If the court requires, the expert may have to make a prior disclosure of the facts or data upon which the opinion is based. 88 If facts are admitted for the limited purpose of evaluating the validity and probative value of the expert's opinion, an admonition to that effect must be given to the jury upon request. 89 Of course, the facts and data underlying opinions are always proper subjects for cross-examination. 90

The provision that an expert may rely upon facts or data made known to him "at or before the hearing," 91 may imply that experts should be permitted to attend depositions and trial and see and hear the evidence presented. Experts may also be provided with

82. Cooper et al., supra note 3, at J-54, J-55.
83. Ky. R. Evid. 703.
84. Id.
85. Ky. R. Evid. 703(a).
86. Id.
87. Id. See also Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991) (reversible error to admit testimony of "child abuse accommodation syndrome" when it was not established as a generally accepted medical concept); Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991) (police officer was not qualified to testify on the subject of pedophilia and insufficient foundation was laid to establish the "pedophile profile," which the defendant allegedly fit, had been generally accepted in the scientific community); but see Sargent v. Commonwealth, 813 S.W.2d 801 (Ky. 1991) (expert testimony of police detectives that 15 pounds of marijuana was "for sale" rather than "personal use" held admissible).
88. Ky. R. Evid. 705.
89. Ky. R. Evid. 703(b).
90. Ky. R. Evid. 703(c).
91. Ky. R. Evid. 703(a).
facts from the hearing in the formulation of appropriate hypothetical questions.

New rule 706 explicitly recognizes the power of the court to call expert witnesses *sua sponte*, or upon motion of any party. The court may solicit nominations, appoint an agreed upon expert, or choose its own expert. The expert must consent to the appointment and is required to advise all parties of his findings. The parties have the right to take the expert’s deposition, and the expert may be called to testify by any party or the court. Court appointed experts are subject to cross-examination by all parties, including the party calling the witness. Court appointed experts are entitled to “reasonable compensation” in whatever sum the court may allow, and be paid by the parties, in proportion, as directed by the court.

The official commentary to KRE 706 states that the prescribed procedure is intended, in part, to guard against “the danger of selecting an expert lacking impartiality on the subject matter under inquiry.” However, the trial judge, in such situations, becomes the sole determiner of who will review the evidence, make findings and testify at trial as a court-appointed expert.

KRE 706 gives trial judges both a powerful tool to promote the administration of justice, and a powerful weapon with the potential for abuse. Challenges and appeals based upon the trial judge’s selection of expert(s) as partial are foreseeable. After all, the risk that juries will exaggerate the significance of testimony given by a court-appointed expert is significant. In fact, KRE 706 may actually necessitate an increase in the practice of hiring “rent-a-witnesses” when attorneys find their cases on the receiving end of what they may perceive as a biased court-appointed expert report.

**L. Hearsay**

KRE 801A(a) codifies the pre-existing Kentucky common law
rule of *Jett v. Commonwealth*. Under *Jett*, a witness who testifies in court may be confronted with any other statement he has made, whether in court or not, and whether under oath or not, concerning the same subject matter. After establishing a foundation of time, place and persons present (identical to that required for the admission of a prior inconsistent statement) the prior statement is admissible, not just for impeachment, but as substantive proof of the truth of the content of the statement. *Jett* is a good rule of evidence. It is a powerful tool in the “search for the truth”.

Under the rule, once a witness testifies in court about something, everything that person has ever said about the same subject or events is admissible, and the fact finder must take all the witness’ statements into account in determining the truth. It is, in short, a very good rule and a great courtroom tool because it lets the finder of fact hear everything the witness has ever had to say on a subject, whether hearsay under the Federal Rules of Evidence or not.

Professor Lawson and the Study Committee recommended abrogation of *Jett* to promote, “uniformity between the state and federal rules.” While uniformity with the Federal Rules might be a desirable goal and might minimize the possibility of forum-shopping or increase the efficiency of the judicial system, Kentucky experience with *Jett* was a good reason “to propose a departure from the Federal Rules.”

For example, there were only two reported decisions in Kentucky of defendants who appear to have been convicted solely on the basis of out-of-court statements, later repudiated, then admitted under *Jett*. In contrast there are a substantial number

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100. 436 S.W.2d 788 (Ky. 1969).
101. Id. at 790.
103. *Jett*, 436 S.W.2d at 790.
104. See Ky. R. Evid. 102.
105. COOPER ET AL., supra note 3, at J-68.
106. COOPER ET AL., supra note 3, at J-68. The committee recommended requiring prior inconsistent statements to have been made under oath and subject to the penalty of perjury in a trial, deposition, or other proceeding to be admissible.
107. Id. at J-1.
108. Id.
109. See Muse v. Commonwealth, 779 S.W.2d 229 (Ky. Ct. App. 1989) (When 12 year old special education student/victim repudiated her accusations against her stepfather's
of cases in which acquittals were won on the basis of Jett statements. Often, Jett-admitted statements have formed the sole evidentiary basis for self-defense jury instructions and other affirmative defense instructions. Because the prosecution cannot retry an accused for the same crime, once acquitted, there are no reported decisions of such statements helping the accused win acquittal.

KRE 801A(a) promotes the effectiveness of a trial as a means for re-creation of events and revelation of the truth. It is a wise and good rule that was fashioned by the Supreme Court of Kentucky based on the collective wisdom of 200 years of statehood and thousands of hotly litigated cases. Kentucky Rule of Evidence 801A(a)\textsuperscript{110} is superior to the Federal Rule.

Rule 801A(b) governs admissions of parties, including: a party's oral statements, made in either an individual or representative capacity; statements made by others which are authorized by the party; statements by a party's agent or servant made within the scope of agency or employment; or statements of people with whom the government claims your client is engaged in a conspiracy.\textsuperscript{111} Under 801A(b), even something printed in Reader's Digest may be admissible if a party "manifested an adoption or belief in its truth."\textsuperscript{112}

\textit{M. Hearsay Exceptions}

KRE 803 changed pre-existing Kentucky law on exceptions to the hearsay rule. Rule 803(1), the present sense impression exception, is identical to the Federal Rule,\textsuperscript{113} but new to Kentucky law. There is no reported Kentucky decision addressing the exception. A present sense impression is defined as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter."\textsuperscript{114}

\footnotesize
\textsuperscript{110} Ky. R. Evid. 801A(a).
\textsuperscript{111} Ky. R. Evid. 801A(b).
\textsuperscript{112} Ky. R. Evid. 801A(b)(2).
\textsuperscript{113} FED. R. EVID. 803(1).
\textsuperscript{114} Ky. R. Evid. 803(1).
KRE 803(7) is a new provision in the Kentucky law of hearsay evidence. It is also identical to the Federal Rule and allows evidence of the absence of a business record to prove the nonexistence or nonoccurrence of some matter, if the matter was of a kind for which a written record was regularly made and preserved. The Evidence Rules Study Committee, while deeming questions of admissibility of this type of evidence more a question of relevancy than hearsay, retained the rule for purposes of uniformity with the Federal Rules of Evidence 803(7).

Similarly, KRE 803(10) allows evidence of the absence of a public record to prove the nonexistence or nonoccurrence of a matter. A custodian's certificate indicating a diligent search and inability to find a record is proof of the absence of such a record. The certificate will be self-authenticating under KRE 902, without the necessity of the custodian of records as a witness.

KRE 803(11) is new to Kentucky law and solves the problem of admitting religious organization records such as those of births, marriages, divorces, or ancestry when they are offered by one not under a business duty to keep them as required by KRE 803(6). This section is limited to proving facts of "personal or family history."

KRE 803(12), relating to certificates of marriage, baptism, or other ceremony or administration of sacrament, allows the introduction of such certificates to prove the ceremony or sacrament occurred. While this changes Kentucky law, the effect is relatively insignificant because the rule cannot be used to prove other facts which may be gleaned from the document.

KRE 803(13) changes Kentucky law relative to the age requirement to qualify as an ancient document from thirty years to twenty years under the new rule which is in accord with the Federal Rules of Evidence.

116. Cooper et al., supra note 3, at J-72.
117. Ky. R. Evid. 803(10).
118. Id.
119. Id.
120. Ky. R. Evid. 803(11).
121. Id.
123. Id.
124. See, e.g., Elkorn Coal Corp. v. Bradley, 288 S.W. 326 (Ky. 1926).
125. Ky. R. Evid. 803(13).
Kentucky did not adopt a residual hearsay exception as proposed by the Study Committee.126 A residual hearsay exception is a rule of evidence that gives a judge the discretion to admit into evidence a hearsay statement that is not within the ambit of any recognized exception to the general rule prohibiting the introduction of hearsay, where the trial judge is satisfied that the hearsay statement has sufficient equivalent circumstantial guarantees of trustworthiness.127 A residual hearsay exception vests broad powers with the trial judge to admit hearsay as proof.

Although given several opportunities to fashion a residual hearsay exception, the Kentucky Supreme Court has declined to do so.128 The Federal Rules of Evidence contain residual hearsay exceptions in two forms, one that does not require the declarant to be unavailable129 and one that does require a showing of unavailability.130

The Evidence Rules Study Committee proposed a residual exception for Kentucky, but would have limited its use to those situations in which the declarant was unavailable, for example, dead, incompetent, or beyond the reach of judicial process.131 A witness was also unavailable under the proposed rule if the declarant "was exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement."132 However, the proposed rule would have offended the rights of criminal defendants to confront and cross-examine their accusers133 and was properly rejected by the Kentucky bench and bar.

CONCLUSION

Only experience will determine whether the new Kentucky Rules of Evidence are superior to the pre-existing common law

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126. COOPER ET AL., supra note 3, at G-8.
127. See FED. R. EVID. 803(24).
128. See, e.g., Estes v. Commonwealth, 744 S.W.2d 421 (Ky. 1988); Wager v. Commonwealth, 751 S.W.2d 28 (Ky. 1988).
129. FED. R. EVID. 803(24).
130. FED. R. EVID. 804(b)(5).
132. KY. R. EVID. 804(a)(1).
133. U.S. CONST. amend. VI; KY. CONST. § 11.
of evidence which was forged on the anvil of litigation in Kentucky courts for 200 years. All the collective experience of the sources cited by the Evidence Rules Study Committee, including the Federal Rules and holdings of courts in others states, does not guarantee that, in practice, the KRE will "facilitate the search for the truth" more effectively than the pre-existing Kentucky common law of evidence or will further the individual rights of most Kentuckians.134

134. In Greek mythology, Ulysses (Odysseus) and his fellow warriors were sentenced by the gods to ten years of perilous wandering after their victory at Troy as retribution for the "hubris" they displayed in discounting the power of the gods over their destiny and for making insufficient and inappropriate sacrifices.

The trojan priest Laocoon, who had tried to warn his fellow residents of the City of Troy to abandon the wooden horse, went to the ocean shore with his two sons to offer a sacrifice to the gods, in a final attempt to save the city. As he stood by the sea, two huge serpents rose from the water, coiled themselves around Laocoon and his two sons, and bit and crushed them to death. Guerber, supra note 1, at 333-35.
INSURANCE LAW IN KENTUCKY IN THE 1990s - WHERE WILL THE COURT GO FROM HERE?

by Martin J. Huelsman*

The judiciary of Kentucky has, in the first few years of the nineties, been faced with various challenges to traditional interpretation of various aspects of insurance law. These challenges have resulted in decisions having no particular pattern but from which further controversy looms on the horizon. This summary will review cases of new impression, cases resulting in reversal of previous law, and most importantly, the key decisions which promise to impact basic rights of both insurers and the insured. Specifically, general key developments will first be summarized with relevant references provided for more detailed analysis by the reader. This will be followed by detailed treatment of the cases which will have the greatest impact on the future of insurance law in the Commonwealth.

I. KEY DEVELOPMENTS

A. Policy Provisions and Kentucky Statutory Interpretation

Several decisions have been rendered addressing the meaning of various duties and obligations of the insurer under various statutory provisions. Two such decisions involve instances where insurers cannot be compelled to subrogate a claim. Two other decisions considerably broaden the meaning of the word “occupying” as it pertains to no-fault policy coverage.

In situations involving an excess liability carrier, the doctrine of reasonable expectations1 cannot be said to require one insurer

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* Professor, Salmon P. Chase College of Law. The author is grateful for the assistance of Tamela J. White in the preparation of this article.

1. The doctrine of reasonable expectations may be summarized as follows:

In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.

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to cover another's insolvency. Thus, in the case of Hendrix v. Fireman's Fund Ins. Co., the excess liability carrier could not be compelled to provide "drop down" coverage for an insolvent insurer where the original insurance contract did not expressly provide for such coverage.

Another situation in which the insurer cannot be compelled to subrogate a claim is where the agent fails to secure a policy for the contracting insured despite the fact that premiums are paid to the agent. In such situations, it is the agent from whom the claimant must seek recovery and not the insurer.

As to construction of particular policy provisions, named driver exclusions have been found to be void as against public policy, and therefore, the court will not enforce such a provision in an automobile insurance policy. Additionally, "occupying" a vehicle

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PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 633 (1988); see also Jones v. Bituminous Casualty Corp., 821 S.W.2d 798, 802 (Ky. 1991) (quoting Woodson v. Manhattan Life Ins. Co., 743 S.W.2d 835, 839 (Ky. 1977)), where the Kentucky Supreme Court summarized the doctrine as:

The insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.

Id. at 802 (citing R.H. Long's "The Law of Liability Insurance," § 5.10B).


3. Id. at 941.

4. Travelers Ins. Co. v. Bowling, 806 S.W.2d 40, 42 (Ky. Ct. App. 1991) (vehicle owners must seek payment from agent who absconded premium payments and not the company whom the agent represented; to find otherwise would be to hold the company vicariously responsible for the acts of an independent agent).

5. Beacon Ins. Co. v. State Farm Mut. Ins. Co., 795 S.W.2d 62, 63 (Ky. 1992) (policy provisions excluding the son of the insured as a covered driver found to be unenforceable); See Bishop v. Allstate, 623 S.W.2d 865 (Ky. 1981) and Mosley v. West American, 743 S.W.2d 854, 856 (Ky. 1988) (the court struck down any exclusions that reduced coverage below the minimum limits of Motor Vehicle Reparations Act (No-Fault - KY. REV. STAT. ANN. § 304.39 (Baldwin 1992))).

The 1992 General Assembly modified Beacon by inserting the following:

Exclusion from coverage as operator by agreement. In an automobile liability insurance policy, the insurer and the named insured may agree to exclude any member of the household not a spouse or dependent from coverage as the operator of an insured vehicle. The names of persons excluded shall be set forth in the policy or in an endorsement that is signed by both parties.


Although named driver exclusions are rarely used, the decision will have an impact on the people in the Commonwealth. However, most policies will continue to have the standard omnibus clause.
within the meaning of the No-Fault Act and thus, in terms of policy coverage, has been broadened. The first case to address this issue was *Kentucky Farm Bureau Mut. Ins. Co. v. Gray.* In *Gray,* the insured's son, while assisting a stranded motorist, was found to be "upon the vehicle" within the meaning of "occupying" as provided by the terms of the insurance contract. The son had removed the battery from the insured's car and was engaged in the act of replacing it when the car slipped out of gear, rolling against the stranded motorist and injuring his leg. Although physically outside of the vehicle, the court determined that by statute, "use" of the vehicle included not only occupants but those parties injured while "using" the vehicle and that contractual language containing the terms "in or upon or entering into or alighting from" such vehicle was broad enough to include acts involving these minor repairs.

The term "occupying" was further interpreted in the case of *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney.* The named insured was standing approximately 150-200 feet from her stranded truck when she was struck by an oncoming vehicle. The vehicle's driver was an uninsured motorist. In adopting an expansive, yet reasonable, interpretation of the meaning of "occupying," the court established four criteria to be used in such cases. These criteria are:

1. There must be a causal relation or connection between the injury and the use of the insured vehicle;
2. The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
3. The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

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7. Id. at 930.
8. Id. at 928-29.
10. Id.
11. Kentucky Farm Bureau v. Gray, 814 S.W.2d at 930.
12. 831 S.W.2d 164 (Ky. 1992).
13. Id. at 164.
14. Id. at 165.
15. Id. at 168.
(4) The person must also be engaged in a transaction essential to the use of the vehicle at the time.16

Although subject to criticism,17 the listed criteria will provide useful guidance in determining factual questions as to whether one is injured while occupying a disabled vehicle.

B. Tort Law

In the area of tort law, settlement and apportionment of liability was considered by the Supreme Court of Kentucky in Stratton v. Parker.18 The question submitted to the court was whether a defendant may be attributed credit to the monetary amount of liability based on the amount paid by another settling defendant whose percentage of fault was zero.19 In a well reasoned opinion written by Justice Vance, such a credit was determined to be unavailable, as it would be against the policy behind several liability in a comparative negligence state.20 Thus, an insurer or a plaintiff may aggressively pursue and execute a reasonable tort-settlement without concern that a joint-tortfeasor may hold out and benefit from such settlement. In the end, settlement is obviously encouraged. However, as pointed out in the concurrence to the decision,21 fundamental questions remain unanswered. These include, the scope of the reach of the decision since the apportionment statute addresses the situations of parties to a suit and not the situations where nonparties have not settled;22 the constitutionality of portions of the Kentucky Apportionment Statute;23 and the potential for inconsistent application of the law.24

Of additional interest in the tort field is a decision which reevaluated the meaning of "permanent disfigurement" for pur-
poses of meeting a threshold under the Motor Vehicle Reparations Act. In *Smith v. Higgins*, the definition of "permanent disfigurement" was broadened to include "[a]ny scar capable of ordinary perception or which produces ongoing personal discomfort." This differs significantly from that of prior caselaw which would have required a claimant to "materially alter" one's appearance such as that which would be noticeable from a mere conversational distance. Thus, an enlarged class of claimants may now seek factual determination of the extent of scar injuries and just compensation.

II. RADICAL CHANGES IN THE LAW: THE KEMPf AND JAMES GRAHAM BROWN CASES

Having completed the review of key developments, the following discussion will focus on two specific cases likely to have the greatest future impact on insurance law practice in the state. Beginning with the automobile insurance area, more specifically, underinsured motorist coverage was revisited in the 1991 decision of *Kentucky Cent. Ins. Co. v. Kempf*. Factually, this case involved that of an automobile accident between Jessie Marie Holcomb and Eric Kempf. Eric, age sixteen at the time, was indisputably determined to be solely at fault. Ms. Holcomb notified her insurance carrier, Kentucky Central, that a settlement agreement was being negotiated with Mr. Kempf's insurance carrier, Aetna Casualty Insurance Company. Notably, the settlement agreement reserved Ms. Holcomb's right to seek underinsured benefits.

Id. Justice Leibson notes that in *Burke Enter., Inc. v. Mitchell*, 700 S.W.2d 789 (Ky. 1985) (a case relied upon by the majority in *Stratton*), no apportionment instruction was given and a credit was afforded to joint-tortfeasors based upon traditional tort liability principles and not those of comparative fault. *Stratton*, 793 S.W.2d at 822.


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from Kentucky Central. After settling the claim with the Kempfs, Kentucky Central paid Ms. Holcomb the full amount under her underinsured motorist coverage as the policy, which, by its own terms, provided for payment once the limits of the underinsured's policy were exhausted.

After this series of events, Kentucky Central brought action seeking subrogation against Eric Kempf. Kentucky Central claimed that, regardless of the method of determining damages, be it settlement or judgment, subrogation rights existed under Kentucky's Underinsured Motorist Statute.

The court of appeals answered this claim in the negative finding that the express terms of the statute require a judgment before subrogation rights may be asserted against an underinsured's carrier. The conclusion was buttressed not only by the overall statutory scheme in the state but by statutory construction and on the basis of public policy concerns.

33. Id. To this, Kentucky Central objected as this provision in the settlement agreement was not in the agreement originally forwarded to the company. Id.

34. As noted by the court, the policy provided coverage regardless of whether exhaustion was by settlement or by judgment. Kempf, 813 S.W.2d at 830.

35. Id. at 831.

36. Id. (quoting Ky. REV. STAT. ANN. § 304.39-320 (Baldwin 1988)). The statute reads as follows:

(1) As used in this section, "underinsured motorist" means a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident.

(2) Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering. His insurance company shall be subrogated to any amounts it so pays, and upon payment shall have an assignment of the judgment against the other party to the extent of the money it pays.


37. Kempf, 813 S.W.2d at 831.

38. Id. Specifically, the court cited State Auto. Mut. Ins. Co. v. Empire Fire & Marine Ins. Co., 808 S.W.2d 805, 808 (Ky. 1991), in which the Kentucky Supreme Court stated: "In ordinary circumstances, an injured party must first obtain judgment against the opposing party defendant and then seek enforcement of the judgment rendered in an action against the defendant's indemnitor."

39. Kempf, 813 S.W.2d at 831. Specifically, the court noted that, absent ambiguity, the plain meaning of words is applied in construing statutory language. The word
The following concerns arise from the *Kempf* decision. First, insureds impliedly waive claims to underinsurance benefits which they may have, even at the time of settlement, justifiably expected to receive, having paid for the coverage. Second, counsel must inform a party before settlement that any such underinsurance benefit may be forfeited. It is unclear whether such forfeiture will result in more cases going to trial than being settled—that is yet to come. Finally, insurance policies that fail to expressly limit underinsurance coverage to judgments will be judicially modified by the *Kempf* decision.\(^{41}\)

Clearly, *Kempf* will place an intolerable burden on the courts until overruled.\(^{42}\) The plaintiff will not be able to settle with the defendant in order to pursue their underinsured motorist coverage. The defendant's will not settle with the plaintiff without a "full" release. The underinsured motorist carrier can take a bull-headed attitude of saying to the plaintiff and the defendant that they will not discuss settlement until a judgment is rendered. Whether the judgment is coercive or written, it is binding and will also need to be decided.

The last area of development in Kentucky insurance law that remains to be discussed is that involving the case of *James Graham Brown Found., Inc. v. St. Paul Fire and Marine Ins.*

"judgment" was found to mean solely court-ordered relief; *See supra* note 36 for the relevant text of the statute.

40. *Id.* at 832. The court noted that this outcome:

has the effect of removing a great deal of confusion from this area of the law. Insurers need not worry about first party bad faith or unfair claims settlement practice charges simply by requiring their insureds to get a judgment before seeking underinsurance benefits. Insureds are aware that, by settling claims against the other party defendant, they are waiving their right to claim underinsurance benefits from their own insurer.

*Id.* (emphasis added).

41. The court took notice of the fact that the Holcomb's policy provided the following: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by *payment of judgments or settlements.*" *Id.* at 830 (emphasis added). Since the policy permitted settlements, the court found no conflict with its final decision that subrogation could be sought only upon judgment.

42. Just prior to the publication of this article, *Kempf* was overruled in *Coots v. Allstate Ins. Co.*, Nos. 91-SC-929-TG, 92-SC-162-TG, 1993 WL 75977 (Ky. Mar. 18, 1993) (striking down the judgment requirement and announcing a procedure by which a party may put the underinsured carrier on notice to waive any subrogation interest against the tortfeasor or pay the tortfeasor's policy limits to protect its interest against the tortfeasor's carrier).
The case involved the determination of the applicability of comprehensive general liability insurance clauses to environmental damage assessments rendered pursuant to a federal authority and the independent nature of the insured's duty to defend. 44

Factually, the James Graham Brown Foundation ("Foundation") had inherited three wood processing plants. 45 All three plants were found to have serious environmental cleanup problems and one of the sites had been subject to an ordered cleanup under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). 46 Having fifteen general liability and fifteen excess liability insurance policies, the Foundation sought coverage for cleanup costs under the comprehensive general liability clauses. 47

In the initial hearing, summary judgment was granted to the insurance companies both on the issue of policy coverage and the duty to defend. 48 The circuit judge determined that there was no covered "occurrence" within the meaning of the policies 49 "because the operators of the processing plants were aware of the damage that was being incurred by the routine operators." 50 "The result was expected or intended because they knew of this damage and consequently there was no 'occurrence' and no insurance coverage." 51 As to the duty to defend, since no coverage was found, the decision to defend was said to be purely a discretionary one on the part of the insurer being dependent upon the obligation to provide coverage. 52

43. 814 S.W.2d 273 (Ky. 1991).
44. Id. at 275.
45. Id. (The three plants were located in Louisville, Kentucky; Brownville, Alabama; and Live Oak, Florida).
46. Id. (The Foundation had been warned that similar orders may be forthcoming as to the other sites).
47. Id. Notably, the Foundation was not insured under any specific environmental policy nor was an environmental exclusion clause present in any of its insurance contracts. Id. at 277.
48. James Graham Brown, 814 S.W.2d at 275.
49. Id. "Occurrence" was defined essentially the same in all of the policies as: "[a]n accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." Id. at 275 (emphasis added).
50. Id. at 275-76.
51. Id. at 276.
52. Id. (citing Cincinnati Ins. Co. v. Vance, 730 S.W.2d 521 (Ky. 1987)).
In reversing the decision on both counts, the supreme court, in an opinion written by Justice Wintersheimer, determined that exclusion from coverage for environmental claims was appropriate only where the resulting damage was intentional and, regardless of that intent, the duty to defend was an independent obligation under an insurance contract.

Turning first to the intentional causation of damages and to coverage exclusion, the court analyzed the strict liability nature of CERCLA claims, the relationship of the Foundation to prior operators of the processing plants, and the definition of ‘occurrence’ within the insurance contract itself. As to the nature of CERCLA strict liability, it was noted that the Foundation could foreseeably be responsible for the contamination that resulted from years of mishandling of wastes, despite the fact the Foundation had been the responsible operator for only a short time at all the sites. Citing R.H. Long’s, *The Law of Liability Insurance*, the determination was made that “one who is statutorily vicariously liable for the intentional act of another cannot be denied coverage since the defendant does not possess the requisite intent to do injury.” More specifically, the real issue at hand was characterized as “whether the Foundation expected or intended all the damage for which the government now seeks redress.” Thus, from a coverage standpoint, the requisite intent for policy exclusion is not presumed absent at the initiation of such environmental coverage claims.

As to the issue raised regarding the definition of “occurrence,” the court initially determined that under comprehensive general liability policies, maximum coverage was reasonably expected by

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53. *Id.* at 277. The court stated: “[t]he activity which produced the alleged result may be fully intended and the residual effects fully known, but the damage itself may be completely unexpected and unintended.” *Id.*

54. *Id.*

55. *Id.*

56. *Id.* Specifically, the Foundation had operated the Louisville and Brownville sites for nine years of their sixty years in operation, and the Live Oak site for two of its thirty years. *Id.*

57. *Id.* (citing R.H. LONG, *THE LAW OF LIABILITY INSURANCE*, § 5.06 (1990)).

58. *James Graham Brown*, 814 S.W.2d at 277.

59. *Id.* at 278. As such, in the case at hand, a factual question existed as to whether the resulting environmental contamination was accidental and whether the intended damage was intended on the part of the Foundation’s board. Therefore, the decision of the circuit court in granting summary judgment was determined to be in error. *Id.*
the insured and that only expressly excluded risks could be dismissed from coverage. In accordance with this broad coverage, the term "occurrence" was found to be such that would be "broadly and liberally construed in favor of extending coverage to the insured." Tying these two issues together (intent and breadth of coverage), the court determined that:

[If injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable. While the activity which produced the alleged damage may be fully intended, recovery [on the part of the insurer] will not be allowed unless the insured intended the resulting damages.]

Thus, the test for coverage under an occurrence claim will be a subjective one, consistent with principles of construing ambiguity against the insurer and supporting the reasonable expectations of the insured since "it cannot be accepted as a fact that the parties in good faith intended to bargain for insurance that paid no benefits."

As to the duty to defend, the court held that the imputation of such a duty was an independent obligation under an insurance contract. However, based upon public policy and an insurer's duty of good faith and fair dealing with its insured, the court refused to deviate from long-standing tradition and summarized the duty in Kentucky to be as follows:

The duty to defend is separate and distinct from the obligation to pay any claim .... The defense clause in the policy contract is a contractual right of the insured for which he has paid a premium, and the duty to defend is broader than the duty to indemnify .... [A]n insurer which breaches its duty to defend and who is subsequently determined to owe a duty of indemnity must pay the judgment.

60. Id.
61. Id. (citing Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co., 477 N.E.2d 1227 (Ohio Ct. App. 1984)).
62. Id.
63. Id. at 279 (citing Fryman v. Pilot Life Ins. Co., 704 S.W.2d 205 (Ky. 1986)).
64. Id.
66. Id. at 277.
67. Id. at 280 (noting that the majority of Kentucky policyholders are not in the position financially to provide an adequate defense).
68. James Graham Brown, 814 S.W.2d at 280.
CONCLUSION

Recent judicial decisions have affected various aspects of insurance law. Two recent decisions note instances where an insurer cannot be compelled to subrogate a claim: 1) where the original insurance contract did not expressly provide that an excess liability carrier would provide coverage for an insolvent insurer, and 2) where an agent fails to secure a policy for the contracting insured despite the fact that premiums are paid to the agent. Additionally, courts have found void, as against public policy, the construction of particular terms and provisions in automobile insurance policies.

In the area of tort law, the court recently decided that a defendant may not be attributed credit to the monetary amount of liability based on the amount paid by another settling defendant. Also, courts have reevaluated the meaning of “permanent disfigurement” for purposes of meeting a threshold under the Motor Vehicle Reparations Act.

Numerous radical changes in the law were set forth in the decisions of Kentucky Cent. Ins. Co. v. Kempf and James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Ins. Co. The court of appeals in Kempf held that under Kentucky’s Underinsured Motorist Statute, a judgment is required before subrogation rights may be asserted against an underinsured’s carrier. In James Graham Brown, the supreme court determined that exclusion from coverage for environmental claims was appropriate only where the resulting damage was intentional and, regardless of that intent, the duty to defend was an independent obligation under an insurance contract.

As Kentucky prepares to enter the 21st century considerable attention needs to be paid by the courts in making public policy

71. See supra notes 5-16 and accompanying text.
72. See supra note 18 and accompanying text.
73. See supra notes 26-27 and accompanying text.
74. 813 S.W.2d 829 (Ky. Ct. App. 1991); see supra notes 29 and 42 and accompanying text.
75. 814 S.W.2d 273 (Ky. 1991); see supra note 43 and accompanying text.
76. Kempf, 813 S.W.2d at 831.
77. James Graham Brown, 814 S.W.2d at 280.
decision in the insurance law area. The General Assembly con-
tinues to overrule the courts when they go too far. With the
insurance companies consistently changing their policies, the *James
Graham Brown* decision will be of little to no value in the future.
The courts and the insurance companies need to be vigilant in
their decisions to meet the needs of Kentucky residents without
making insurance unaffordable.
DEVELOPMENTS IN BANKRUPTCY LAW DURING 1992

by Robert A. Goering*

There was considerable development in the area of bankruptcy law during 1992. The courts and Congress made new laws and changed the old laws in a variety of manners, resolving some issues and casting doubts in other areas.

The United States Supreme Court clarified how to determine the ninety day preference period when payment is made to a creditor by check, indicated that long term debts may be subject to the "ordinary course of business exception" just as short term debts are, discussed the issue of "lien stripping" in a Chapter 7 bankruptcy, determined that ERISA qualified pension plans are not property of the bankruptcy estate, and strictly applied Rule 4000(b) to a bankruptcy trustee.

The Fourth and Seventh Circuits addressed but failed to decide the continued viability of the new value exception after the codification of the absolute priority rule. The Sixth and Seventh Circuits determined that Bankruptcy Courts may not conduct jury trials.

The Judicial Council of the United States increased the filing fee in Chapter 7 and Chapter 13 bankruptcies effective December 1, 1992. The House and Senate passed bankruptcy amendments.

* Robert A. Goering is an adjunct faculty member at Salmon P. Chase College of law and a partner at the law firm, Goering & Goering. He is a certified bankruptcy specialist in consumer and business bankruptcy by the American Bankruptcy Institute. He is a 1957 graduate of Yale University and a 1962 graduate of Salmon P. Chase College of Law. The author gratefully acknowledges the assistance of Mary Lee Muehlenkamp in the preparation of this article.

6. In re Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992); In re Snyder, 967 F.2d 1126 (7th Cir. 1992).
7. In re Baker & Getty Financial Services, Inc., 954 F.2d 1169 (6th Cir. 1992); In re Grabill Corp., 967 F.2d 1152 (7th Cir. 1992).
in the closing hours of the 102d Congress, which although they did not make it through the conference committees, will likely be addressed again by Congress in 1993.9

I. SUPREME COURT DECISIONS

One area that was clarified by the United States Supreme Court was how to calculate the ninety day preference period when payment on a debt was made by check. Under the Bankruptcy Code, transfers of an interest of the debtor in property, for an antecedent debt, made to a creditor within ninety days of the filing of the bankruptcy petition, are preferential.10

In *Barnhill v. Johnson,*,11 the Court resolved the issue of what constitutes a complete transfer for preference purposes when payment was made by check.12 Differing results had been reached by various circuits on the issue of whether the date of transfer was the date the creditor received the check, or the date the check cleared the bank.13 Despite the broad definition of “transfer” under the Bankruptcy Code,14 the Court held that no transfer occurs when payment is made by check prior to when the drawee bank honors the check by paying it.15 The creditor’s receipt of the check is not considered even a conditional transfer because the “property” is the account maintained by the debtor at the drawee bank, and the creditor as holder of the check has no right of action against the bank or the account merely because of his receipt of the check.16

12. Id. at 1390.
13. Id. at 1388 n.3. Circuits applying the date of honor rule include Nicholson v. First Inv. Co., 705 F.2d (11th Cir. 1983) and In re New York City Shoes, 880 F.2d 679 (3rd Cir. 1989) (dicta); circuits applying the date of delivery rule include Global Distrib. Network Inc. v. Star Expansion Co., 949 F.2d 338 (4th Cir. 1991); In re Belknap, Inc., 909 F.2d 879 (6th Cir. 1986); In re Kenitra, Inc., 797 F.2d 796 (9th Cir. 1986), cert. denied sub nom.; and Morrow, Inc. v. Agri-Beef Co., 479 U.S. 1654 (1987).
14. “[T]ransfer” means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(58) (1988).
16. Id. at 1390-91.
In *Union Bank v. Wolas*, the Supreme Court faced another preference issue. The debtor made an interest payment and paid a loan commitment fee on a long term debt to its bank during the ninety day period preceding the filing of the bankruptcy petition. The trustee tried to recover these payments as preferential transfers under 11 U.S.C. § 547(b), and argued that long term debts are not eligible for the ordinary course of business exception.

The focus of the Court was whether the debt was incurred and payment was made in the ordinary course or financial affairs of the debtor and transferee rather than whether the debt was short term or long term. The Court held that payment on a long term debt within the ninety day preference period could not be avoided by the trustee if the transfers meet the "ordinary course of business" exception.

Two purposes of the preference section were identified. First, because the trustee can avoid pre-bankruptcy transfers made within ninety days of the filing, the debtor is protected from creditors racing to the courthouse to "dismember the debtor." Second, the principal bankruptcy policy of "equality of distribution among creditors of the debtor" is facilitated. The Court felt that, even if it is conceded that to allow long term creditors to use the ordinary course of business exception does not directly further the policy of equal treatment, the policy of deterring the race to the courthouse is furthered because long term creditors have no incentive to race to the courthouse, and the goal of equal treatment may in fact be indirectly furthered.

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18. Id. at 529.
19. Id.
20. Id. at 530.
21. Id. at 533. The ordinary course of business exception appears in the Bankruptcy Code at 11 U.S.C. § 547. This section states:
   (c) The trustee may not avoid under this section a transfer —
   (2) to the extent such transfer was —
      (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
      (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
      (C) made according to ordinary business terms.
22. Barnhill, 112 S. Ct. at 533.
23. Id.
24. Id.
The Court addressed the issue of "lien stripping" in a Chapter 7 bankruptcy in *Dewsnup v. Timm.* Creditors made a loan to the debtor, secured by a deed of trust granting a lien on certain real property owned by the debtor. The debtor defaulted on the loan, and the creditors issued a notice of default. However, before the foreclosure sale, the debtor filed Chapter 7 bankruptcy.

The debtor attempted to "strip down" or avoid the part of the creditor's lien to the extent it exceeded the judicially determined value of the collateral. The debtors argued that 11 U.S.C. § 506(a), which defines an allowed claim as secured to the extent of the value of the creditor's interest in the estate's interest in such property, and 11 U.S.C. § 506(d), which states that "to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void," permit the bankruptcy court to reduce or "strip down" the lien to the value of the collateral.

The Court rejected the debtor's argument, holding instead that 11 U.S.C. § 506(d) does not allow a debtor to "strip down" a creditor's lien in a Chapter 7 bankruptcy. The term "allowed secured claim" was analyzed term-by-term to refer, first, to a claim that is allowed, and second, to a claim that is secured. Because there was no question that the claim was "allowed" under 11 U.S.C. § 502 and because the claim was secured by a lien with recourse to the underlying security, no stripping down was permitted. Any increase in value over the judicially determined value during the bankruptcy will accrue for the benefit of the creditor, not for the benefit of the debtor or other unsecured creditors. The Court carefully noted that it was not determining whether "allowed secured claim" has a different meaning under other provisions of the Bankruptcy Code.

26. Id. at 775.
27. Id.
28. Id.
29. Id.
30. Id. at 778.
31. Id. at 777.
32. Id.
33. Id. at 778.
34. Id. at 778 n.3.
Whether ERISA\textsuperscript{35} qualified pension plans are property of the bankruptcy estate was considered in \textit{Patterson v. Shumate}.\textsuperscript{36} Shumate was a participant in his employer's ERISA qualified pension plan.\textsuperscript{37} The employer filed bankruptcy, and the trustee terminated the pension plan and paid all participants but Shumate.\textsuperscript{38} When Shumate filed personal bankruptcy two years later, his bankruptcy trustee wanted Shumate's interest in the ERISA plan to be considered part of his bankruptcy estate.\textsuperscript{39}

Under the Bankruptcy Code, property of the estate does not include a debtor's interest in a plan or trust that contains a transfer restriction "enforceable under applicable nonbankruptcy law."\textsuperscript{40} The pension plan contained an anti-alienation provision as required by ERISA.\textsuperscript{41} The Court found the plain language of the Bankruptcy Code and ERISA to be determinative and held that because the literal terms of 11 U.S.C. § 541(c)(2) were satisfied and the asset was removed from the control of the debtor, ERISA pension plans are not property of the bankruptcy estate.\textsuperscript{42}

The Court rejected the argument that "applicable nonbankruptcy law" is limited to state law.\textsuperscript{43} The Bankruptcy Code did not limit the definition to state law only because Congress knew how to restrict the scope of applicable law to state law if it wanted to.\textsuperscript{44}

\textit{Taylor v. Freeland & Kronz}\textsuperscript{45} focused the Supreme Court's attention on Bankruptcy Rule 4003(b).\textsuperscript{46} Under that rule, a trustee has thirty days after the section 341 creditor's meeting to file objections to the list of property claimed by the debtor as exempt.\textsuperscript{47} In \textit{Taylor}, the Chapter 7 debtor claimed an exemption

\begin{itemize}
  \item \textsuperscript{36} 112 S. Ct. 2242 (1992).
  \item \textsuperscript{37} \textit{Id.} at 2245.
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.}
  \item \textsuperscript{40} 11 U.S.C. § 541(c)(2) (1988).
  \item \textsuperscript{41} \textit{Patterson}, 112 S. Ct. at 2245. 29 U.S.C. § 1056(d)(1) of ERISA provides that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."
  \item \textsuperscript{42} \textit{Patterson}, 112 S. Ct. at 2246-48.
  \item \textsuperscript{43} \textit{Id.} at 2246.
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} 112 S. Ct. 1644 (1992).
  \item \textsuperscript{46} \textit{Id.} at 1648.
  \item \textsuperscript{47} Fed. R. Bank. P. § 4003(b) (1988).
\end{itemize}
for potential proceeds from a pending employment discrimination suit.\footnote{Taylor, 112 S. Ct. at 1647.} The trustee wrote a letter to the debtor advising that he considered any proceeds to be part of the estate, but the trustee did not file a formal objection to the claimed exemption.\footnote{Id.} The debtor later settled the suit for $110,000 and the trustee filed a complaint against the debtor in bankruptcy court demanding that the money be turned over to the bankruptcy estate.\footnote{Id.}

The trustee contended that since the debtor did not have even a colorable basis for claiming all proceeds from the suit as exempt, the court should review the exemption at the point when it is being challenged rather than refuse to review the exception since the thirty day objection period had passed.\footnote{Id. at 1648.} The trustee argued that requiring good faith from a debtor claiming exemptions will presumably discourage them from claiming meritless exemptions in the hope that the trustee will not object.\footnote{Id. at 1649.} This good faith requirement had been adopted by several courts of appeals.\footnote{Id. See In re Patterson, 920 F.2d 1389, 1393-94 (8th Cir. 1990); In re Dembs, 757 F.2d 777, 780 (6th Cir. 1985); and In re Sherk, 918 F.2d 1170, 1174 (5th Cir. 1990).}

The debtor maintained she should be able to keep the money since she claimed the property as exempt and the trustee did not file a timely objection.\footnote{Taylor, 112 S. Ct. at 1647.} The court agreed with the debtor by looking at the plain language of Bankruptcy Rule 4003(b).\footnote{Id. at 1648.} Although the trustee could have made a valid objection to the claimed exemption, the court ruled he was barred from later challenging the validity of the exemption because he did not act promptly within the statutory time allotted.\footnote{Id. at 1648-49.} The court noted that while Congress can enact legislation requiring that exemptions be claimed in good faith, the Supreme Court does not have the authority to require that which Congress has not.\footnote{Id. at 1649.}

In applying Rule 4003(b) strictly to a trustee, the Court in Taylor showed its tendency to strictly apply the words of a statute. Like Taylor, Patterson v. Shumate\footnote{112 S. Ct. 2242 (1992). See supra notes 36-44 and accompanying text.} shows the Court's use of strict statutory interpretation.
II. COURTS OF APPEALS DECISIONS

While the United States Supreme Court clarified several bankruptcy issues in 1992, the Courts of Appeals in the Fourth and Seventh Circuits considered, but failed to decide, the issue of whether the new value exception is still a viable concept in light of the codification of the absolute priority rule for Chapter 11 bankruptcies.\(^{59}\)

Under the Bankruptcy Code, the bankruptcy court is obliged to confirm a Chapter 11 plan despite objections of any impaired class of creditors so long as the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."\(^{60}\) The court-created absolute priority rule, codified in the Bankruptcy Code, provides that a plan is considered "fair and equitable" to a dissenting class if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property."\(^{61}\)

Prior to the codification of the absolute priority rule, the courts had recognized a "new capital exception."\(^{62}\) In explaining this exception, one court noted that "there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor .... Where th[e] necessity [for new money] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made."\(^{63}\)

Bankruptcy courts are divided as to whether the codification of the absolute priority rule after the Los Angeles Lumber\(^{64}\) case, with no codification of the new capital exception, eliminated the availability of the exception.\(^{65}\) Circuit courts have discussed but not decided the issue, and the United States Supreme Court expressly declined to decide the issue in 1988.\(^{66}\)

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\(^{59}\) In re Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992); In re Snyder, 967 F.2d 1126 (1992).


\(^{62}\) Bryson, 961 F.2d at 503.

\(^{63}\) Id. (quoting Case v. Los Angeles Lumber Prod. Co., 308 U.S. 106, 121 (1939)).


\(^{65}\) Bryson, 961 F.2d at 503.

In *In re Bryson Properties*, XVIII, the Fourth Circuit was faced with a Chapter 11 debtor who argued that the new capital exception was still viable and that his reorganization plan should be confirmed by the court. *In re Bryson* is generally cited for the proposition that the Fourth Circuit no longer accepts the new capital exception to the absolute priority rule despite the fact that the court did not expressly decide the issue. "Even if some limited new capital exception were viable under the Bankruptcy Code, it would not be so expansive as to apply under the facts of this case." 68

Instead, the court looked to the plain language of the Bankruptcy Code and found that the exclusive right given to equity holders to contribute capital constitutes "property" under 11 U.S.C. § 1129(b)(2)(B)(ii) which was received or retained on account of a prior interest. 69 The court refused to confirm the plan. 70

The Seventh Circuit also faced the new value exception in *In re Snyder*. 71 As in *In re Bryson*, the debtor wanted its reorganization plan to be confirmed by the court on the basis of the "new value" or "fresh capital" exception to the absolute priority rule. 72 After a lengthy analysis of the history of the absolute priority rule and the new value exception, the court declined to decide the viability of the exception. 73 "[A]ssuming the new value exception retains its viability, the Debtors' proposed contribution fails to meet its requirements" because the proposed contribution is not "substantial." 74

Since the court held that the proposed contribution was not "substantial" rather than totally disavowing the new value exception, many believe the exception will be found to be acceptable if and when the Seventh Circuit does decide the issue. The reluctance of the circuit courts to decide the issue, 75 and the split

67. 961 F.2d 496 (4th Cir. 1992).
68. Id. at 505.
69. Id. at 504.
70. Id. at 505.
71. 967 F.2d 1126 (1992).
72. Id. at 1127.
73. Id. at 1130-31.
74. Id. at 1131.
75. See, e.g., Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) and *In re Stegall*, 865 F.2d 140 (7th Cir. 1989).
of opinions in the bankruptcy court\textsuperscript{76} make the issue of the new value exception one that the Supreme Court will need to resolve. The Sixth Circuit addressed the issue of whether a bankruptcy court may conduct a jury trial in \textit{In re Baker & Getty Financial Services, Inc.}\textsuperscript{77} The trustee in an involuntary bankruptcy sought a declaratory judgment regarding coverage and payment under a fidelity bond.\textsuperscript{78} In a bench trial for this core proceeding, the bankruptcy court awarded $500,000 under the bond.\textsuperscript{79} The district court affirmed that the proceeding was a core proceeding, but remanded the case to the bankruptcy court for a jury trial.\textsuperscript{80}

The Sixth Circuit first noted that the circuits were split on the issue of whether the bankruptcy court can conduct jury trials.\textsuperscript{81} The court looked to the statutory language in the Bankruptcy Code and Bankruptcy Rules and found no authorization from Congress for bankruptcy courts to conduct jury trials.\textsuperscript{82} In the only mention of jury trials, the Bankruptcy Code indicates that it does not affect a right to jury trial that a person may have regarding a personal injury or wrongful death claim.\textsuperscript{83} Because there is no express authority from Congress, the court refused to imply that Congress intended that bankruptcy courts conduct jury trials.\textsuperscript{84}

The Seventh Circuit faced the same question and also concluded that bankruptcy courts may not conduct jury trials in \textit{In re Grabill Corp.}\textsuperscript{85} When a jury trial is required by the Seventh Amendment, the trial must be in the district court sitting in its original jurisdiction of bankruptcy because the Bankruptcy Code

\textsuperscript{76} Compare, e.g., \textit{In re Pullman Constr. Ind., Inc.}, 107 B.R. 909 (Bankr. N.D. Ill. 1989) with \textit{In re Pine Lake Village Apartment Co.}, 19 B.R. 819 (Bankr. S.D.N.Y. 1982).

\textsuperscript{77} 954 F.2d 1169 (6th Cir. 1992).

\textsuperscript{78} Id. at 1170.

\textsuperscript{79} Id. at 1175.

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 1173. One circuit held that bankruptcy courts may conduct jury trials. See Ben Cooper, Inc. v. The Ins. Co. of the State of Pa., 896 F.2d 1394, 1402-04 (2d Cir. 1990), \textit{cert. granted} 111 S. Ct. 425 (1990) \textit{reinstated} 924 F.2d 36, \textit{cert. denied} 111 S. Ct. 2041 (1991). Two circuits held that no jury trials may be conducted in bankruptcy court. See \textit{In re United Mo. Bank of Kansas City, N.A.}, 901 F.2d 1449, 1454-57 (8th Cir. 1990) and \textit{Kaiser Steel Corp. v. Frates}, 911 F.2d 380, 392 (10th Cir. 1990).

\textsuperscript{82} \textit{In re Baker}, 954 F.2d at 1173.

\textsuperscript{83} Id. (citing 28 U.S.C. \textsection 1411(a) (1988)).

\textsuperscript{84} Id.

\textsuperscript{85} 967 F.2d 1152 (7th Cir. 1992).
does not authorize bankruptcy judges to conduct jury trials.\textsuperscript{86} This court also noted that circuits are split on this issue, but did not find it surprising "given the ambiguous statute and legislative history."\textsuperscript{87}

\section*{III. LEGISLATIVE ACTIVITY DURING 1992}

Using the authority granted in the Bankruptcy Code,\textsuperscript{88} and in response to pressure from Congress on government agencies to look to user fees as a revenue source, the Judicial Council of the United States increased the filing fee effective December 1, 1992 in Chapter 7 and Chapter 13 bankruptcies from $120 to $150.\textsuperscript{89} If the filing fee is paid in installments,\textsuperscript{90} an Ohio debtor must submit a down payment of $30 when the petition is filed, and a Kentucky debtor must submit a down payment of $70 with the petition.

The House and Senate both passed far reaching amendments to bankruptcy law shortly before adjourning in 1992.\textsuperscript{91} The House Bill provided for status conferences to be held by the court, something that is not expressly provided for under current law.\textsuperscript{92} The House Bill also called for mandatory appellate panels.\textsuperscript{93} Under current law, appellate panels comprised of bankruptcy judges may be established by the judicial council of a circuit and approved for use by a majority of district judges within each district.\textsuperscript{94} The House Bill would make these panels mandatory, and would result in bankruptcy judges deciding bankruptcy law

\begin{footnotesize}
\textsuperscript{86} Id. at 1158.
\textsuperscript{87} Id. at 1153.
\textsuperscript{88} 28 U.S.C. \S\ 1930(b) (1988).
\textsuperscript{90} An individual commencing a voluntary case or a joint case under Title 11 may pay such fee in installments. 28 U.S.C. \S\ 1930(a) (1988).
\textsuperscript{91} S. 1985 was passed by the Senate on June 17, 1992. H.R. 6020 was passed by the House on October 3, 1992. After amending S. 1985 to conform to H.R. 6020, the House passed S. 1985. A compromise bill was reported out of conference October 5 and passed the Senate on October 7, however, the legislation died on October 9 when the House adjourned. David E. Bantleon & Kathy Kresch, A bankruptcy law for the '90s., BUS. LAW TODAY, Jan.-Feb. 1993, at 25.
\textsuperscript{92} H.R. 6020, 102d Cong., 2d Sess. \S\ 105(a) (1992). A status conference would provide for formal updating to the court as to the status of cases. There is currently no specific authority for status conferences in the Bankruptcy Code.
\textsuperscript{93} Id. at \S\ 105(c).
\textsuperscript{94} 28 U.S.C. \S\ 158 (1988). The Sixth Circuit judicial council has not adopted bankruptcy panels.
\end{footnotesize}
during the initial appeal of a bankruptcy court decision.  

House Bill 6020 would substantially increase compensation for trustees. The fraudulent conveyance period would be extended from its current one year period to two years under the House Bill. The maximum time the court in a Chapter 11 bankruptcy could allow as the exclusivity period for the debtor to file the reorganization plan would be 425 days.

The debt limit in a Chapter 13 bankruptcy would be limited to $1,000,000 total, regardless of whether the debts are secured or unsecured. Also in a Chapter 13 filing, the law would change to state that only first mortgages on principal residences may not be altered.

The House Bill contained many other provisions important to the bankruptcy practitioner. The Senate Bill contained both similar and dissimilar provisions to the House Bill. Perhaps the most significant aspect of both bills would be the reversal of the Seventh Circuit case that applied a one year preference period rather than ninety days for a lender whose debt was guaranteed by an insider of the debtor because the payment produced a benefit for an insider creditor, including a guarantor.

The House and Senate bills were passed in the closing hours of the 102d Congress. Because the major sections of the bills are so similar, many commentators and practitioners, including this author, believe the 103d Congress will resume discussions about Bankruptcy Amendments later in 1993.

CONCLUSION

The past year brought clarification to some issues regarding preferences, lien stripping, ERISA plans, filing objections to

95. H.R. 6020 at § 105(c).
96. Id. at § 108.
97. Id. at § 111.
98. Id. at § 102. The Bankruptcy Code currently provides that in a Chapter 11 bankruptcy, only the debtor may file a plan during the first 120 days after the date of filing. 11 U.S.C. § 1121(b). The court is permitted to extend this 120-day period upon request of a party in interest and after notice and hearing. Id. at § 1121(d).
99. H.R. 6020 at § 108(a).
100. Id. at § 202. Currently, the plan filed by the debtor is not permitted to modify any mortgage on the debtor's principal residence. 11 U.S.C. § 1322(b)(2).
103. See Levin v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989). S. 1985 § 301 and H.R. 6020 § 301 would amend the Bankruptcy Code to disallow a trustee to recover a transfer from a transferee who is not an insider.
104. See supra notes 101 and 102.
claimed exemptions, and jury trials. It also brought a lack of resolution on the issue of the new value exception to the absolute preference rule, and a need for action by the United States Supreme Court on the issue. Legislation amending the Bankruptcy Code was introduced but not enacted into law. The year of 1993 promises to be a year to watch for further decisions and changes regarding bankruptcy law.
A SURVEY OF CRIMINAL LAW STATUTES
ENACTED IN 1992

by W. Robert Lotz*

I. INTRODUCTION

The 1992 regular session of the Kentucky General Assembly took up and passed a number of bills substantially affecting areas of practice in criminal law. This survey discusses and analyzes a number of these bills, all amending the Kentucky Revised Statutes, which were selected for their importance to the practicing criminal lawyer. The author followed these bills through the legislature and testified in connection with a number of them. A short summary of legislative trends and directions, along with a forecast of future trends is included.

II. NEW OFFENSES CREATED

A. Stalking (KRS §§ 508.130-.150)

Under House Bill 445, the new crime of stalking was created. The intent of this legislation was to deter and punish persons who engage in an intentional course of harassing conduct directed at a specific person or persons. Under Kentucky Revised Statutes (KRS) § 508.130, the definitional section, the course of conduct must be one that would cause a reasonable person to suffer substantial mental distress, must serve no legitimate pur-
pose, and must involve a pattern of conduct composed of two or more acts evidencing a continuity of purpose. An exclusion for "Constitutionally protected activity" is included, with the burden apparently being placed upon a defendant to convince the court, as a matter of law, that his actions were constitutionally protected. There are two degrees of the offense.

KRS § 508.150, a class A misdemeanor, sets forth the elements of stalking in the second degree. Under KRS § 508.150, the offense is committed when a defendant intentionally:

- Stalks another person; and
- Makes an explicit or implicit threat with the intent to place that person in a reasonable fear of:
  1. Sexual contact as defined in KRS 510.010.
  2. Physical injury; or
  3. Death.

An attempt by the bill's sponsors to more broadly define "sexual contact" under KRS § 510.010(7) was defeated. Therefore, the definition of "sexual contact" is that still used in connection with sexual abuse prosecutions under KRS § 510.110, § 510.120 and 510.130.

5. Id.
10. KRS § 510.110 states:
   Sexual abuse in the first degree. (1) A person is guilty of sexual abuse in the first degree when: (a) He subjects another person to sexual contact by forcible compulsion; or (b) He subjects another person to sexual contact who is incapable of consent because he: 1. Is physically helpless; or 2. Is less than twelve (12) years old. (2) Sexual abuse in the first degree is a Class D felony.

11. KRS § 510.120 states:
   Sexual abuse in the second degree. (1) A person is guilty of sexual abuse in the second degree when: (a) He subjects another person to sexual contact who is incapable of consent because he is mentally retarded or mentally incapacitated; or (b) He subjects another person who is less than fourteen (14) years old to sexual contact. (2) Sexual abuse in the second degree is a Class A misdemeanor.

12. KRS § 510.130 states:
   Sexual abuse in the third degree. (1) A person is guilty of sexual abuse in the
KRS § 508.140, a class D Felony, sets forth the elements of stalking in the first degree. Stalking in the first degree includes all of the basic elements of stalking in the second degree and upgrades the crime to a felony offense if any of the following additional elements are present:

a. A Domestic Violence Protective Order or other Court Order has been issued and the Defendant has had service or notice of it.
b. A Criminal Complaint is currently pending and the defendant has had service or notice of it.
c. The Defendant has been convicted within the previous 5 years of a Felony or Class A Misdemeanor (other than Stalking in the Second Degree), with the same victim or;
d. The Defendant was armed with a deadly weapon while committing the offense.

B. Possession of Child Pornography (KRS § 531.335)

Senate Bill 116 created a new offense formally entitled "Possession of Matter Portraying a Sexual Performance by a Minor." KRS § 531.335 criminalizes, for the first time under Kentucky law, the possession or control of matter depicting an actual sexual
performance by a minor. The definition of the offense requires proof of a defendant’s knowledge of the content and character of the matter and that the sexual performance is by a minor. Punishment is set as a class A misdemeanor for a first offense and as a class D felony for a second or subsequent offense.

C. Use and Investment of Drug Related Income (KRS § 218A.1405)

House Bill 132, as part of the Omnibus Controlled Substances Act, made it a crime for any person who has knowingly received any income derived directly or indirectly from trafficking in a controlled substance, to use or invest that income to acquire property or in connection with a commercial enterprise. KRS § 218A.1405 classifies the offense as a class D felony and also provides for forfeiture of property constituting or derived from such drug income. Criminal defense attorneys should be aware of this new statute as it arguably applies to legal fees which an

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20. Id.
24. KRS § 218A.1405 states in full:

Use and investment of drug-related income — Penalties. (1) It shall be unlawful for any person who has knowingly received any income derived directly or indirectly from trafficking in a controlled substance to use or invest any part of that income, or any proceeds thereof, to acquire any property, or to establish or operate any commercial enterprise. (a) As used in this section, “property” includes real and personal property, whether tangible or intangible. (b) As used in this section, “commercial enterprise” means any proprietorship, partnership, corporation, association or other legal entity, including any individual or group not a legal entity, which is engaged in any business or commercial activity or whose activities affect business or commerce. (2) Any person who violates this section shall be guilty of a Class D felony and, in addition to other penalties prescribed by law, shall forfeit any property constituting or derived from any income received directly or indirectly from trafficking in a controlled substance.

attorney knows are being paid from drug money proceeds.

D. Violation of Domestic Violence Protection Order
(KRS § 403.763)29

House Bill 115 created a new class A misdemeanor offense of intentional violation of a domestic violence order.30 Criminal liability requires that the defendant have been served or given notice of the existence of the order.31 This offense was added to the domestic violence legislation under House Bill 115 because of concerns that the existing civil contempt procedures were denying certain charged defendants of fundamental due process rights.32 When the charge is a misdemeanor rather than civil contempt, the defendant has more clearly delineated access to appointed counsel, bond setting, jury trial and other procedures.

Under KRS § 403.760(5), civil proceedings and criminal proceedings for violation of a protective order are mutually exclusive.33 Once one proceeding has been initiated the other may not be undertaken. Under KRS § 403.760, peace officers having probable cause to believe a violation of a domestic violence order has occurred are mandated to arrest and charge without necessity of warrant.34 If the domestic violence order is from another county from that in which the peace officer makes the arrest, proceedings automatically become criminal prosecutions.35 Such defendants

29. KRS § 403.763 states:
Criminal penalty for violation of protective order. (1) A person is guilty of a violation of a protective order when he intentionally violates the provisions of an order issued pursuant to KRS 403.715 to 403.785 with which he has been served or has been given notice. (2) Violation of a protective order is a Class A misdemeanor.


31. Id.

32. Id.

33. KRS § 403.760(5) states, “Civil proceedings and criminal proceedings for violation of a protective order for the same violation of a protective order shall be mutually exclusive. Once either proceeding has been initiated the other shall not be undertaken regardless of the outcome of the original proceeding.” KY. REV. STAT. ANN. § 403.760(5) (Michie/Bobbs-Merrill 1990).

34. KY. REV. STAT. ANN. § 403.760 (Michie/Bobbs-Merrill 1990).

35. Id.
should be arraigned, given bond, and appointed counsel under the rules of criminal procedure. 36

E. Operating an Aircraft Under the Influence of Alcohol or Other Substance (KRS § 183.061) 37

House Bill 36 created a new offense of operating or acting as a crew member of a civil aircraft while using or under the influence of alcohol or other impairing substance. 38 KRS § 183.061 incorporates a per se section which criminalizes any such act

36. Id.
37. KRS § 183.061 states:
Prohibition against operation of or acting as crewmember of civil aircraft while using or under the influence of alcohol or other substance — Consent to tests — Penalty — Reports to Federal Aviation Administration. (1) As used in this section, "crewmember" means any person performing or assigned to perform any duty in a civil aircraft during the time which the aircraft is undergoing preflight inspection, boarding, or carrying passengers or crew, or any time the aircraft is under power or in flight. (2) It is unlawful for any person to operate, attempt to operate, or act, or attempt to act, as a crewmember of any civil aircraft in this Commonwealth: (a) Within eight (8) hours after the consumption of any alcoholic beverage; or (b) While under the influence of alcohol; or (c) While using any substance that affects his faculties in any way contrary to safety; or (d) With four one-hundredths of one percent (0.04%) or more by weight of alcohol in his blood. (3) Any person who operates or attempts to operate or acts or attempts to act as a crewmember of any aircraft in this Commonwealth is considered to have given his consent to one (1) or more tests of his blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which affects his faculties in any way contrary to safety, if arrested for a violation of this section. (4) Testing for alcohol concentration or other substances shall be done in the manner prescribed in KRS Chapter 189A, and the defendant shall have the same rights as provided by KRS Chapter 189A with regard to refusing the test. (5) Any person who violates the provisions of subsection (2) of this section shall be punished as provided in KRS 189A.010. Any person who refuses a test offered pursuant to subsection (3) shall be fined two hundred dollars ($200) or be imprisoned in the county jail for not less than forty-eight (48) hours nor more than thirty (30) days, or both. Conviction for a violation of subsection (2) shall not bar a conviction for refusal to take tests for alcohol or other substances. Conviction for refusal to take tests for violation of alcohol or other substances shall not bar a conviction for a violation of subsection (2). (6) The filing of charges, results of chemical testing, and results of the trial or other subsequent proceedings shall be reported to the division, branch, or office of the Federal Aviation Administration having jurisdiction for regulation and certification by the law enforcement agency making the arrest within thirty (30) days of the date of arrest. Law enforcement agencies possessing evidence of a violation of this section shall present the evidence for use by the Federal Aviation Administration as well as for prosecution by the state under this section.

occurring within 8 hours of consumption of alcohol or alcoholic beverage or with more than 0.04% of alcohol in the blood.  

Testing, advice of rights and the right to independent testing procedures are the same as under Kentucky's 1992 driving under the influence statutes. Refusals of testing are punished with a mandatory minimum 48 hour jail sentence and/or a $200.00 fine. The punishments are otherwise the same as provided by Kentucky law for driving motor vehicles under the influence of alcohol.

III. REDEFINITION OR CODE CHANGES TO PREVIOUSLY EXISTING OFFENSES

A. Rape with an Object (KRS § 510.010(8)(9))

Senate Bill 160 amended the definition of "sexual intercourse" so as to equate penetration of the anus or sex organs of a victim with a foreign object to penetration with the penis. The practical effect of this definition change is to punish penetration by objects as rape under the existing rape statutes. Under KRS § 510.010, penetration by finger or any other non-penile part of the actor's person is not included and remains punishable as sexual abuse. The foreign object must be manipulated by a person other than the complainant, and there is an exception for "performance of generally recognized health care practices." The same penalties

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42. KRS § 510.010(8) states:
   "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs or anus of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ or anus by a foreign object in the course of the performance of generally recognized health care practices.
44. See supra note 42.
45. Id.
are imposed for rape with an object as in rape cases involving penile penetration.\textsuperscript{46} Since the penetration with an object has been included in the definition of “sexual intercourse in its ordinary sense,” the statute is unclear as to whether both penile and foreign object penetration in a single continuous assault constitutes one or two rape offenses.

\textbf{B. Omnibus Controlled Substances Act (KRS §§ 218A.010-.350)}\textsuperscript{47}

House Bill 132 made a complete review and overhaul of the Kentucky statutes governing criminal offenses involving controlled substances.\textsuperscript{48} The penalty provisions under KRS chapter 218A were revised to provide separate penalty sections following each definition of an offense.\textsuperscript{49} Almost uniform across the board enhancement for subsequent offenses was included in the new sentencing scheme. Any prior trafficking offense involving controlled substances now enhances a current offense.\textsuperscript{50} A prior conviction for a non-trafficking offense only enhances a current non-trafficking offense.\textsuperscript{51} Simple possession of marijuana was elevated to class A misdemeanor status,\textsuperscript{52} but, unlike other offenses, is not enhanced for repeat offenders.\textsuperscript{53}

The definitional section of Kentucky’s controlled substances act was amended in three substantial areas.\textsuperscript{54} Controlled substance “analogues” (often known as “designer drugs”) are now included within the parameters of the act.\textsuperscript{55} In marijuana cases, stalks and seeds may now be included in the gross weight which is used to determine the level of offense.\textsuperscript{56} In non-marijuana cases,


\textsuperscript{51} \textit{Id.}


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}
non-controlled substances (often known as "cut") are now included in the gross weight of a controlled substance for purposes of determining the level of offense. These definitional changes bring the Kentucky statutes more in line with federal drug statutes.

For the first time expungement of a conviction is available to first offenders convicted of misdemeanor or felony drug possession charges. Previously, expungement was available only for convictions for possession of marijuana. Voided convictions under the expungement section cannot be used for enhancement or legal disabilities, and may occur only once with respect to any person. Application cannot be made for expungement until the person has completed treatment, probation, or other sentence. This expungement provision should apply to persons convicted before its effective date.

C. Increase in Felony Theft Level from $100.00 to $300.00 (KRS §§ 514.010-.060)

House Bill 651 made theft offenses misdemeanors unless the value of property involved was $300.00 or more. Previously the felony theft level had been set at $100.00. All the theft offenses under KRS § 514.010 were amended, where applicable. The increased level has not been published as amending KRS 514.110, receiving stolen property. It is anticipated, since this was the intent of the law, that this section will be clarified in the 1994 legislature so as to set the $300.00 felony level in receiving stolen property cases as well.

57. Id.
60. Id.
61. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
D. Battered Spouse Defense (KRS § 503.010(3), KRS § 508.050(3))

House Bill 256 amended the Kentucky statutes regarding the use of physical force in self-protection so as to allow admission of evidence of prior acts of domestic violence by the person against whom the force was used in support of a defendant's claim of self-defense justification. The definition of "imminent" under KRS § 503.010(3) was amended to allow a jury to infer a belief that danger was imminent from a past pattern of repeated serious abuse. These amendments codify the battered spouse defense into Kentucky law.

IV. SENTENCING, PUNISHMENT AND POST CONVICTION LAW CHANGES

A. Felony Shock Probation (KRS § 439.265(3)(a)) (The Omnibus Penalties Revision Act)

House Bill 20 reviewed the penalty provisions for a large number of offenses scattered outside of the criminal code and

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67. KRS § 503.010 states:
Definitions for chapter. The following definitions apply in this chapter unless the context otherwise requires: (1) "Deadly physical force" means force which is used with the purpose of causing death or serious physical injury or which the defendant knows to create a substantial risk of causing death or serious physical injury. (2) "Dwelling" means any building or structure, though movable or temporary which is for the time being either totally or partially the defendant's home or place of lodging. (3) "Imminent" means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse. (4) "Physical force" means force used upon or directed toward the body of another person and includes confinement.


68. KRS § 503.050 states:
Use of physical force in self-protection — Admissibility of evidence of prior acts of domestic violence and abuse. (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person. (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat. (3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.


71. KRS § 439.265(3)(a) provides:
reclassified those penalty provisions so that all non-code felonies and misdemeanors are assigned a class.\textsuperscript{72} Such offenses can now be sentenced under the existing sentencing scheme for criminal code offenses in KRS § 532.010.\textsuperscript{73} Wherever discretion had to be exercised as to whether a penalty range should be increased or reduced by the new classification, the penalties were generally reduced by the reclassification.

House Bill 20 also amended Kentucky's Shock Probation Act, by adding KRS § 439.265(3)(a) which allows a sentencing judge to order a defendant held in a local detention facility while the court rules upon motions for shock probation.\textsuperscript{74} The court can also order work release or community service for class C and class D felons while the court decides on shock probation.\textsuperscript{75} Defendants may not be transferred into the state system until the shock probation motion has been ruled upon.\textsuperscript{76} The Commonwealth is given an opportunity to argue for or against work release or community service at a hearing.\textsuperscript{77} This statute is unclear as to whether or not a motion must be filed by a defendant before a judge may enter such an order.\textsuperscript{78} Although the bill aims, in part, at keeping employment options open for low level felons being considered for shock probation, it is unclear whether the court can enter orders during the first 30 days after sentencing.\textsuperscript{79}

During the period in which the defendant may file a motion pursuant to this statute, the sentencing judge, within his or her discretion, may order that the defendant be held in a local detention facility that is not at or above maximum capacity until such time as the court rules on said motion. During this period of detention, and prior to the court's ruling on said motion, the court may require the defendant to participate in any approved community work program or other forms of work release. Persons held in the county jail pursuant to this subsection shall not be subject to transfer to a state correctional facility until the decision is made not to place the petitioner on shock probation.

\textsuperscript{72} H.B. 256, Regular Leg. Sess. (Ky. 1992).
\textsuperscript{73} KY. REV. STAT. ANN. §§ 532.010-.030 (Michie/Bobbs-Merrill 1990).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} The reasons for the confusion stems from KRS § 439.265(1) which states that the court may rule upon a motion to suspend execution of a sentence not earlier than thirty days after the defendant has been incarcerated following his conviction and sentencing.

B. County Jails to House Certain Class D Felons

(KRS § 532.100(4))

House Bill 504 amends KRS § 532.100 to provide that all class D felons (except sexual offenders with a sentence of two years or more) must serve their sentence as state prisoners in the county jail unless the county has chosen to get a waiver from the Department of Corrections. All other state felony prisoners must be transferred out of the county jail within 40 days of final sentencing. The jailor may request certain class D prisoners be transferred into the state system. Provision is made for the state to pay a per diem amount to county jailors for the class D Felons.

This provision can have a substantial effect on class D felons who could end up spending years in a county jail if parole is not granted. Such felons, by not being absorbed into the state system, also are currently barred from special services in that system such as education or inpatient alcohol and drug treatment programs. They may, however, be classified for community custody status, allowing access to furloughs and community work service.

C. Misdemeanor Expungement (KRS § 431.078)

House Bill 242 creates a new section of the Code allowing expungement of misdemeanor and violation convictions (except

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80. KRS § 532.100(4) provides:
The provisions of KRS 500.080(5) notwithstanding, if a Class D felon is sentenced to an indeterminate term of imprisonment of five (5) years or less, he shall serve that term in a county jail; except that, when an indeterminate sentence of two (2) years or more is imposed on a Class D felon convicted of a sexual offense enumerated in KRS 197.410(1), the sentence shall be served in a state institution. Counties choosing not to comply with the provisions of this subsection shall be granted a waiver by the commissioner of the Department of Corrections.


83. Id.

84. The sentence of imprisonment for a class D felony is from one to five years in the state penitentiary or reformatory. KY. REV. STAT. ANN. § 532.020 (Michie/Bobbs-Merrill 1990).


86. KRS § 431.078 provides:
Expungement of misdemeanor and violation conviction records. (1) Any person who
for sex offenses and sexual offenses committed against a child).\textsuperscript{67} Applications for expungement cannot be filed until five years has passed since completion of the sentence or probationary term.\textsuperscript{88} Applicants cannot have any felony convictions, any subsequent criminal convictions, or pending charges, or have had any other criminal convictions for five years prior to the conviction sought

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has been convicted of a misdemeanor or a violation, or a series of misdemeanors or violations arising from a single incident, may petition the court in which he was convicted for expungement of his misdemeanor or violation record. The person shall be informed of the right at the time of adjudication. (2) The petition shall be filed no sooner than five (5) years after the completion of the person's sentence or five (5) years after the successful completion of the person's probation, whichever occurs later. (3) Upon the filing of a petition, the court shall set a date for a hearing and shall notify the county attorney; the victim of the crime, if there was an identified victim; and any other person whom the person filing the petition has reason to believe may have relevant information related to the expungement of the record. Inability to locate the victim shall not delay the proceedings in the case or preclude the holding of a hearing or the issuance of an order of expungement. (4) The court shall order sealed all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records, if at the hearing the court finds that: (a) The offense was not a sex offense or an offense committed against a child; (b) The person had no previous felony conviction; (c) The person had not been convicted of any other misdemeanor or violation offense in the five (5) years prior to the conviction sought to be expunged; (d) The person had not since the time of the conviction sought to be expunged been convicted of a felony, a misdemeanor, or a violation; (e) No proceeding concerning a felony, misdemeanor, or violation is pending or being instituted against him; and (f) The offense was an offense against the Commonwealth of Kentucky. (5) Upon the entry of an order to seal the records, the proceedings in the case shall be deemed never to have occurred; all index references shall be deleted; the persons and the court may properly reply that no record exists with respect to the persons upon any inquiry in the matter; and the person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application. (6) Copies of the order shall be sent to each agency or official named therein. (7) Inspection of the records included in the order may thereafter be permitted by the court only upon petition by the person who is the subject of the records and only to those persons named in the petition. (8) This section shall be deemed to be retroactive, and any person who has been convicted of a misdemeanor prior to July 14, 1992, may petition the court in which he was convicted, or if he was convicted prior to the inception of the District Court to the District Court in the county where he now resides, for expungement of the record of one (1) misdemeanor offense or violation or a series of misdemeanor offenses or violations arising from a single incident, provided that the offense was not one specified in subsection (4) and that the offense was not the precursor offense of a felony offense for which he was subsequently convicted. This section shall apply only to offenses against the Commonwealth of Kentucky.
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to be expunged. This law is retroactive to all past misdemeanors. Expungement requires a petition to the sentencing court and a hearing involving the county attorney.

D. Elimination of Probation and Parole Restrictions for Victims of Domestic Violence or Abuse (KRS § 533.060, KRS § 439.3401)

House Bill 256, which codified the battered spouse defense, eliminated the prohibition against probation under KRS § 533.060

89. Id.
90. Id.
91. Id.
92. KRS § 533.060 states:

Probation or conditional release — Effect of use of firearm — Other felonies. (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted. If the person convicted claims to be exempt from this statute because that person was the victim of domestic violence and abuse as defined in KRS 403.720, the trial judge shall conduct a hearing and make findings to determine the validity of the claim and applicability of this exemption. The findings of the court shall be noted in the final judgment. (2) When a person has been convicted of a felony and is committed to a correctional facility maintained by the Department of Corrections and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence. (3) When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.


93. KRS § 439.3401 states:

Parole for violent offenders — Applicability of section to victim of domestic violence or abuse. (1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim. (2) A violent offender who has been convicted of a capital offense and who
in cases where the defendant establishes that the victim was engaged in domestic violence and abuse.\textsuperscript{95} It also eliminated the parole limitations for violent felony offenders under KRS \$ 439.3401\textsuperscript{96} where a defendant establishes to a court, after notice and hearing, to have been a victim of domestic violence or abuse.\textsuperscript{97} Both of these statutory "breaks" to victims of domestic violence have been made retroactive and allow for appointment of counsel and appeal of the circuit court's decision on whether the defendant qualifies as a victim of domestic violence or abuse.\textsuperscript{98} Defense counsel who have convicted clients doing sentences under the Violent Felony Offender Act whose initial parole hearing is set at 50\% of their sentence should review all such files for evidence that the defendant was a victim of domestic violence.

\textbf{E. Sentence Without Pre-Sentence Investigation Report (KRS \$ 532.050)\textsuperscript{99}}

Senate Bill 244 allows a defendant in custody and ineligible for probation or conditional discharge to request, in writing, imme-

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has received a life sentence (and has not been sentenced to twenty-five (25) years without parole), or a Class A felony and receives a life sentence, or to death and

his sentence is commuted to a life sentence shall not be released on parole until

he has served at least twelve (12) years in the penitentiary. (3) A violent offender

who has been convicted of a capital offense or Class A felony with a sentence of

a term of years or Class B felony who is a violent offender shall not be released

on parole until he has served at least fifty percent (50\%) of the sentence imposed.

(4) This section shall not apply to a person who has been determined by a court

to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with

regard to the offenses involving the death of the victim or serious physical injury

to the victim. The provisions of this subsection shall not extend to rape in the

first degree or sodomy in the first degree by the defendant. (5) This section shall

apply only to those persons who commit offenses after July 15, 1986.


\textbf{94. KY. REV. STAT. ANN. \$ 533.060} (Michie/Bobbs-Merrill 1990) (use of a firearm).

\textbf{95. H.B. 256, Regular Leg. Sess. (Ky. 1992).}

\textbf{96. KY. REV. STAT. ANN. \$ 439.3401} (Michie/Bobbs-Merrill Supp. 1992) (the 50\% service

of sentence requirement).

\textbf{97. H.B. 256, Regular Leg. Sess. (Ky. 1992).}

\textbf{98. KY. REV. STAT. ANN. \$ 439.3401} (Michie/Bobbs-Merrill Supp. 1992); KY. REV. STAT.


\textbf{99. KRS \$ 532.050 states:}

Presentence procedure for felony conviction. (1) No court shall impose sentence for

conviction of a felony, other than a capital offense, without first ordering a

presentence investigation after conviction and giving due consideration to a written

report of the investigation. The presentence investigation report shall not be
diate sentencing without waiting for completion of the Pre-sentence Investigation report (P.S.I.).

The bill does not allow the defendant to waive the report. The purpose of the bill was to speed the transfer or classification of felons who know that they will be receiving a sentence of incarceration. This gives many class D felons quicker access to community work status reclassification and gives higher level felons quicker transfer from local correctional facilities. However, no provision has been made for an opportunity to review the P.S.I. by the prisoner or legal counsel to correct any inaccurate or incomplete information. The P.S.I. continues to be a critical document for subsequent parole decisions, and the burden is on defense counsel to talk to the probation officer doing the report and to correct errors before it is forwarded to the Corrections Cabinet.

F. DNA Data Bank for Sexual Offenders (KRS § 17.170)

House Bill 631 allows DNA blood samples of convicted sexual offenders to be taken by the Department of Corrections for
inclusion in law enforcement identification data bases. KRS § 17.170 anticipates the creation of such data bases by the Federal Bureau of Investigation under federal law. It does not address admissibility of DNA evidence.

G. HIV Testing of Sex Offenders (KRS § 510.320)

House Bill 481 requires certain sexual offenders to be ordered
to undergo Human Immunodeficiency Virus tests under the control of the Cabinet for Human Resources with information going to the victim, the defendant, and the Department of Corrections.\textsuperscript{108} Under KRS § 510.320, the results are not a public record, but are not accorded any privilege or protection from disclosure or use in other civil or criminal proceedings.\textsuperscript{109}

V. SUMMARY AND TRENDS

Review of the legislation which passed the 1992 General Assembly indicates that modifications to the criminal code which attempted to deal with and penalize domestic and sexual violence were well received.\textsuperscript{110} The “War on Drugs” also was reflected by tougher controlled substance laws.\textsuperscript{111} Legislation which tended to support alternative sentencing and moves to increase the use of local or county jail facilities for property and nonviolent offenders, while reserving state facilities for persons serving longer sentences, continued to change the framework by which the state handles post conviction inmates.\textsuperscript{112}

In pointing out the types of legislation which passed, it is important to consider areas in which proposed legislation was defeated. Attempts to broaden or toughen Kentucky’s driving
under the influence laws or to further attack or control alcohol consumption were generally unsuccessful.\textsuperscript{113} Attempts to eliminate the jury sentencing system in Kentucky were defeated, as were attempts to further restrict the sentencing discretion of judges\textsuperscript{114} and the parole discretion of the Kentucky Parole Board.\textsuperscript{115}

No action was taken amending Kentucky's death penalty statutes\textsuperscript{116} or the criminal law provisions in the Kentucky Juvenile Code.\textsuperscript{117}

No actions were taken substantially amending criminal procedures or the manner in which cases are tried.

Current events and the author's experience with the last legislative session indicate that some areas of focus for future legislative change can be clearly identified. Funding for the Department of Public Advocacy and provision of public defender services has not been addressed for a substantial period of time and continues to be a more and more critical issue. It is unlikely that another legislative session can occur without some attempt to address these problems.

\textsuperscript{113} See H.B. 98 which would have created a new section for the crime of vehicular homicide as a class B felony. H.B. 98, Regular Leg. Sess. (Ky. 1992).

\textsuperscript{114} See H.B. 125 which would have created a new section requiring sentencing in traffic and criminal cases, other than capital cases, to be by a judge rather than by jury, create a sentencing commission, and require judges to utilize guidelines by General Assembly. H.B. 125, Regular Leg. Sess. (Ky. 1992).

\textsuperscript{115} See H.B. 129 which would have created a section which required the administrative office of courts to compile sentencing and pretrial release records of each judge and make them available to the public for the cost of making a computer search. H.B. 129, Regular Leg. Sess. (Ky. 1992); H.B. 109 which would have created a new section changing sentencing philosophy favoring punishment for the penal code rather than probation. H.B. 109, Regular Leg. Sess. (Ky. 1992); H.B. 441 which would require judges give the maximum sentences for probation, shock probation, home incarceration, and conditional discharge. H.B. 441, Regular Leg. Sess. (Ky. 1992); S.B. 7 which would replace the penalty of life imprisonment with penalty of life imprisonment without parole for 25 years. S.B. 7, Regular Leg. Sess. (Ky. 1992); and H.B. 763 which would establish the status of persistent misdemeanant and provide six to twelve month mandatory jail term without probation. H.B. 763, Regular Leg. Sess. (Ky. 1992).

\textsuperscript{116} See H.B. 774 which would have changed the method of execution from electrocution to lethal injection. H.B. 774, Regular Leg. Sess. (Ky. 1992); H.B. 689 which would require the Supreme Court to establish a unified review procedure and consolidation of matters for criminal appeals by rule. H.B. 689, Regular Leg. Sess. (Ky. 1992); and S.B. 225 which would require the Justice Cabinet and Department of Public Advocacy to jointly study the death penalty and if the factors of race, sex, religion, or national origin are a factor then make a report. S.B. 225, Regular Leg. Sess. (Ky. 1992).

\textsuperscript{117} See H.B. 130 which would have permitted use of juvenile records in adult felony proceedings, pretrial release, sentencing purposes, and felony trials. H.B. 130, Regular Leg. Sess. (Ky. 1992); and H.B. 146 would allow disclosure of juvenile records to parents of child abused by another child. H.B. 146, Regular Leg. Sess. (Ky. 1992).
An Attorney General's task force has been investigating issues surrounding sexual and physical abuse of children. However, it is expected that most of the recommended legislation will not attempt to tinker with the conduct of criminal trials or the criminal code, but rather will seek to provide additional resources, services, and support for victims as well as revamping offender treatment programs.

As the Department of Corrections continues to demand more budget resources, additional attempts to provide alternative sentences and increase sentencing and parole discretion, and to move property and nonviolent offenders out of the state prisons probably will be addressed. To be meaningful this will require review of the persistent felony offender statutes, at least where nonviolent felony offenders are concerned, as well as the so called "Truth in Sentencing" laws. There also needs to be a wider review of blanket statutory prohibitions on probation, conditional discharge and shock probation contained in statutes such as KRS § 532.090(5) (persistent felony offenders, second degree), KRS § 533.060(2) (felony committed while on parole, probation, shock probation, or conditional discharge), and KRS § 532.045 (sexual offenses involving minors). Overall, the legislature seems to be increasingly unwilling to tinker further with the criminal code to increase penalties or to create new offenses in response to special interests or isolated high publicity cases. This reflects a positive trend in Kentucky legislation fueled in part by financial realities and in part by better information being demanded from all sides in the debate over proposed bills impacting criminal law.
CUMULATIVE TRAUMA DISORDERS: A REPETITIVE STRAIN ON THE WORKERS' COMPENSATION SYSTEM

by H. Douglas Jones* and Cathy Jackson**

I. INTRODUCTION

Cumulative trauma disorders, known by many descriptive phrases,1 denote physical afflictions which develop over the course of time. Unlike traumatic injuries, these conditions develop bit-by-bit rather than instantaneously. Blamed primarily upon repetitive motions within the workforce, these conditions, first identified more than 200 years ago, have recently been called "the occupational illness of the decade."2 Such conditions account for one-half of all work related injuries,3 and by one estimation, cost $27 billion annually in medical bills and lost work days.4 Carpal tunnel release, a procedure for relieving carpal tunnel syndrome, one of the most common cumulative trauma disorders, is the second most frequently performed surgery in America.5 Just as the repetitive motions "batter nerves and tendons [like] incessant drops of water erode a stone,"6 so do repetitive injury claims place increasing strain upon an already burdened workers' compensation system.7

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1. These conditions are also referred to as repetitive strain injuries, wear and tear injuries, overuse syndromes and repetitive motion injuries.
5. Goldofitas, supra note 3, at 46.
7. While Kentucky's statistics do not include a breakdown of the nature of reported
This article will explore the history of cumulative trauma injuries and the recent explosion of workers' compensation claims involving these conditions. This phenomenon will be examined in the context of the prevailing medical research and empirical studies available, documenting drastically differing opinions as to diagnosis, treatment, and work relatedness. The issue of apportionment of work-related cumulative trauma disorders will then be discussed including the recent Kentucky Supreme Court holding in *Newberg v. Armour Food Co.* Finally, attention will shift to the impact that these conditions are having on the Kentucky workers' compensation system.

II. HISTORY OF CUMULATIVE TRAUMA DISORDERS

In 1717, Bernardino Ramazinni, an Italian physician considered the father of occupational medicine, divided workers with occupational diseases into two classifications: those who suffer from the "harmful character of the materials they handle," and those who are injured by "certain violent and irregular motions and unnatural positions of the body ... [that impair] the natural structure of the vital machine." Long before the collective designation of these conditions as cumulative trauma disorders, the ailments were often labeled for the type of occupation that caused them, such as telegraphist's cramp, bricklayer's shoulder, stitcher's wrist, carpenter's elbow, gamekeeper's thumb, and cotton twister's hand. Specific work activities causing such repetitive motion conditions were identified in 1959 by Dr. Radford Tanzer including milking a cow,
ladling soup, and pressing the trigger on a spray paint gun.¹⁶

Today, the workers most frequently reporting these injuries include computer keyboard operators, meat cutters, supermarket cashiers, assembly workers, pneumatic-equipment operators, and truck drivers.¹⁷

III. CAUSATION IN CUMULATIVE TRAUMA INJURIES

The burden of proving causation in a workers' compensation claim is upon the injured worker.¹⁸ Causation involves both medical and legal considerations. Medical causation is addressed by physicians who formulate medical opinions, including a diagnosis and resulting physical restrictions. Physicians are commonly asked if the diagnosis and resulting physical restrictions were caused by the patient's work activity. All opinions formulated by the physician must be rendered within the realm of reasonable medical probability.¹⁹ Such opinions are commonly based solely on the history related by the patient. The physician, of course, must depend on the patient to truthfully and accurately relate all portions of their history. However, ultimately it is the responsibility of the finder of fact to make the final determination as to work relatedness, after considering the medical evidence and all other relevant evidence.

The interrelationship between the medical and legal disciplines as to work relatedness was explicitly addressed by the Kentucky Court of Appeals in Hudson v. Owens:²⁰

The legal profession and medical profession view causation problems from different perspectives. The physician defines cause in terms of single and isolated bits of scientific exactitude. The lawyer views cause as a vehicle for adjusting losses in accordance with the policy conditions which are embodied in social legislation such as our workers' compensation law.

It seems to us that the job of the medical witness is to testify as to the presence or absence of causation from the medical standpoint, and it is the job of the [finder of fact] to declare

¹⁷. Grant, supra note 7.
whether or not, considering the medical evidence and the other relevant factors present, the situation of a work-connected injury is present.\footnote{21. Id. at 569.}

\textbf{A. Medical Factors}

Cumulative trauma injuries most commonly affect soft tissues in the hands, wrists, and arms, although the conditions can also result in shoulder or neck symptoms.\footnote{22. Willis Goldsmith, \textit{Current Developments in Safety and Health}, 15 \textit{EMPLOYEE RELATIONS} L.J. 2 (1989).} Industries which have felt the impact include meatpacking plants where workers can make the same forceful motion 20,000 to 30,000 times daily.\footnote{23. Goldoftas, \textit{supra} note 3, at 46.} Telephone operators frequently may handle 1,200 calls daily.\footnote{24. Landers, \textit{supra} note 13, at 99.} Glass cutters, using high-speed grinders to etch designs in crystal weighing as much as five to eight pounds, may average 17,000 to 18,000 hand movements daily.\footnote{25. Id.} In earlier years, office workers had frequent interruptions to remove paper from typewriters, file, and answer telephones. Today's worker in an automated office may be stationed at a computer making continuous finger-striking motions for the entire workday.

Historically, sheer repetition of motion, whether gripping, twisting, or reaching, has been considered the primary cause of cumulative trauma conditions, especially when accompanied by vibration or extreme temperatures.\footnote{26. Id.} However, current medical literature suggests there are numerous other factors to be considered, most of which are non-occupational. These other factors include age, gender,\footnote{27. Women are five times more likely to be affected than men. Phillip Wright, \textit{Carpal Tunnel and Ulnar Tunnel Syndromes and Stenosing Tenosynovitis}, in \textit{CAMPBELL'S OPERATIVE ORTHOPAEDICS} 3435 (8th ed. 1992).} anatomical variation, smoking, pregnancy,\footnote{28. "Pregnancy also makes women vulnerable, probably because the tendency to retain fluids exacerbates any pressure from swelling." \textit{Id.}} diabetes, rheumatoid arthritis, and menopause.\footnote{29. Wright, \textit{supra} note 27, at 3435.} These non-occupational factors are often overlooked in determining both medical and legal causation.
1. The Most Common Cumulative Trauma Disorders

The more frequently observed disorders include carpal tunnel syndrome, tenosynovitis, epicondylitis, tendinitis, Raynaud’s syndrome, deQuervain’s disease, and thoracic outlet syndrome.30 These disorders typically involve tendons, nerves, or both nerves and blood vessels.31

Carpal tunnel syndrome, seemingly the most common cumulative trauma disorder, is “a nerve disorder resulting from pressure on the median nerve where it passes from the forearm through the carpal tunnel in the wrist and into the hand.”32 This pressure or compression of the median nerve affects the hand’s sensory and motor functions.33 Symptoms include pain, numbness, and tingling of the hand, predominantly at night, as well as the inability to distinguish hot from cold.34 The condition occurs most frequently in persons between thirty and sixty years of age.35 In addition, it is five times more likely to affect women than men.36 Other whole body conditions which are sometimes associated with carpal tunnel syndrome are obesity, diabetes mellitus,37 thyroid dysfunction,38 and Raynaud’s disease.39

Tenosynovitis involves the sheath surrounding a tendon which, when used repetitively, produces excessive fluid causing the sheath to become swollen and painful.40 Tenosynovitis of the finger is known as “trigger finger” and results in snapping or jerking motions upon attempts to move the finger.41 This condition occurs most frequently in adults over forty-five years of age.42 Medical literature indicates many cases of tenosynovitis respond favorably to steroid injections and do not require surgery.43

30. Landers, supra note 13 at 100. (citing CUMULATIVE TRAUMA DISORDERS: A MANUAL FOR MUSCULOSKELETAL DISEASES OF THE UPPER LIMBS (Vern Putz-Anderson ed., 1988)).
32. Landers, supra note 13, at 100.
34. Landers, supra note 13, at 100.
35. Wright, supra note 27, at 3435.
36. Id.
38. Id.
39. See infra notes 48-51 and accompanying text.
40. Wright, supra note 27, at 3435.
41. Goldsmith, supra note 22, at 292.
42. Wright, supra note 27, at 3440.
43. Id. at 3439.
Epicondylitis, also known as “tennis elbow,” involves inflammation of tendons in the elbow region commonly caused by upward motions of the palm against resistance, such as screwdriving.\textsuperscript{45}

Tendinitis, commonly associated with activities such as golfing, pitching, crocheting, and excessive needlepoint, occurs when a muscle or tendon is repeatedly tensed, sometimes resulting in tendon fibers fraying or tearing apart.\textsuperscript{47}

Raynaud’s syndrome, or “vibration white finger,”\textsuperscript{48} is associated with extensive use of vibrating hand tools in cold temperatures, which damage blood vessels in the fingers.\textsuperscript{49} Common symptoms include numbness and tingling in the fingers, skin turning pale and cold due to blocked blood vessels, and possible loss of sensation and control in the fingers and hands.\textsuperscript{50} Extreme cases of blocked blood vessels can lead to gangrene.\textsuperscript{51}

DeQuervain’s disease, named after the French physician who first described it, can be caused by excessive friction between two thumb tendons and their common sheath.\textsuperscript{52} Causes of this condition include combinations of forceful gripping and hand twisting.\textsuperscript{53} The condition occurs most often in adults between thirty and fifty years of age, and women are affected ten times more often than men.\textsuperscript{54} One source reports that anatomic variations are common with this condition, including separate dorsal compartments.\textsuperscript{55} In addition, over half of the patients in one deQuervain study upon whom surgery was performed had “berrant” or duplicated tendons.\textsuperscript{56}

\textsuperscript{44} One journalist described cumulative trauma disorders as “the poor relations of that scourge of the country club, tennis elbow — the difference being that most middle-class tennis players don’t rely on their backhand for their livelihood.” Jason DeParle, \textit{Wrist Watch}, \textit{The New Republic}, July 11, 1983, at 11-13.

\textsuperscript{45} Repetitive Motion, supra note 6, at 14.

\textsuperscript{46} Landers, supra note 13, at 100.

\textsuperscript{47} Id.

\textsuperscript{48} Repetitive Motion, supra note 6, at 14.

\textsuperscript{49} Landers, supra note 13, at 100.

\textsuperscript{50} Id.

\textsuperscript{51} Goldsmith, supra note 22, at 293.

\textsuperscript{52} Landers, supra note 13, at 100.

\textsuperscript{53} Id.

\textsuperscript{54} Wright, supra note 27, at 3439.

\textsuperscript{55} Id. at 3440.

\textsuperscript{56} Id.
2. The Controversial Thoracic Outlet Syndrome

Thoracic outlet syndrome (TOS) remains the most debated of all cumulative trauma injuries.\textsuperscript{57} It is defined as "a collective term, describing a number of disorders attributed to compromise of blood vessels and/or nerves at any of several points between the base of the neck and the [armpit]."\textsuperscript{58} Part of the controversy stems from the fact that the term thoracic outlet syndrome is actually a heading under which several distinct conditions are grouped, with nothing more in common than the affected part of the body. Some of the conditions concern vascular disorders.\textsuperscript{59} The classical or "true" type of thoracic outlet syndrome is extremely rare and concerns compression of the nerve fibers along the medial forearm and, occasionally, the hand.\textsuperscript{60} X-rays of patients with this condition nearly always reveal an abnormally formed cervical rib or an abnormal C7 vertebra, in the form of an elongated transverse process.\textsuperscript{61}

It is the \textit{neurogenic} thoracic outlet conditions which remain most debated among the medical community, having been referred to as the "disputed" type of neurogenic thoracic outlet syndrome.\textsuperscript{62} Unlike the patients who suffered from classic thoracic outlet syndrome, other patients experienced the same muscle wasting, weakness, pain, and paresthesia, but without the accompanying abnormal rib or vertebra.\textsuperscript{63} Nevertheless, for many years (1930's through 1950's), physicians focused on the first thoracic rib or muscles on either side of the neck as the culprits.\textsuperscript{64} Over time a number of different syndromes were named and various surgical procedures developed, the majority of which were scalenotomies.\textsuperscript{65} Unfortunately, the failure rate of these surgeries was as high as sixty percent.\textsuperscript{66} In time, other causes for these

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 30.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Surgical severing of one or more scalenus muscles near their insertion on the ribs. \textit{WEBSTER'S MEDICAL DESK DICTIONARY} 636 (1986).
\textsuperscript{66} Wilbourn, supra note 57, at 32.
upper extremity complaints without the anatomical deformities were identified, namely cervical radiculopathy in 1943, and carpal tunnel syndrome in 1953.67 Thereafter, for nearly ten years, interest in the thoracic outlet area declined.68

However, in the 1960’s, several thoracic surgeons again sparked interest and promoted surgical intervention for neurogenic types of TOS.69 These surgeries remain quite controversial. A primary reason is that relatively few neurologists and neurosurgeons acknowledge the existence of neurogenic thoracic outlet syndrome.70 Rather, the condition is being promoted as a common one by doctors whose training and expertise are not concentrated in neurological impairments.71

Depending upon a given physician’s persuasion, the disputed subgroup of thoracic outlet syndrome is either quite typical or absolutely non-existent. The disparity is evidenced by the fact that the thoracic surgery group at Mayo Clinic, which does not diagnose the disputed type, reportedly performed less than 120 surgical procedures for TOS in a thirty-two year period.72 Conversely, an individual thoracic surgeon who adheres to the disputed type reported 1,400 surgeries in less than half that amount of time.73 Indeed, the discrepancies in diagnosis of the disputed types of TOS are readily apparent, not only within our country, but as evidenced by the fact that there are still many countries in which these conditions are unknown.74

Even within the United States, its incidence is highly variable from region to region, city to city, and even from one hospital to another within the same city. In this respect, the disputed type is different from the vascular and true neurogenic types, and from other entrapment neuropathies such as carpal tunnel syndrome, which are not only recognized throughout the world, but also have approximately the same reported incidence worldwide.75

Adding to the complexities of cumulative trauma injuries is the fact that there are relatively few objective testing mechani-

67. Id. at 30.
68. Id. at 31.
69. Id.
70. Id. at 32.
71. Id. at 31.
72. Id.
73. Id.
74. Id.
75. Id.
Therefore, the physician must depend upon the patient's subjective complaints of pain and numbness.\textsuperscript{77} Even more unfortunate is the reality that an eager surgeon whose decision to operate is unsupported by objective findings, often has a legitimizing effect on the employee's claim for workers' compensation benefits. Frequently the beginning symptoms of cumulative trauma disorders simply document the basic problem: "a poor physical fit between the person and the job."\textsuperscript{78}

\textbf{B. The U.S. West Communications, Inc. Experience}

U.S. West Communications, Inc., (U.S. West) which employs over 55,000 workers in fourteen states, encountered mounting problems with cumulative trauma injuries during the 1980's.\textsuperscript{79} U.S. West faced National Institute of Occupational Health and Safety inspections and Occupational Safety and Health Administration citations.\textsuperscript{80} In addition, two product liability suits were filed by injured workers against the manufacturer of the computerized work stations for directory assistance operators employed by U.S. West.\textsuperscript{81}

Nortin M. Hadler, M.D., Professor of Medicine and Microbiology/Immunology at the University of North Carolina at Chapel Hill, agreed to provide expert testimony in the product liability litigation with the stipulation that his fee would include contributions to a designated research fund and permission to publish the findings of his small area analysis.\textsuperscript{82} Of the fourteen states

\textsuperscript{76} Most physicians rely upon: the Tinel's sign, tapping on the wrist which causes paraesthesia traveling up the arm; the Phalen's test, pressing the backs of both hands together at right angles; or applying direct pressure over the carpal tunnel in an attempt to induce symptoms. However, with all three approaches, both false-negative and false-positive results can occur. \textit{Testing for Carpal Tunnel Syndrome}, 338 \textit{The Lancet}, Aug. 24, 1991, at 480.

\textsuperscript{77} Goldoftas, \textit{supra} note 3, at 48.

\textsuperscript{78} Landers, \textit{supra} note 13, at 104.


\textsuperscript{80} \textit{Id.} at 114.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 113. Small area analysis, an epidemiologic technique that analyzes medical services based on the community in which the patient resides, is especially useful in studying variances between industries, within industries, and even within a given company whose business venture extends to multiple geographic regions. \textit{Id.}
where U.S. West did business, cumulative trauma disorders affected a substantial number of employees in only four states, namely Colorado, Arizona, Oregon, and Washington.\textsuperscript{83} The remaining ten states experienced significantly less occurrences of these disorders. For example, in 1988 Utah reported less than two claims per 1,000 workers,\textsuperscript{84} while Arizona reported nine per 1,000 workers;\textsuperscript{85} and in 1990, while Utah's statistics remained below two claims per 1,000 workers,\textsuperscript{86} Arizona's claims nearly doubled to seventeen claims per 1,000 workers.\textsuperscript{87} The following comparison of two of the four problem states, Arizona and Colorado, provides interesting insight into the dissimilar results in the treatment of carpal tunnel syndrome.

By the end of 1989, 190 directory assistance operators in Arizona had reported cumulative trauma complaints to the company's medical department.\textsuperscript{88} Over ninety percent of those employees, treated exclusively by the company medical department, returned to work without restrictions.\textsuperscript{89} Of the employees reporting symptoms, thirty-seven percent were referred for outside medical consultation and did not fare as well.\textsuperscript{90} In fact, of those employees referred for outside medical treatment, thirty were litigants in the products liability suit.\textsuperscript{91} Most of these litigants were treated by a small number of hand, thoracic, and vascular surgeons.\textsuperscript{92} All routine laboratory and radiographic studies performed upon these patients were normal.\textsuperscript{93} Likewise, those patients who underwent specialized electrodiagnostic tests all had normal results.\textsuperscript{94} Despite these normal test results, seventy invasive or surgical procedures were performed upon those thirty litigants, including eighteen carpal tunnel releases, twelve series

\textsuperscript{83} Id. In the four states with substantial claims, any outside medical consultation was at the discretion of the U.S. West company physician. Id.
\textsuperscript{84} Id. at 115.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 116.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 114. Both products liability suits were settled out of court and the return to work status of the litigants is not known. Id.
\textsuperscript{92} Id. at 116.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
of stellate blocks, and nine thoracic outlet syndrome procedures. All testing and surgical procedures were approved in advance by the company's medical department and the $1.5 million in costs was indemnified by its workers' compensation program.

By comparison, of the 165 Arizona workers who reported cumulative trauma disorder symptoms, 129 returned to full-time employment without restrictions. Of those employees referred to outside medical practitioners (again being a small number of surgeons), less than twenty surgical procedures were undertaken and no multiple procedures were proposed. Of those employees who did undergo surgery, the majority were able to return to work.

These statistics raise several significant questions. Why were three times as many surgical procedures performed on the Colorado workers? Why were so many invasive procedures performed with no objective test findings? Are the workers in states such as Utah, with minimal reports of problems, suffering in silence? Do reported cumulative trauma disorders have a "contagious" effect among co-workers?

Dr. Hadler commented upon the disparate results in the U.S. West experience: "[C]lose inspection of this small area analysis provides an object lesson in the human costs of prematurely basing workplace health and safety policy on as tenuous a concept as CTDs [cumulative trauma disorders]." Dr. Hadler found the U.S. West results even more striking in comparison to the epidemic of "repetition strain injuries" experience in Australia. In Australia, descriptions of the "novel" repetitive strain conditions appeared in clinical literature in the early 1980's describing symptoms of incapacitating arm pain with no inflammatory, dystrophic, or neuropathic signs. Suddenly, an outbreak of reported injuries followed. At one point, these injuries disabled thirty percent of the work force in two of the Australian states. The
epidemic was labeled an "iatrogenic sociopolitical phenomenon," iatrogenic meaning "induced in a patient by a physician's actions or words." The epidemic was subsequently squelched when policy reforms were implemented. An interesting contrast with the U.S. West scenario is that Australian patients were usually spared surgical intervention.

Dr. Hadler emphasized the human factors inherent in these disorders whose symptoms are primarily subjective and whose treatment regime is so dependent upon the persuasion of the medical practitioner.

[The workers' perceptions of the implications of the discomfort, personal resources on and off the job, job flexibility and alternatives, and personal satisfactions on and off the job are potential confounders of the experience of any illness. The arm discomfort is real, but the quality of the experience is perturbable by these and other confounders.

Finally, Dr. Hadler suggests that cumulative trauma disorders are inappropriately analogized to the engineering concept of metal fatigue, which begs the question, "If you use your arm repetitively, shouldn't it wear out?" This misperception, however, is contraindicated by the body's biological healing process in that post-surgical rehabilitation requires repetitive movements to assure proper rehabilitation of tendons and joints.

IV. WORK-RELATEDNESS OF CUMULATIVE TRAUMA DISORDERS: PERCEPTION VS. REALITY

The final decision with respect to work relatedness, also referred to as legal causation, ultimately lies with the finder of fact. Repetitive use injuries inherently mandate closer scrutiny than do traumatic injuries for many reasons. These reasons

106. Hadler, supra note 73, at 117.
107. Id. at 118.
108. Id.
109. Id.
110. Id.
112. In 1972, amendments to the Workers' Compensation Act repealed KY. REV. STAT. ANN. §342.005 which limited coverage to traumatic work injuries. The successor statutes, KY. REV. STAT. ANN. §342.610(1) and KY. REV. STAT. ANN. §342.620(1), clearly extended workers' compensation coverage to non-traumatic injuries.
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include: the cumulative nature and gradual onset of the symptoms; the subjective history related by the patient; the lack of objective diagnostic tests; non-occupational factors including age, sex, and a host of medical conditions which precipitate the same or similar symptoms; job dissatisfaction; and the effects of the litigation process. Eminent qualified medical experts and well-documented empirical studies mandate a conclusion that repetitive use symptoms are not work related simply because they manifested themselves at work.113

Dr. George Phalen, a leading authority on carpal tunnel syndrome whose testing technique bears his name,114 estimated that in the majority of instances, work activity aggravated — but did not cause — the condition.115

Dr. Arthur Canario, chief of orthopedic surgery at Beth Israel Hospital in Newark, New Jersey, concluded that: "For such an 'extremely common' ailment 'it is impossible that every case of Carpal Tunnel Syndrome would be occupational."116 In support of his view that mere repetitive motions are not sufficient to cause carpal tunnel syndrome, Dr. Canario cited the illustration of classical pianists, stating each one should have the condition if mere constant motion is the cause.117 The "constant motion" argument also breaks down in the analysis of any occupation requiring constant motion, including stenographers, data processors, carpenters, production assembly workers, or pneumatic tool operators.

Another study of the previously referenced Australian experience suggested that job dissatisfaction played a significant part in the epidemic.118 A Carnegie Mellon University professor con-


114. The Phalen’s test is performed by having the patient press the backs of both hands together at right angles. Numbness and tingling over the distribution of the median nerve suggests carpal tunnel syndrome. Teresa Shellenbarger, When You’re Asked About Carpal Tunnel Syndrome, RN, July 1991, at 41.

115. H. Vincent McKnight, Jr., Biomechanics of VDT Carpal Tunnel Cases, TRIAL, June 1991, at 50 (citing George Phalen, M.D., The Carpal Tunnel Syndrome, 48 J. BONE & JOINT SURGERY 211 (1966)).


117. Id.

118. Repetitive Motion, supra note 6, at 14.
cluded: "The ambiguous nature of [cumulative trauma disorder] makes it the perfect candidate for many workers as they seek an approved exit from the computing pool while preserving benefits and some salary."119

A New York School of Medicine study indicates that the patient's perception that a cumulative trauma disorder is work related can, in fact, retard recovery.120 That study found the forty-two percent of studied patients covered by workers' compensation had slower initial improvement and remained off work for longer periods of time — 8.4 versus 1.7 months for non-compensation patients.121 In fact, the workers' compensation patients were less likely to return to their jobs or to resume any work at all.122

To add to the controversy, medical literature indicates that carpal tunnel syndrome can be spontaneous, most commonly during pregnancy, and that it is associated with nonoccupational conditions, including hypothyroidism, rheumatoid arthritis, multiple myeloma, gout, diabetes, as well as other afflictions.123 There is also evidence that oral contraceptives can induce the syndrome.124

Another fact causing great concern is that most physicians rely solely on the subjective history related to them by the employee regarding onset of symptoms, nature of job duties, and medical history when formulating an opinion as to work relatedness. In reality, both the physician and the finder of fact have the responsibility of weighing the employee's subjective assertions against other relevant evidence, such as length of employment. When symptoms arise after only a few days or weeks on the job, work relatedness must be scrutinized rather than presumed. When the employee asserts repetitive use job functions, the actual physical requirements should be investigated, including at a minimum, review of the employer's job description. Another important consideration is the employee's activities outside the

121. Id. at 1922.
122. Id. at 1923.
123. Gunter R. Hasse, M.D. et al., Coping with Carpal Tunnel Syndrome, PATIENT CARE, July 15, 1990, at 127.
124. Shellenbarger, supra note 114, at 40.
place of employment which involve repetitive motions, such as tennis, golf, crocheting, or needlepoint, to name but a few.

Finally, the realities of the New York School of Medicine study cannot be ignored. The study revealed that those patients covered by workers' compensation had slower initial improvement and remained off work for longer periods of time than non-compensation patients with the same or similar symptoms.

The Kentucky Workers' Compensation Act is solely designed to compensate workers injured during the course of employment. Both the medical and legal communities must accept this premise. The finder of fact should be sensitive to physicians who hastily intervene surgically in cases with little or no objective findings presuming the procedures will be covered by workers' compensation. Work relatedness should not be determined and benefits awarded solely on the basis that surgery had been performed or treatment rendered. Especially in instances where medical health insurance is available to pay the costs of non-occupational injuries, the labeling of these conditions as work-related thwarts the purpose of the Act and results in burdensome expenses. Such awards shackle the employer with disability and medical benefits in significant amounts. Each permanent partial disability results in benefits paid over eight years and medical benefits paid for the employee's lifetime. Such self-insured groups and employers bear these costs directly. Employers with private insurance bear these costs indirectly through increased premiums or perhaps loss of coverage.

Each claim of questionable merit places a greater burden upon a workers' compensation system already laden with thousands of claims. L. T. Grant, Commissioner of the Kentucky Workers' Compensation Board, reported 75,000 reports of work-related injuries in 1991 alone. He further estimated that over 10,000 fully litigated claims will be processed and assigned to fifteen administrative law judges during the 1992-1993 fiscal year. Extreme caution must be used to control meritless claims. Particular heed must be taken when considering repetitive motion injuries, which having been recognized for centuries, are now "in

125. Cotton, supra note 120, at 1922.
126. Id.
127. Grant, supra note 7.
128. Id.
vogue" and are appearing in alarming numbers in the workers' compensation arena. The paperwork associated with the processing of these claims and workers' compensation awards may be the proverbial straw that breaks the camel's back. Simply put, the Kentucky workers' compensation system cannot bear the ever-increasing costs associated with the treatment of non-occupational repetitive use conditions.

V. APPORTIONMENT OF CUMULATIVE TRAUMA DISORDERS

The history of apportionment between the employer and the Special Fund is set forth in *Yocom v. Jackson.* The creation of the Special Fund in 1946 was intended:

> [To assist employees who suffered a greater degree of disability following a compensable injury because of the presence of a pre-existing "permanent partial disability." The employer [is] only liable for the degree of disability which would have resulted from the subsequent injury had there been no pre-existing disability.]

In 1960, the Kentucky legislature extended the liability of the Special Fund to a "pre-existing disease not previously disabling but aroused into disabling reality" by the subsequent injury. In 1972, amendments to the workers' compensation law again further expanded liability and mandated that the Special Fund is liable for a dormant, nondisabling "disease or condition" brought into disabling reality by a subsequent injury. Because a "dormant" nondisabling condition is not statutorily defined, it has been molded and shaped by judicial interpretation. *Yocom v. Jackson* defines a dormant, nondisabling condition as "a departure from the normal state of health" so long as it is reasonably foreseeable that the abnormality "may become disabling to some degree as a result of the ordinary stresses of everyday life over the employee's expected work life."

129. 554 S.W.2d 891 (Ky. Ct. App. 1977).
130. The fund was originally called the Subsequent Injury Fund.
131. *Yocom*, 554 S.W.2d at 893-894.
132. *Id.* at 894 (quoting 1960 Ky. Acts ch. 147) (emphasis added).
133. *Id.* (emphasis added).
134. 554 S.W.2d 891 (Ky. Ct. App. 1977).
135. *Id.* at 896.
In *Princess Mfg. Co. v. Jarrell*, the employee developed a rash as a result of an allergic reaction to certain fabrics used in the garment factory where she was employed. The question on appeal before the Kentucky Supreme Court was whether an allergic reaction was an occupational disease under the statutory definition. The court focused on the medical cause for the allergic reaction:

Allergic reactions are caused by an inherent weakness or inability in certain people to tolerate exposure to substances known as allergens. Often this inherent weakness remains hidden for years but a sufficiently prolonged or unusual exposure will cause a sensitization to a particular allergen and an allergic reaction will develop. This allergic reaction will not develop, however, in other individuals equally exposed to the same substance unless they too are affected with the inherent inability to withstand such exposure.

The court found the allergic reaction to be work-connected in that it was caused by a condition encountered in her work in a greater degree than it would have been encountered outside of the employment situation.

Relying upon *Princess Mfg. Co.*, the court of appeals in *Farmers Rural Elec. Co-op Corp. v. Cooper* addressed an employee's allergic reaction to chemicals contained in computer terminals in the workplace. Three physicians testified that the employee suffered an adverse reaction to some chemical irritant emanating from computers, however, none of the physicians could identify the responsible chemical. In response, the court reversed the Workers' Compensation Board's dismissal of the occupational disease claim and stated that the physician's inability to identify the particular chemical irritant which emanated from the computer and caused the allergic reaction was not sufficient grounds to dismiss the claim.

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136. 465 S.W.2d 45 (Ky. 1971).
137. Id.
138. Id. at 47 (emphasis added).
139. Id.
140. 715 S.W.2d 478 (Ky. 1986).
141. Cooper, 715 S.W.2d at 480.
142. Id.
There is a twofold analogy to be drawn between these two cases and cumulative trauma disorders, specifically carpal tunnel syndrome. First, only a limited number of workers in the respective work environment will develop cumulative trauma symptoms. Just as an allergic reaction is the exception rather than the rule in garment factory settings, true carpal tunnel syndrome afflicts only a small percentage of the total workforce. By inference, then, those who are afflicted appear to have some pre-existing or predisposing condition not found in the majority of workers. This is especially true in those instances where workers develop repetitive use symptoms within days of commencing employment.

Second, while the medical community may be in agreement that certain workers are more prone to develop such cumulative trauma disorders, they are often unable to pinpoint or name the pre-existing condition. Nevertheless, just as the chemical irritant in Cooper remained unnamed and unidentified, its existence was undisputed just as the majority of the medical community agrees that, upon exposure to certain work activities, some workers suffer from unspecified pre-existing conditions that inevitably lead to cumulative trauma symptoms. The Cooper decision supports the conclusion that the inability to identify the pre-existing condition does not bar apportionment.\(^{143}\)

Recently, the Kentucky Supreme Court held in Newberg v. Armour Food Co.,\(^{144}\) that it was unwilling to say "that a predisposition, in and of itself, constitutes a dormant, nondisabling condition." In Armour Food, the worker experienced pain, numbness, and swelling in his hands and wrists within four or five days after commencing employment.\(^ {145}\) The testimony showed he had no problems of this nature prior to his employment.\(^ {146}\) Two medical experts testified that the swift onset of symptoms was highly unusual.\(^ {147}\) One physician testified that the worker had a predisposition for developing carpal tunnel syndrome;\(^ {148}\) however, he did not state that this predisposition could be considered a

\(^{143}\) Id.
\(^{144}\) 834 S.W.2d 172 (Ky. 1992).
\(^{145}\) Id. at 173.
\(^{146}\) Id.
\(^{147}\) Id.
\(^{148}\) Id.
"departure from the normal state of health," as required by Jackson. Another physician testified that the sudden onset of symptoms was usually caused by an underlying problem such as a rheumatic-like disease, but that no such disease was found in this worker. Nevertheless, that physician testified that some underlying problem must have caused the worker's immediate onset of symptoms. The Supreme Court of Kentucky overruled the Workers' Compensation Board and the court of appeals' rulings that the workers' narrow carpal canal was analogous to an arthritic condition that was dormant and aroused in symptomatic reality by work. Citing Jackson, the supreme court stated that the medical evidence presented did not specify that the predisposition constituted a "departure from the normal state of health."

It is important that the Armour Food decision not be read too narrowly. The court did not state that a predisposition to carpal tunnel syndrome, whether identified or not, is insufficient to warrant an apportionment of benefits between the employer and the Special Fund. Rather, the court stated that the medical evidence presented failed to meet the requirements of Yocum v. Jackson, namely that the predisposition constituted a departure from the normal state of health which might become disabling to some degree as a result of the ordinary stresses of everyday life. Therefore, explicit medical testimony is required to support an apportionment in cumulative trauma disorder claims.

When such a small number of employees experience cumulative trauma symptoms while the majority of their co-workers remain asymptomatic despite performing the same or similar job functions, one of several deductions are supported. First, the employee simply is not well suited anatomically or physiologically to perform job functions requiring repetitive movements. Such was the case in Princess, where the court spoke in terms of

149. Id. See supra note 134 and accompanying text.
150. Armour Food, 834 S.W.2d at 174.
151. Id.
152. Id.
153. Id. at 175.
155. Armour Food, 834 S.W.2d at 175.
"inherent weakness or inability in certain people to tolerate exposure to substances known as allergens." 157 This would explain the case of the worker who experiences symptoms within a few days or weeks of commencing employment. Arguably, the work activity simply made the employee aware of the "poor physical fit between the person and the job." 158 Such physical incompatibility does not necessarily represent a work-related injury or disability because the employee may not be any worse physically than prior to commencing employment. A second deduction may be that the employee suffers from one or more non-occupational factors previously discussed in this article. Finally, a deduction may be that the work activity triggered and aroused a pre-existing, dormant, non-disabling condition, whether identified or not, into symptomatic reality.

CONCLUSION

The purpose of this article has been to address for the medical and legal communities, as well as interested members of the labor and industry communities, certain conclusions necessary to preserve a viable Kentucky workers' compensation system: (1) repetitive use symptoms manifested during the course of employment are not automatically work related; (2) not all employees who experience cumulative trauma symptoms have resulting disabilities; (3) surgery or other invasive procedures alone do not warrant an automatic determination of work relatedness; and (4) repetitive use conditions caused by the arousal of pre-existing, dormant conditions, whether identifiable or not, must meet the requirements set forth in Yocum v. Jackson 159 to support an apportionment of benefits between the employer and the Special Fund.

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157. Id.
158. Goldoftas, supra note 3, at 104.
159. 554 S.W.2d 891 (Ky. Ct. App. 1977).
EMPLOYMENT-AT-WILL IN KENTUCKY: “THERE OUGHT TO BE A LAW”

by Michael Jordan*

I. INTRODUCTION

A few weeks ago a friend of mine, I’ll call him Bill, approached me with a question concerning his son-in-law.¹ His son-in-law, whom I’ll call Sam, was working as a mid-level manager at a department store in Kentucky. Sam was an eleven-year employee and during that time he received favorable evaluations of his performance. Over the last three years the store experienced some financial difficulties and the salaries of all management personnel were frozen. Sam, therefore, had not received a raise in three years but he chose to, as he later explained to me, “stick it out” because he was satisfied with his job and the company seemed to be pleased with his performance. Unfortunately, this all changed drastically when a new regional manager was hired. During Sam’s first meeting with the new manager, Sam was told he probably would never receive another raise or promotion no matter how long he stayed with the company. When queried about the reason for this decision, the new manager simply responded that “change was needed in the organization.”

Sam’s next meeting was no better than the first. He was reminded that he was “stuck” in his present position and if he sought new employment without informing his supervisor he would be discharged. Sam believed that if he actually looked for another job and informed his supervisor, he would be discharged anyway. My friend asked if Sam could call me and discuss his situation. I agreed and that night Sam called and related essentially the same story I was told earlier in the day. His concern was understandable given his belief that he was a loyal and productive employee. Equally as clear was Sam’s belief that, as he stated it, “there ought to be a law against treating people

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* Assistant Professor of Law at the University of Louisville, B.A., Bowdoin College, 1975; J.D., University of Iowa, 1980.

¹ The facts of this incident have been altered slightly to protect the identity of “Bill” and “Sam.”
this way." While these facts may read like a law school exam question for an employment law test, the sad truth is that this is not a hypothetical. Sam is still wondering what he should do and why there is no law that prevents him from being discharged or forced to resign.

Besides the obvious sadness one experiences when told of these circumstances, what struck me most about Sam's response was how common it is. Both Sam and my friend were certain that the supervisor's conduct was or ought to be "against the law." Their response is not uncommon. Most people believe that satisfactory job performance means job security and that there must be some reasonable justification to support an employer's decision to terminate an employee. In Kentucky, no matter how widely held, this belief is unsupported by legal doctrine. Sam, like many others, is a victim of the employment-at-will doctrine.

Although this doctrine has been subject to vigorous attack, it has survived essentially intact since its inception. However, with the drafting of the Model Employment Termination Act [hereinafter "the Act"] by the National Conference of Commissioners on Uniform State Laws, the Kentucky legislature now has the opportunity to bring order to an area of the law where certainty


3. The employment-at-will doctrine holds that a contract of employment for an indefinite period may be terminated at any time and for any reason by either party. See, Seroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977).


is desired but often hard to find; or if it is found, it is achieved at the expense of fairness.

The need for legislative action becomes clearer if the at-will doctrine and the public policy exception that developed in response to the shortcomings of the doctrine are understood. To that end, I will discuss the at-will doctrine, followed by an analysis of the public policy exception. Finally, I will examine the Model Employment Termination Act, specifically its “good cause” requirement, in order to demonstrate how the Act represents an effective and equitable response to the problems raised by the at-will doctrine.

II. THE AT-WILL DOCTRINE

A. Mutuality and Consideration

The at-will doctrine applies only to employment relationships of an indefinite duration. Although we analyze the employment relationship in contractual terms, the doctrine may be traced to two sources of law: the law of master and servant and the common law of contracts. It is important to keep the contractual nature of the employment relationship in mind because the at-will doctrine is based upon an important concept in the law of contracts: mutuality of obligation. The best way to understand the concept of mutuality of obligation is to examine an early case decided by the Kentucky Court of Appeals.

In Louisville & Nashville R.R. Co. v. Offutt, the plaintiff was employed by a railroad for a number of years, then terminated. A strike against the railroad forced it to rehire the plaintiff as a strike replacement. When the plaintiff was discharged a second time following settlement of the strike, he alleged that the railroad had agreed to maintain his employment as long as he

6. See supra note 3 and accompanying text.
7. See Dennis M. Hyatt, Note, Employment At Will And The Law Of Contracts, 23 BUFF. L. REV. 211, 212-13 (1973). Master and servant defined the nature of the relationship between servants and feudal lords. The concept of master and servant was later applied to consensual relationships based upon the nature, terms and conditions of work performed by one party for another. See also Note, Duty To Terminate Only In Good Faith, supra note 4, at 1824-25.
9. Id. at 181.
did "faithful and honest work for the company." Since there was no dispute as to the acceptable quality of the plaintiff’s work, he believed that he was entitled to continuous employment. The issue was, therefore, whether an employment contract existed which precluded the railroad from discharging the plaintiff.

The court held that because the plaintiff failed to demonstrate that the hiring was for a definite period of time, his employment fell within the purview of the at-will doctrine. Thus, plaintiff’s services could be terminated at any time regardless of how competently he was performing. The crucial inquiry, therefore, was why the court determined that no employment contract existed. The answer to this inquiry may be found in the court’s understanding of mutuality of obligation.

The concept of mutuality dictates that if an employee does not promise to work for any fixed period of time, the employer is equally free to terminate the relationship at any time. It was clear that the plaintiff, while alleging the existence of a contract which bound the company, did not believe that he was obligated to work for any specific period of time. He could, if he chose, not show up for the first day of work, or work for a day then quit. The railroad had absolutely no legal recourse. What the court required but could not find in Offutt was an exchange of promises that would bind both the plaintiff and the railroad.

As illustrated by Offutt, this type of analysis raises a question of consideration although the issue is addressed as one of mutuality of obligation. The mutuality/consideration problem is not

10. Id.
11. Id. at 182.
12. Id.
13. Id.
14. See Note, Duty To Terminate Only In Good Faith, supra note 4, at 1819.
15. See Hyatt, supra note 7, at 218-19.
16. See id. at 219; see also JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS 225-26 (3d. ed. 1987) Use of the term mutuality of obligation rather than consideration leads to needless confusion. Many courts mistakenly read mutuality of obligation as an exchange of identical promises. An employer who promised not to discharge an employee was not, according to this view, receiving from an employee a benefit sufficient to support the employer’s promise. If the employee provided a return promise it served two functions. First, it was consideration supporting the employer’s promise. Second, it served an evidentiary function. The promise provided proof that the parties actually bargained and the employer’s promise was not merely gratuitous or donative. See Note, Modern Contract
insurmountable, however. Subsequent decisions make it clear that, notwithstanding how it is denominated, mutuality is really an attempt by the court to assess the adequacy of the consideration offered. It is possible for an employee to provide adequate consideration to transform an at-will relationship into an employment contract.

In *Yellow Poplar Lumber Co. v. Rule*, 17 for example, plaintiff Rule was offered employment by the defendant sawmill company for as "long as [the company] was engaged in the sawmill business on the Ohio River." 18 Rule's employment was contingent on surrendering all claims he might have against the company arising from a prior employment-related accident. 19 Rule accepted the offer, but upon recovering from his previous accident and reporting to work, the company refused him employment. 20 Rule sued alleging a breach of contract. 21

Under the employment at-will doctrine one would expect, and indeed the company argued, that Rule's claim must fail. His employment contract failed to specify a definite period of time for the employment and mutuality was absent. 22 However, the court found that there was an enforceable employment contract for a definite period of time and that mutuality existed. 23 The court determined that the contract's duration, "although not in terms for a definite period in days or months," was still "susceptible of at least approximate duration" because the employment was for the time that the defendant sawmill would be operating its sawmills in the vicinity. 24 The court also determined that Rule's release of the claim against the company created an

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Theory, supra note 2, at 456-57. This view of mutuality has been severely criticized because it views an employee's rendering of services as adequate consideration to support an employer's promise. See Winters, supra note 4 at 210-12. The term mutuality of obligation ought to be abandoned in favor of simply viewing the issue as one of mutuality of consideration.

17. 50 S.W. 685 (Ky. Ct. App. 1899).
18. Id. at 685.
19. Id.
20. Id.
21. Id. The statute of limitations barred suit on the original injury.
22. Id. (Rule could not be compelled to work for the company).
23. Id. at 685-86.
24. Id. at 686.
option contract in which he provided consideration (other than his services) for the company's promise to provide employment as long as it was engaged in the sawmilling business. Thus, the release provided adequate consideration to make the agreement binding. Although, the mere performance of services was insufficient consideration to support an employer's promise not to terminate, the additional independent consideration transformed the employment arrangement from an employment-at-will relationship to an employment contract.

There is more to the independent consideration requirement than one might think. Consider, for example, the court's reasoning in *Rasnick v. W.M. Ritter Lumber Co.* where mutuality became a search for independent consideration which would provide "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." In *Rasnick,* the company engaged the services of Dr. A.S. Richardson as its company doctor and R.E. Osborn as its company manager and bookkeeper. An agreement was reached whereby the plaintiff, his wife, and his stepdaughter all agreed to dismiss the various suits against the company employees in exchange for the company's promise to employ the plaintiff for "as long as it had work to do or lumber to manufacture at its said plant." The plaintiff and his family dismissed the suits, but the company refused to provide employment. When the plaintiff sued to enforce the employment contract, it appears from the record that the court held that there was insufficient consideration.

The court distinguished *Yellow Poplar* on the basis of the claim against the employer. In *Rasnick,* because the dismissed claim was not against the company which promised employment, the settlement did not directly affect the employer and was therefore, inadequate consideration. However, in *Yellow Poplar,* the dismissed claim was against the company and therefore directly

25. Id. at 685-86.
29. Id. at 801.
30. Id.
31. Id.
32. See Id.
33. Id. at 801-02.
34. See supra notes 28-32 and accompanying text.
affected the employer. Rasnick clearly illustrates that mutuality is nothing more than the court's assessment of the adequacy of consideration provided by the employee. 35

Yellow Poplar illustrates another significant aspect of the at-will doctrine. The at-will doctrine often imposes certainty at the expense of the parties' intentions and to the detriment of the employee rather than the employer. By finding mutuality, the court in Yellow Poplar eliminated the biggest hurdle in the path of the employee's claim. The court then could easily determine that the contract was of definite duration. In short, the presence of additional consideration heightened the level of scrutiny used by the court in searching for evidence of the parties' intention concerning the duration of the contract. Other cases underscore the difficulty of determining whether an employment contract is for a definite period of time. For example, Duff v. P.T. Allen Lumber Co. 36 and Stephens v. Horn 37 are illustrative.

In P.T. Allen Lumber, two employees entered into an employment contract to cut timber of a certain diameter on 952 acres of the employer's land; to saw the body of the trees into saw logs; and to drag the logs to a location where they would later be carried to the employer's mill to be manufactured into lumber. 38 The plaintiffs alleged that the employer breached the employment contract when the company fired them after only nine months of work and the clearing of only thirty acres of trees. 39 The court found that there was no breach because the contract was a contract for service for an indefinite duration. 40 If the contract was enforced as written, the plaintiffs would have had, in effect, perpetual employment cutting trees for the company. 41 For the court, it was "inconceivable that the parties comprehended or proposed to enter into any such agreement," 42 although, the language of the contract, explicitly stated that Duff

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35. See Edwards v. Kentucky Utilities Co., 150 S.W.2d. 916 (Ky. Ct. App. 1941) (refusing to expand independent consideration doctrine to recognize an employee detriment as adequate consideration).
37. 236 S.W.2d. 953 (Ky. Ct. App. 1950).
38. P.T. Allen Lumber Co., 220 S.W.2d at 981.
39. Id.
40. Id. at 982.
41. Id. at 983.
42. Id.
was to cut all of the timber on the designated acreage.\textsuperscript{43}

In \textit{Stephens v. Horn},\textsuperscript{44} the plaintiff agreed to construct a coal loading chute for the defendant. When the defendant refused to continue payments during the construction of the chute, the plaintiff alleged that the contract was breached.\textsuperscript{45} The company defended on the grounds that the contract was for an indefinite duration and was therefore terminable at-will, citing \textit{P.T. Allen Lumber} in support of its proposition. However, the \textit{Stephens} court distinguished \textit{P.T. Allen Lumber} by noting that in the instant case, the contract was for a definite amount of work.\textsuperscript{46} Where the contract failed to provide a time period for the work, it would be deemed to require performance within a reasonable time.\textsuperscript{47} The “reasonable time” requirement read into the contract also meant that the contract was for a definite duration.\textsuperscript{48}

The apparent incongruity of the two decisions is explained by examining the notion that underlies the at-will doctrine: a promise of “permanent” employment means “indefinite” employment and is therefore employment at-will.\textsuperscript{49} The problem in both \textit{Stephens} and \textit{P.T. Allen Lumber}, is that the court’s outcome was based on whether or not the parties’ relationship appeared to resemble an indefinite employment relationship. Regardless of the appearance of the relationship, the court’s inquiry should be into the intentions of the parties at the time of contracting. The results in both cases were dictated by a rigid understanding of the at-will doctrine rather than the intent of the parties.

\textit{Yellow Poplar} appears to make the at-will doctrine a rule of construction by allowing mutuality to serve the evidentiary function of determining the parties’ intentions. In practice, however, the courts in Kentucky apply the rule as being one of law; indefinite employment contracts could not be anything other than terminable at-will.\textsuperscript{50} In an indirect way, the Kentucky Supreme Court acknowledged that Kentucky’s mutuality requirement was in fact a rule of law and not a rule of construction.

\textsuperscript{43} Id. at 981.
\textsuperscript{44} 236 S.W.2d 953 (Ky. 1950).
\textsuperscript{45} Id. at 954.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} See Perry v. Wheeler, 75 Ky. (12 Bush) 541, 548 (1877).
\textsuperscript{50} See Shapiro, supra note 2, at 340-47; Hyatt, supra note 7, at 221-27.
In *Shah v. American Synthetic Rubber Corp.*,\(^{51}\) the plaintiff Shah was a chemical engineer hired by the defendant American Synthetic.\(^{52}\) Shah alleged that he surrendered substantial benefits from his previous employer to work for the defendant.\(^{53}\) He also alleged that he was subject to a ninety day probation period, during which he could be fired for any reason, and that after serving his probationary period, he would be considered a permanent employee dischargeable only for cause in accordance with the policies and procedures of the company.\(^{54}\) The issue, one of first impression in Kentucky, was whether an employment contract for an indefinite period of time was enforceable where the employer agreed to limit its power to terminate an employee.\(^{55}\) The court summarized Kentucky case law on employment at-will and referred to the long-standing doctrine that employment for an indefinite period is at-will, even if the parties acknowledge that the employment was viewed as being "permanent employment."\(^{56}\) Moreover, the court reiterated a theme discussed in *Yellow Poplar*: the characterization of the contract as of definite or indefinite duration turned on the intent of the parties and the facts of the case.\(^{57}\)

*Shah* is important at two levels. The first and most obvious level is that an otherwise at-will employment relationship was transformed into a contractually binding relationship through the use of company policies, procedures and handbooks. The second, and most important reason is that the court fundamentally altered its view of the at-will doctrine. Mutuality, which had been the cornerstone of the at-will doctrine, was no longer a guise behind which the court would search for adequate consideration from an employee. As the court expressly held, "parties may enter into a contract of employment terminable only pursuant to its express terms -as 'for cause'- by clearly stating their intentions to do so,  

\(^{51}\) 655 S.W.2d. 489 (Ky. 1983).  
\(^{52}\) Id. at 491.  
\(^{53}\) Id.  
\(^{54}\) Id. at 491-92.  
\(^{55}\) Id. at 492.  
\(^{56}\) Id. at 491. The court cited several cases to support this proposition, but the first case to articulate this position was *Perry v. Wheeler*, 75 Ky. (12 Bush) 541 (1877). No authority was offered in *Wheeler* to support this position other than the Court's assertion that the parties may have said the employment was permanent but they intended for it to continue until one or the other desired to terminate the relationship. Id. at 548-49.  
\(^{57}\) See *Shaw*, 655 S.W.2d. at 490.
even though no other consideration than services to be performed or promised, is expected by the employer, or performed or promised by the employee." The impact of this simple statement was to sweep aside earlier cases that implicitly disfavored employee claims of a binding contract unless an employer's promise was supported by consideration other than services rendered to the employer. Although the court did not explicitly state this proposition, its acceptance may be gleaned from the cases cited as examples of Kentucky's "new" position on the effect of the absence of additional consideration to support a promise not to discharge.

For example, the Kentucky Supreme Court cited Drzewiecki v. H. & R. Block. In Drzewiecki, a former H. & R. Block employee alleged the existence of an employment contract, citing an extensive written agreement that specified the terms on which the employee assumed the responsibility for opening a new branch office for Block. Block argued that the contract between itself and the plaintiff was for permanent employment. Since no evidence was offered to show consideration other than services, the agreement was terminable at-will. The California appellate court's holding, adopted by the Kentucky Supreme Court in Shah, was that a contract for permanent employment is not terminable at-will if the employer has clearly agreed to limit its right to do so.

The Shah court also cited with approval a Michigan appellate decision, Rowe v. Noren Pattern & Foundry Co. In Rowe, the plaintiff was a "fix it" man who alleged that he was induced by the defendant to leave his employer and work for defendant. As part of the inducement, the defendant offered permanent employment if the plaintiff passed a forty-five day probationary period. The plaintiff changed employers, sacrificing an opportunity for a vested pension with his former employer. He was subsequently terminated and the lower court upheld the termination as a prerogative of the employer under the at-will doc-

58. Id. at 492.
60. Id. at 704.
62. Id. at 716.
63. Id.
As with Drzewiecki, the issue was whether an employment contract was created where the length of employment was indefinite and no additional consideration, other than services, was provided by the employee. Although the court noted that "relinquishment of the employee of a job . . . in order to accept the new position of permanent employment does not constitute special consideration sufficient to support the contract[,]" an exception exists "where it is clear at the time of hiring that the employee would not have left his former position except for the offer of a position." In Rowe, the court determined that the plaintiff would not have left his former position but for the company's promise that he would come under the protective umbrella of union membership. As such, the employment contract was not terminable at-will, notwithstanding the fact that the contract was for an indefinite term. From its tacit approval of the holdings in Drzewiecki and Rowe, it is clear that the Kentucky Supreme Court has rejected the additional consideration requirement.

B. The Public Policy Exception

No discussion of the at-will doctrine in Kentucky would be complete without at least a brief review of the public policy exception to the at-will doctrine. The public policy exception is important not because it creates an employment contract that did not otherwise exist, but rather because it limits the reasons an employer may rely upon in discharging an employee.

The public policy exception to the employment-at-will doctrine was first recognized in Firestone Textile Co. Div. v. Meadows. In Firestone, plaintiff Meadows was injured during the course of his employment. He later alleged that his subsequent discharge was because he sought workers' compensation benefits. Meadows conceded that as an at-will employee he was subject to

64. Id. at 716-17.
65. Id. at 715.
66. Id.
67. Id. at 716.
68. Id. at 717.
69. Id.
70. 666 S.W.2d. 730 (Ky. 1983).
71. Id. at 731.
discharge for any reason, including a morally indefensible one.\textsuperscript{72} However, the court defined the issues as being narrower than a challenge to the at-will doctrine. Instead, the questions presented were whether the court should recognize an exception to the doctrine and if the Kentucky Workers' Compensation Act could serve as the basis for that exception.\textsuperscript{73}

The court recognized an exception to the at-will doctrine where the discharge would violate a well-defined and fundamental public policy.\textsuperscript{74} Next, the court turned to the question of whether the Workers' Compensation Act articulated a well-defined and fundamental public policy.

The court first noted that the Workers' Compensation Act did not explicitly prohibit an employer from discharging an employee who exercised his rights under the Workers' Compensation Act.\textsuperscript{75} Nevertheless, the court found that the Workers' Compensation Act embraced the view that employees should accept or reject coverage free of employer coercion.\textsuperscript{76} The court held that implicit "in the Act as a whole is a public policy that an employee has a right to be free to assert a lawful claim for benefits without suffering retaliatory discharge."\textsuperscript{77} Moreover, there is a significant public interest in having injured employees receive and employers pay for medical expenses; otherwise, injured employees might become public charges.\textsuperscript{78}

Finally, the court emphasized that it was not abandoning the at-will doctrine.\textsuperscript{79} The exception was limited to circumstances where a public policy established by the legislature would be violated by the unrestricted operation of the employment-at-will doctrine.\textsuperscript{80} The court also believed that employers had a legitimate interest in having this new exception clearly defined and controlled.\textsuperscript{81} To that end, the court established the exception as a tort action for wrongful discharge.\textsuperscript{82} Under this arrangement,
III. TIME FOR A CHANGE?

Even with the modifications to the at-will doctrine discussed in the previous section, the at-will doctrine still offers little protection to Kentucky's workers. Kentucky law in this area may have come a long way, but the progress is illusory. This section will discuss what is wrong with Kentucky's law on employment-at-will and the public policy exception.

A. Policy and Procedural Employment Manuals

As discussed previously, Shah v. American Synthetic Rubber Corp. appeared to provide employees with the opportunity to overcome their at-will status by demonstrating that the employee entered into an employment contract even though no additional consideration beyond services was provided to the employer. Unfortunately, the possibility of entering into a contract has not necessarily offered more protection to the at-will employee.

An example will demonstrate why this is true. Assume that an employee accepts employment with an employer who has adopted a procedure manual explaining personnel policies and practices. The employee would naturally assume that the manual provides some measure of job security. However, the security offered by a procedure manual and the holding in Shah is easily circumvented by employers.

In Nork v. Fetter Printing Co., the Kentucky Court of Appeals decided a series of three cases growing out of what the court described as a "spate" of wrongful discharge actions. Presumably, the court intended to eliminate the "quandary" about the effect employee manuals or handbooks have upon the status of the at-will doctrine. The general rule is that a court will find an employment contract where the employee handbook contains explicit contract language and there are no disclaimers either in

83. Id.
84. 655 S.W.2d 489 (Ky. 1983).
85. See supra notes 51-58 and accompanying text.
86. 738 S.W.2d. 824 (Ky. Ct. App. 1987).
87. Id. at 825.
the handbook or any other document signed or read by the employee. In *Nork*, the plaintiff alleged the existence of a contract based upon an employee handbook. However, the plaintiff's application for employment signed some twenty years before he was discharged stated that, "[i]t is further agreed that this contract may be terminated at will by either employer or employee."\(^{88}\) The court concluded that unless his at-will status was modified by the handbook his claim would fail.\(^{89}\) The court found that the handbook contained "policy statements which Fetter management admittedly strove to follow, but this [was] not tantamount to an expression of a contractual agreement where the language is not contractual."\(^{90}\) Nothing in the handbook, therefore, expressly created a contract.\(^{91}\)

Although the holding in *Nork* is clear, important questions still remain unanswered. For example, it is unclear what the court means by language that is "contractual" as opposed to "policy statements" which one aspires to follow.

Decided with *Nork* was the companion case of *Baker v. Slack*\(^ {92}\) in which the employee argued that language in an employee manual created an employment contract. The manual stated in pertinent part that:

> It should be clearly understood that the continued employment of any associate of the company will depend upon the successful performance of all work assigned to the associate, and the general following of the guidelines of this booklet, during a trial period of up to ninety (90) days, and upon the continued successful performance and the further need of the associate's continued employment by the Company.\(^ {93}\)

The court rejected the plaintiff's argument and equated the company's statement to one of making the employee permanent after ninety days. Permanent employment is indefinite employment and, therefore, at-will.\(^ {94}\)

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88. *Id.*
89. *Id.*
90. *Id.* at 825.
91. *Id.*
92. 738 S.W.2d 824 (Ky. Ct. App. 1987).
93. *Id.* at 826.
94. *Id.* The Court's construction of the language in the manual may also have been inappropriate in view of the fact that probationary periods have come to have a special meaning in management/labor relations. Successful completion of a probationary period
Although the court cited Shah to support its conclusion, in Baker's case, this type of analysis is actually at odds with the Shah court's holding. The notion that "permanent" employment is "indefinite" employment looks back to a time when mutuality of obligation was a barrier to the creation of an employment contract. Shah supposedly eliminated this problem by focusing upon the parties' intentions as opposed to adhering to a rigid rule of law. However, a literal reading of Baker indicates that regardless of the parties' intent, an offer for permanent employment still signifies that an at-will rather than a contractual relationship exists.

Two additional points may be gleaned from Nork. It is clear that explicit disclaimers, whether in the form of statements in the handbook or documents signed by the employee, will defeat a contract of employment claim. It also appears that a disclaimer of a contract of employment may be modified by an employee handbook since the Nork court examined the handbook to ascertain if Nork's status was altered.

Problems still remain with a case that falls somewhere between the facts in Nork and Baker. For example, it would be easy to envision a situation where an employee handbook, sufficient to create an employment contract at the time the employee is hired, is subsequently modified by the employer in an attempt to remove all job security provisions and have the relationship revert back to one at-will. Following the logic of Nork, since the at-will relationship can be modified only by explicit contract language, the employer cannot later modify the contract unless that right is reserved explicitly. This approach has been rejected by some courts and it is not clear what the Kentucky courts will do when this issue is addressed.

often signifies that an employee can expect permanent employment unless discharged for cause. See Timothy J. Heinsz, The Assault on the Employment At Will Doctrine: Management Considerations, 48 Mo. L. Rev. 855, 884 (1983). Arguably, the use of this term of art, "probationary period," suggests that the language in the manual was either an explicit or implicit manifestation of an intent to create some kind of job security for the employees.

95. See Louisville & Nashville R.R. Co. v. Offutt, 36 S.W. 181 (Ky. Ct. App. 1896); Note, The Duty to Terminate Only In Good Faith, supra note 4, at 1819.

96. For a discussion of this issue and the cases which have adopted different approaches to this question, see St. Antoine, supra note 4, at 61-62. This issue was also extensively analyzed in Pine River State Bank v. Mettille, 333 N.W.2d. 622 (Minn. 1983) and In Re Certified Question, 443 N.W.2d. 112 (Mich. 1989).
In any event, employee handbooks offer only minimal job security. An employer may easily circumvent the creation of a contract by using disclaimers. Moreover, Kentucky could find that any job security offered in a handbook and serving as the basis for a contract may be unilaterally modified by the employer, even if the employer failed to reserve the right to do so.

B. In Search of Public Policy

The problem with the public policy exception is readily apparent. A public policy may serve as the basis for the exception only where the policy is fundamental and well-defined. This requirement is met when the policy is evidenced by a constitutional or statutory provision.\footnote{97. See Firestone, 666 S.W.2d. at 731.}

Justice Stephenson’s dissent in Firestone pointed out one of the major criticisms of the public policy exception, “an ingenious lawyer can nearly always find a right ‘implicit in a statute,’ particularly when such a right can mean almost anything.”\footnote{98. Id. at 734.} Even in Firestone, the very opinion in which the court recognized the public policy exception, the court acknowledged that it was dealing with a statute which neither explicitly proscribed the action taken by the employer nor created a private remedy for any injury suffered by an employee.\footnote{99. Id. at 732-33.} Nevertheless, the court found a public policy which was violated.\footnote{100. See Id.}

An additional reason renders the public policy exception unstable and ineffectual in protecting employees. The public policy exception presupposes that employment relationships exist in a separate private sphere distinct from governmental regulation of public policy. In reality, however, economic life, particularly the employment relationship, is shaped and defined by governmental regulation to such an extent that it is difficult, if not impossible, to draw any neat line between public policy and private employment relationships.\footnote{101. See generally Karl E. Klare, The Public/Private Distinction in Labor Law, 130 U. PA. L. REV. 1358 (1982) (the public/private distinction has been incorporated into labor law and is based upon the erroneous conviction that it is possible to conceive of social and economic life apart from government and law); Paul Brest, State Action And Liberal}
lawyers as much as it is caused by the myriad of connections between the private sphere of employment relationships and governmental regulation. As the court was forced to recognize in *Firestone*, legislative silence is not necessarily an indication of apathy.

Decisions regarding the public policy exception should turn on something other than how clearly or artfully the legislature has expressed itself. *Firestone* demonstrates that a strong public policy may not necessarily be explicitly stated or expressed in ways that courts are accustomed to identifying, that is, by creating a private cause of action. An inartfully drafted statute may express a significant policy which is not readily discernible, but no less significant than a carefully worded statute which is patently clear on policy. There is no clear reason why an employee's job security should be based upon the inability of legislative aides to clearly express policies that may be deeply felt but awkwardly expressed.

Although the logic of *Firestone* could have lead to a rather broad-based protection of employees, it has not. Sensing the potentially expansive implications of its decision, the court circumscribed the *Firestone* decision in *Grzyb v. Evans*.

In *Grzyb*, the court articulated three criteria as necessary to establish the public policy exception. First, the termination must violate a fundamental and well-defined public policy. Second, the policy must be evidenced by a constitutional or statutory provision. Finally, whether the policy meets these criteria is a

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Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296 (1982) (the public/private distinction becomes untenable if one believes that all social relationships and transactions are governed by law, but fails to establish a substantive, normative theory of rights); Morton J. Horwitz, The History Of The Public/Private Distinction, 130 U. Pa. L. Rev. 1423 (1982) (most Americans agree that there are private activities that should be beyond the reach of governmental interference, however there is disagreement as to what those activities should be and the criteria used to identify those activities beyond the reach of governmental control).

102. 700 S.W.2d. 399 (Ky. 1985).
103. Id.
104. Id. at 401.
105. Id.
question of law for the court to decide.\textsuperscript{106} In addition, a wrongful discharge action cannot be maintained if the legislature has already provided a remedy for the injury suffered from the employer's proscribed act.\textsuperscript{107}

The Grzyb court appended an important caveat to Firestone and delineated the types of conduct that constitute a violation absent an explicit statutory or constitutional provision prohibiting the discharge. First, a violation occurs when the reason for the discharge was the employee's failure or refusal to violate a law during the course of employment.\textsuperscript{108} Alternatively, a violation occurs when the discharge is based upon an employee's exercise of a right conferred by a well-established legislative enactment.\textsuperscript{109} Finally, the court noted that an "employment-related nexus" is required.\textsuperscript{110} Although the court defined an "employment related nexus" as one "critical to the creation of a 'clearly defined' and 'suitably controlled' cause of action for wrongful discharge,"\textsuperscript{111} no further explanation was provided. However, a subsequent appellate court's cursory treatment of the nexus requirement provides greater insight.

In Boykins v. Housing Auth. of Louisville,\textsuperscript{112} the plaintiff, an employee of the Housing Authority, sued the Authority when her son suffered electrical burns from an outlet on premises owned, controlled and managed by the Authority. The Authority terminated Boykins' employment in retaliation for filing the lawsuit. Although the Authority stipulated that this was the reason for the discharge, the court found no public policy violation.\textsuperscript{113} Without elaboration, the court stated that the nexus was absent in Boykins' case.

Boykins suggests that the nexus requirement pertains to more than the actual decision to discharge. The nexus appears to pertain to the employee conduct that gives rise to the termination. Clearly, the effect of the employer's ultimate decision was

\textsuperscript{106} Id. at 399.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 402.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{113} Id.
to deprive Boykins of her job, but the conduct which triggered the employer's response was not job-related. Granted, the lawsuit was against the employer, but it was not over an issue that arose from the employment relationship. In Firestone, however, the incident that triggered the employer's response was job-centered, that is, the plaintiff's conduct was the filing of a job-related workers' compensation claim.

If this is the correct interpretation of the nexus requirement, it represents a serious limitation upon the protection offered by the exception. For example, suppose an employer discovers that its employees plan to vote for a political candidate whom the employer does not support. In response, the employer tells the employees that if they vote they will be terminated. Given the statutory and constitutional protections afforded the right to vote, there is a fundamental, well-defined public policy protecting the right to vote. Arguably, however, there is no employment nexus. The employees' conduct, voting, is no more job-related than Boykins' conduct in filing a lawsuit against her employer. The issue raised by the nexus requirement is real and, as yet, unanswered by the court. Unfortunately, Grzyb is typical of a national trend in the public policy exception. Courts have tended to reduce the protection offered by this exception by construing it narrowly. If this is the correct interpretation of the nexus requirement, it represents a serious limitation upon the protection offered by the exception. For example, suppose an employer discovers that its employees plan to vote for a political candidate whom the employer does not support. In response, the employer tells the employees that if they vote they will be terminated. Given the statutory and constitutional protections afforded the right to vote, there is a fundamental, well-defined public policy protecting the right to vote. Arguably, however, there is no employment nexus. The employees' conduct, voting, is no more job-related than Boykins' conduct in filing a lawsuit against her employer. The issue raised by the nexus requirement is real and, as yet, unanswered by the court. Unfortunately, Grzyb is typical of a national trend in the public policy exception. Courts have tended to reduce the protection offered by this exception by construing it narrowly. Even where the exception has been applied, it tends to protect upper-level management rather than lower level employees.

IV. THE MODEL EMPLOYMENT TERMINATION ACT

If at-will employees are to receive any increased protection from unjust discharge, it will have to come from the legislature. The courts have demonstrated an inability to break through what has been described as their "self-created crust of legal doctrine." America is a nation of employees. For most Americans, a job is the sole means of economic survival. Employment is one area where neither employees nor employers should experience uncertainty in their rights and responsibilities.

114. See Note, The Public Policy Exception, supra note 4, at 1936-37.
115. Id. at 1937-42.
116. Summers, supra note 4, at 521.
117. See Blades, supra note 4, at 1404; Shapiro & Tune, supra note 2, at 337-38.
The Model Employment Termination Act was drafted with an awareness of the need to accommodate competing interests and to add certainty in the employment relationship without sacrificing fairness. The Act illustrates an awareness of the trend of mitigating the harsh result of the at-will doctrine. Since the heart of the Act is the good cause requirement, the focus of this section will be on that requirement and how it relates to other sections of the Act.

A key aspect to the Act, and perhaps the most controversial, is the requirement that employees may not be terminated without good cause. Though this approach represents a radical departure from the employment at-will rule which allows termination for any or no reason, the concept of good cause is not new to labor law. By using the term "good cause," the Act incorporates principles used by arbitrators for years in enforcing and interpreting discharge provisions in collective bargaining agreements. The advantages to this approach are clear. Just cause (the term used by arbitrators) is not simply a word, but a body of substantive and procedural law. It is a term which denotes a process described as the arbitrator discovering and applying the common law of the workplace to employer/employee relations and agreements.

118. See Model Employment Termination Act prefatory note.
119. Id.
120. See id. at § 3(a). Section 1(4) defines good cause as:
(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or
(ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.
Prior to the drafting of the Act, the Montana legislature adopted a wrongful discharge statute which requires that an employee may be discharged only if there is good cause. Good cause means "reasonable job-related grounds for dismissal based upon a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate reason." Mont. Code Ann. § 39-2-903(5)(1987). Though the wording is not identical to the Act, the Montana legislature clearly accepts the basic notion that satisfactory job performance should translate into job security.
121. Id. at § 1 comment.
122. See Summers, supra note 4, at 499-501.
To the uninitiated, good cause appears to be a pro-employee concept which operates to the detriment of employer free choice. At a very simple level this is undeniably true; the prerogatives of employers are being reined in. It ignores, however, another important dimension to the good cause concept. Good cause represents an accommodation of competing interests — those of management and labor — and is not merely another name for job security at the expense of business efficiency.124

An example of this accommodation process can be seen in the Act's definition of good cause.125 Under the Act, employees may be discharged for failure to meet the performance standards required for the job.126 This would constitute a reasonable basis for employer action.127 Moreover, some positions may require more exacting standards than others, and standards once set often need to be changed. In recognition of this fact, the Act allows for employer flexibility in setting and modifying standards of performance.128 Moreover, the Act does not limit the ability of employers to terminate employees caused by changes in economic goals or methodologies. An employer's ability to exercise honest business judgment affecting the organization and operation of the business is not unduly constrained by the concept of good cause.129

Perhaps the strongest argument against an assertion that the Act will unduly fetter employers is an empirical one. The United States is one of the few industrialized countries that has not adopted some form of job protection for employees. There has been no showing that companies operating in Japan or Germany, countries that have protective legislation, have lost their competitive edge.130

However, the Kentucky legislature need look no further than the borders of this country to assess the extent to which good cause would unduly fetter an employer's ability to effectively manage its work force. Good cause, arbitration of disputes, and granting substantive and procedural protections to workers have

124. See Summers, supra note 4, at 505-06.
125. MODEL EMPLOYMENT TERMINATION ACT § 1(4).
126. Id. at § 1 comment.
127. Id.
128. Id.
129. Id. at § 1 (4)(ii) and comment.
130. See generally Newman, supra note 4; Paull, supra note 4.

Additionally, employers are afforded great flexibility. Good cause does not denote a uniform standard of conduct or performance for all employees. It is possible for employers (as well as employees) to impose significant qualifications on the statutory protections which an employee would otherwise receive. By agreement, an employer and employee may define the business-related performance standards which an employee must meet. An employer and employee may agree as to what standards would constitute good cause for termination.\footnote{\textit{Model Employment Termination Act} § 4(b) and comment.} It is also possible for the good cause requirement to be waived by written agreement. For example, the good cause discharge could be sacrificed with the employee reverting to an at-will status in exchange for severance pay upon termination for any reason other than willful misconduct by the employee.\footnote{\textit{Id.} at § 4(c) and comment.} Finally, the Act does not apply to terminations that occur at the expiration of an express oral or written agreement for a specified duration and related to specific undertakings.\footnote{\textit{Id.} at § 4(d).}

The good cause standard does come with a price, however. By adopting the Act, Kentucky would extinguish all common law rights and claims of terminated employees against employers. This would include all claims which are “based on the termination or on acts taken or statements made that are reasonably necessary to initiate or effect the termination if the employee’s termination requires good cause under Section 3(a), is subject to an agreement for severance pay under Section 4(c), or is permitted by the expiration of an agreement for a specified duration under Section 4(d).”\footnote{\textit{Id.} at § 2(c). This section was intended to be read broadly to include several tort actions related to the discharge of an employee. The comment to section 2(c) lists several...}
Good cause then, represents the drafters' efforts to recognize the legitimacy of both employer and employee interests. It is neither pro-employee nor pro-employer. What it represents is a significant, though hardly perfect, attempt to recognize the need for equitable trade-offs between competing interests.

CONCLUSION

In Kentucky, the employment-at-will doctrine and its public policy exception offer little, if any, protection to Kentucky's workers. Further modification of the at-will doctrine simply will not offer the kind of protection provided by the substantive and procedural law developed under the good cause standard. By adopting the Act, the Kentucky legislature could provide a measure of job security for its citizens, but not at the expense of business profitability or fairness. Moreover, we will be spared the onerous task of following the endless twists and turns that the at-will doctrine will take in the court's effort to harmonize its decisions when discord invariably occurs. The sometimes arbitrary and often harsh results of the at-will doctrine would be eliminated in favor of an approach that recognizes the need for accommodating competing interests of equal importance. Until the Act is adopted, the vulnerability of employees will continue. Maybe the most forceful statement that can be made in support of adopting the Act was articulated by Sam when he said, "there ought to be a law against treating people this way." There ought to be a law indeed.

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causes of actions which would be abolished. "These include defamation, intentional infliction of emotional distress, and the like." Id. In describing the reach of this section, it was emphasized that the key to ascertaining which actions are abolished is not the nature of the tort itself. Rather, it is "whether its basis is the termination itself or acts taken or statements made that are reasonably necessary to initiate or effect the termination." Id. Moreover, the abolition is not limited to tort actions. "Contract actions based on terminations under implied-in-fact employment agreements are also abolished for employees protected by the Act." Id.

As the last sentence makes clear, the abolition extends only to those employees covered by the Act. The scope of the coverage is delineated in section 1(1) and section 3(b). Moreover, the Act does not attempt to extinguish rights or claims arising under other state or federal statutes. "See id. at § 2(e) and comment."
MANDATORY REPORTING OF LAWYER MISCONDUCT: CAN THE BENCH & BAR OF THE COMMONWEALTH DISCIPLINE ITSELF WITHOUT IT?

by Beverly Storm*

On January 1, 1990, the Kentucky Supreme Court abolished Supreme Court Rule 3.130 which had adopted the American Bar Association’s Code of Professional Responsibility to govern professional disciplinary matters and which also provided that, “charges [may be] brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.”¹ In its place, the Supreme Court adopted the American Bar Association Model Rules of Professional Responsibility² with some technical revisions and a significant deletion — the so-called “squeal rule” that renders an attorney subject to professional discipline for failing to report an errant colleague.

According to news reports at the time, this event occurred “quietly” and apparently without the concurrence of the special panel charged with studying the proposed new Model Rules for the court.³ After noting that Kentucky was now only one of two states (the other being California) without a “squeal rule,” the Courier-Journal article quoted two of the justices as stating they were unaware that the “squeal rule” had been deleted from the Model Rules when adopted by the court and another justice questioning whether it is ever appropriate for lawyers to be policemen.⁴ A University of Kentucky law professor asserted that

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* Adjunct professor at the Salmon P. Chase College of Law and partner at the law firm of Arnzen, Parry & Wentz, Covington, Kentucky. The author is grateful for and acknowledges the research and assistance of Joyce Stevens in the preparation of this article.

1. Ky. Sup. Ct. Rule 3.130 (repealed Jan. 1, 1990). The consequences of that omission have yet to be determined although given the utilization of it in past disciplinary cases, it could be significant. See KBA v. Jones, 759 S.W.2d 61 (Ky. 1988).

2. MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1980).


4. Id.
the deletion of the mandatory reporting rule was "contrary to the public interest," while a spokesperson for a legal reform group opined that Kentucky's rule change is unimportant because "lawyers don't turn in other lawyers." The Kentucky Bar Association spokesperson disagreed, stating that 10 to 15 percent of disciplinary complaints in Kentucky are filed by other lawyers.5

Unfortunately, the Courier-Journal article missed the mark. At issue is not whether lawyers should and can police themselves, or even whether lawyers should or do report their colleagues for misconduct. Rather, the issue surrounding the mandatory reporting requirement is whether lawyers should themselves be subject to discipline (for example, a reprimand, suspension or disbarment) for failing to file a complaint against another lawyer. A review of the published case law suggests that the imposition of professional discipline for failing to report another lawyer is an event as bizarre and infrequent as being struck by lightning. As such, whatever salutary effect such a rule may have in improving the legal profession is virtually eliminated due to its history of non-enforcement.

The "squeal rule" is codified in Disciplinary Rule (DR) 1-103(A) of the American Bar Association Model Code of Professional Responsibility.7 It provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."8 According to Ethical Consideration (EC) 1-4 of the Code, a lawyer has an obligation to report unprivileged

5. Id.
6. Id.
7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980).
8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980). DR 1-102 defines professional misconduct as a violation of a Disciplinary Rule directly or indirectly, engaging in illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice or conduct which adversely reflects on the ability to practice law. Id.
9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980). It has been suggested that DR 1-103 creates a wide class of potential violators; not only must all misconduct be reported, but another attorney's failure to report presumably must also be reported. Taken literally the rule makes it "a violation for attorney A to fail to report that attorney B failed to report on attorney C." Harold Brown, A.B.A. Code of Professional Responsibility: In Defense of Mediocrity, TRIAL, Aug.-Sept. 1970 at 29, 30. Other logical questions follow: can an attorney in a disciplinary proceeding be separately disciplined for failing to report himself or herself? Can partners or associates of disciplined lawyers be charged with failing to report those closest to them?
knowledge of any conduct clearly in violation of the Disciplinary Rules,\(^{10}\) as the integrity of the profession can be maintained only if such conduct is brought to the attention of the proper officials.\(^{11}\)

Despite this clear and mandatory rule, disciplining lawyers for failing to report their errant colleagues was apparently of little impact in achieving the goal of preserving the integrity of the profession, if impact is measured by frequency of discipline imposed. Since the adoption of the Code in 1970, with one exception, the only reported cases discussing violations of the mandatory reporting rule involved situations where that charge was joined or "piggy-backed" with other more serious charges involving personal culpability on the part of the lawyer.\(^{12}\)

For example, Matter of Bonafield,\(^ {13}\) involved an attorney, Bonafield, who illegally engaged in the private practice of law while sitting as a Workers' Compensation Judge.\(^ {14}\) Bonafield was removed from his position and suspended from the practice of law.\(^ {15}\) Bonafield was aided in his unlawful private practice by one Tedeschi, who acted as his "front" in exchange for a small portion of Bonafield's fees.\(^ {16}\) Tedeschi was found guilty of violating DR 1-102 (misconduct), DR 2-107 (division of fees), DR 3-101 (aiding the unauthorized practice of law) and as well as DR 1-103 for his failure to report Bonafield.\(^ {17}\) Tedeschi received a severe public reprimand.\(^ {18}\)

In Attorney Grievance Commission of Maryland v. Kahn,\(^ {19}\) the failure to report was likewise added to a series of more serious charges. Attorney Kahn was an associate in the law office of one Berman.\(^ {20}\) Berman resigned from the Maryland bar "with preju-

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11. DR 1-103(A) was based upon Canon 29 of the old ABA CANONS OF PROFESSIONAL ETHICS which were adopted in 1908 and which were in effect until the adoption of the Model Code in 1970. Canon 29 provided that "[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession,..."
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 1145.
20. Id. at 1339.
dice" for committing insurance fraud.\(^{21}\) Berman also paid "run-
ners" who brought clients to him, concealing and recouping these
payments by a "double checking system."\(^{22}\) Kahn was found to
have knowledge of and personal participation in Berman's illegal
and unethical activities and he was disbarred for that participa-
tion, as well as for his failure to report Berman.\(^{23}\)

It is clear from these cases that the "failure to report" was a
gratuitous and incidental part of discipline which was imposed
on the attorney for his personal participation in serious miscon-
duct involving a closely-related attorney.

When the matter of the mandatory reporting rule was consid-
ered by the drafters of the new American Bar Association Model
Rules in the early 1980's, they noted that the failure to report
every violation as constituting a professional offense has "proved
to be unenforceable."\(^{24}\)

Nevertheless, the drafters of the Model Rules retained a re-
porting requirement, but limited the obligation to "conduct which
raises a substantial question as to the lawyer's honesty, trust-
worthiness or fitness as a lawyer."\(^{25}\) The Model Code drafters
felt that, "self-regulation" requires its members to initiate disci-
plinary investigations, especially where the victim is unlikely to
discover the offense.\(^{26}\) The drafters further opined that the re-
porting obligation was now limited to those offenses that a self-
regulating profession must vigorously endeavor to prevent;\(^{27}\) thus
presumably making the rule more enforceable.

About the time that many states (including Kentucky) were
adopting, or considering the adoption of, the new Model Rules,
the first and only published decision where professional discipline
was imposed upon an attorney solely for his failure to report
another attorney's misconduct was issued amid a blaze of national
publicity and controversy.\(^{28}\) In that case, Himmel, a suburban
Chicago lawyer, was suspended by the Illinois Supreme Court
for one year for failing to report an attorney who had converted

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\(^{21}\) Id. (Berman submitted personal injury claims supported by false medical reports).
\(^{22}\) Id. at 1341.
\(^{23}\) Id. at 1352.
\(^{24}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 cmt. (1983).
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) Id.
\(^{28}\) In re Himmel, 533 N.E.2d 790 (Ill. 1988).
MANDATORY REPORTING

When the injured client subsequently came to Himmel to represent her, Himmel did not report the conversion to the Illinois Bar authorities. Rather, he negotiated a settlement whereby the errant lawyer paid the client $75,000 on the condition that neither Himmel nor the client reported the matter nor brought criminal charges. When the errant lawyer subsequently failed to honor the settlement and Himmel had to file suit against him, Himmel was charged by the Illinois Bar Association for failing to report the misconduct. Himmel defended his failure to report on the grounds that he was acting on his client's instructions, that the information was privileged and that he would have violated his duty to represent his client by reporting the misconduct and thus voiding his client's favorable settlement.

The case has come to be known as "Himmel's Dilemma," which moniker can be appreciated by practitioners. No such dilemma existed, however, for the Illinois Supreme Court. The court disposed of Himmel's chief defense, that the information was privileged as being gained through his attorney/client relationship and thus exempt from the reporting requirement, by adopting the narrow definition of "privilege" from Wigmore's evidentiary rules. In doing so, the court ignored the broad definition of "privileged information" contained in the Model Code itself. The court held, based on Wigmore's rule, that because the client had discussed the situation with Himmel in the presence of her mother and her fiancee, the privilege was lost and the mandatory duty to report arose as to Himmel. In response to Himmel's argument that the client specifically instructed him not to report the matter, the court stated, "[a] lawyer may not

29. Id. at 796.
30. Id. at 791.
31. Id.
32. Id.
33. Id. at 792-93.
35. In re Himmel, 533 N.E.2d at 794.
36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). DR 4-101(A) requires an attorney to keep secret "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would ... likely ... be detrimental to the client." Id.
37. In re Himmel, 533 N.E.2d at 794.
choose to circumvent the rules by simply asserting that his client asked him to do so.\textsuperscript{38}

The Illinois Supreme Court was undoubtedly disturbed by the fact that the errant lawyer victimized many other clients after Himmel's duty to report arose and that Himmel and his client stood to gain financially from the agreement not to prosecute, akin to "compounding a crime" by accepting consideration not to prosecute or aid in the prosecution. The record shows, however, that Himmel in actuality received no fee for his services.\textsuperscript{39}

Thus, not only was \textit{Himmel} a precedential case demonstrating a willingness to enforce the mandatory reporting rule, but its adoption of the narrow evidentiary view of "attorney/client privilege," as opposed to the broad concept of "client's secrets" set forth in the disciplinary code, would provide few exceptions to the mandatory reporting requirement. As such, many practicing attorneys or judges would be subject to discipline under the mandatory reporting rule for failing to bring charges against their colleagues, should the Bar Association begin strict enforcement of the rule.

CONCLUSION

In a discipline system presently over-taxed with complaints of fraud, conversion and substance abuse, one has to question the use of disciplinary resources to strictly enforce a mandatory reporting rule. Moreover, the failure to enforce a rule, or the tacit acknowledgment of its unenforceability, is harmful to the integrity of a discipline system as a whole. Unless it is demonstrated that complaints brought by lawyers decreased significantly in Kentucky as a result of the deletion of the mandatory reporting rule,\textsuperscript{40} it may be decided that Kentucky properly eliminated that poised sword from the bench and bar of the Commonwealth and potential quagmire from its disciplinary system.

\textsuperscript{38} Id. at 793.
\textsuperscript{39} Id. at 796.
\textsuperscript{40} In a telephone interview with the Kentucky Bar Association spokesperson, it appears there is no difference in attorney initiated complaints prior to or since January 1, 1990, the date the new rules went into effect. Further, it appears that attorneys still regularly assist their clients in bringing complaints against colleagues who have committed wrongs.
STUDENT ARTICLES

KING V. KING: THE BEST INTEREST OF THE CHILD: A JUDICIAL DETERMINATION FOR GRANDPARENT VISITATION

by Melissa L. Moore

I. INTRODUCTION

The statutory creation of grandparent visitation rights generated many inquiries as to the constitutional validity of such provisions. Moreover, the recency of these legislative creatures as well as their nationwide diversity has left many of these questions unanswered. Consequently, the implications of grandparents' visitation rights have become a popular source of litigation.

A constitutional challenge recently threatened the existence of Kentucky's grandparent visitation statute. This statute suffered an attack on the grounds that it served as an unjust deprivation of parents' fundamental liberty interest to raise their children. After conducting a minuscule constitutional analysis, the Kentucky Supreme Court upheld the validity of Kentucky Revised Statute (K.R.S.) § 405.021. Two powerful dissents, written and joined by Justices Lambert and Wintersheimer, attack the court's failure to adequately address this constitutional challenge. As it stands, the circuit court may grant reasonable visitation rights to grandparents upon the finding that such is in the best interest of the child.

5. King, 828 S.W.2d at 631.
6. Id. Special Justice James H. Lucas delivered the court's opinion. Justices Stephens, Combs, Leibson and Spain concurred; while Justices Lambert and Wintersheimer joined one another in two separate dissenting opinions.
7. Id. at 633-38.
This note will examine the judicial interpretation of K.R.S. § 405.021, in its present form, leading to the constitutional challenge made in King v. King. Furthermore, this note will conduct a critical analysis of the King decision and its implications.

II. BACKGROUND

A. The Emergence of Kentucky's Grandparent Visitation Statute

At common law, grandparents did not have an enforceable right to visitation with their grandchildren. Parents were considered to have a moral, but not legal, obligation to allow grandparents visitation with their grandchildren. Courts generally denied grandparents’ petitions for visitation based on the parental right to raise one's children.

During the late 1970’s and the early 1980’s, the rights of grandparents gained popularity and recognition throughout the United States. This national movement resulted in the enactment of grandparents visitation statutes in all fifty states.

9. 828 S.W.2d 630 (Ky. 1992).
10. Succession of Reiss, 15 So. 151, 152 (La. 1894); Jouett v. Rhorer, 339 S.W.2d 865, 868 (Ky. 1960).
11. Succession of Reiss, 15 So. 151, 152 (La. 1894).
13. Sandra Joan Morris, Grandparents, Uncles, Aunts, Cousins, Friends: How is the Court to Decide Which Relationships Will Continue?, 12 FAM. ADVOC. 10 (Fall 1989).
Kentucky followed this national trend by enacting a grandparent visitation statute in 1976. The original statute provided as follows:

1. The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child whose parent is deceased and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
2. The action shall be brought in circuit court in the county in which the child resides.

The legislature amended the grandparent visitation statute in 1984, establishing broader standards for visitation on behalf of grandparents. This statute currently authorizes the circuit court to award grandparent visitation upon the court's subjective finding that such is in the best interest of the child. Despite the broad language of the grandparent visitation statute, Kentucky courts have been quite conservative in their decisions and have strictly construed the terms of the statute.
B. Judicial Interpretation of the Revised K.R.S. § 405.021

1. The Cole Decision

The premiere judicial interpretation of the amended K.R.S. § 405.021 involved whether a great-grandparent had standing to petition for visitation rights. In Cole v. Thomas, the trial court dismissed the great-grandparent's petition upon the finding that the language of K.R.S. § 405.021 did not extend to great-grandparents.

The court of appeals affirmed the circuit court's decision, ruling that K.R.S. § 405.021 applies only to the child's immediate maternal and paternal grandparents. Judge West, speaking for the court, conceded that grandparent visitation awarded by the court pursuant to K.R.S. § 405.021 serves as a judicial infringement upon one's fundamental right to rear their children and therefore must be exercised with discretion. Accordingly, the court held that extending the statute's application to great-grandparents would only "open the door" for other distant familial relations to petition for visitation. The court of appeals made it clear that it would not expand the language of the statute absent a showing of the legislative intent to do so.

2. The Trilogy of Hicks v. Enlow

In 1989, three cases involving Kentucky's grandparent visitation statute were consolidated for judicial consideration. The Kentucky Supreme Court deliberated upon three separate and distinct scenarios in determining the applicability of K.R.S. § 405.021. The central issue in Hicks v. Enlow involved the determination of circumstances which preclude a grandparent from invoking their rights pursuant to K.R.S. § 405.021. Specifically,

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23. Id. at 334.
24. Id. at 335.
25. Id. at 334 (citing Phillips v. Horlander, 535 S.W.2d 72 (Ky. 1975)).
26. Id. at 335.
27. Id.
29. 764 S.W.2d 68 (Ky. 1989).
30. Id. at 69.
the court considered the existence of grandparents' rights in the event that (1) the children's parents are dead and a first cousin adopted them; (2) the parents' rights are terminated and the child had subsequently been adopted; and (3) a step-parent has adopted the child.\footnote{Id. at 68-74.}

The first of the three cases considered by the court involved whether grandparents may petition for visitation upon the deaths of their grandchild's natural parents and the child's subsequent adoption.\footnote{Id. at 73.} After the parents' death, a contested custody and adoption proceeding evolved between the children's maternal cousin and their paternal grandparents.\footnote{Id.} The court awarded the children to their maternal first cousin, who subsequently denied the grandparents' visitation.\footnote{Id.}

The parties involved in this matter were all Alabama residents at the time of this dispute.\footnote{Id.} The grandparents filed a visitation petition\footnote{Id.} pursuant to Alabama's grandparent visitation statute.\footnote{Id.} The Alabama court system denied this petition on the grounds that the adoptive parents were not within the realm of the statutory provision.\footnote{Id.}

Subsequently, the children moved with their adoptive family to Kentucky, whereby the grandparents renewed their petition for visitation pursuant to Kentucky's Grandparent Visitation Statute.\footnote{Id.} The trial court summarily dismissed the grandparents' petition upon the finding that their familial relations with the child were severed at the time of the adoption.\footnote{Id.}

\footnote{31. \textit{Id.} at 68-74.}
\footnote{32. \textit{Id.} at 73.}
\footnote{33. \textit{Id.}}
\footnote{34. \textit{Id.}}
\footnote{35. \textit{Id.}}
\footnote{36. \textit{Id.}}
\footnote{37. \textsc{Ala. Code} § 26-10A-30 (1992). This provision states that: Post-adoption visitation rights for the natural grandparents of the adoptee may be granted when the adoptee is adopted by a stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Such visitation rights may be maintained or granted at the discretion of the court at any time prior to or after the final order of adoption is entered upon petition by the natural grandparents, if it is in the best interest of the child. This provision is similar to the grandparent visitation statute, \textsc{Ky. Rev. Stat. Ann.} § 405.021 (Baldwin 1990), currently in effect in Kentucky. \textit{See supra} note 18.}
\footnote{38. \textit{Hicks}, 764 S.W.2d at 73 (Ky. 1989).}
\footnote{39. \textit{Id.}}
\footnote{40. \textit{Id.}}
The court of appeals as well as the Kentucky Supreme Court affirmed this decision. The Kentucky Supreme Court premised its determination upon the fact that the Commonwealth's only recognized exception regarding post-adoption rights is in the event of a stepparent adoption. According to the court's decision, there is no statutory authority which distinguishes adoption by a cousin from that of a stranger. Consequently, the supreme court affirmed the trial court's decision that "[g]randparents' rights do not extend to adoptions which are not stepparent adoptions."

In the second consolidated case, the court considered whether a paternal grandmother may petition for visitation rights following the termination of her son's parental rights. The paternal grandmother filed a petition for visitation rights with her grandchild two years after her son's parental rights were terminated and the child had been placed in an adoptive home for approximately one month. The circuit court summarily dismissed the petition. The court of appeals reversed this denial and ordered a hearing.

Subsequently, the Kentucky Supreme Court reversed the court of appeals and reinstated the trial court's decision dismissing the petition. Persuasive statutory language governing the termination of parental rights directed the court's decision to accept a

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41. Id.
42. Id.
43. Id. at 73.
44. Id.
45. Id.
46. Id. at 74.
47. Id.
48. Id.
49. Id. at 74.

(1) If the circuit court determines that parental rights are to be terminated involuntarily in accordance with the provisions of this chapter, it shall enter an order that the termination of parental rights and the transfer of custody are in the best interest of the child, and that each petitioner is fully aware of the purpose of the proceedings and the consequences of the provisions of this chapter. The order shall terminate all parental rights and obligations of such parent and release the child from all legal obligations to such parent and vest care and custody of the child in such person, agency or cabinet as the court believes best qualified.

(2) Upon consent by the cabinet for human resources, the child may be declared a
complete severance between the child and his family as a result of termination proceedings. Allowing "[l]itigation by grandparents, by the family of such parents, would frustrate and circumvent the termination decree." Thus, the court concluded that the absence of any exceptions to the severance rule mandated that one could not be recognized absent statutory authority. Consequently, the court refused to extend the rights of grandparents pursuant to K.R.S. § 405.021.

The third consolidated case, considered by the Kentucky Supreme Court in Hicks, involved the implications of grandparent visitation after a stepparent adoption. The court acknowledged that this factual situation "fits the language of the statutory exception in the Adoption Act." The trial court awarded grandparent visitation. The Kentucky Supreme Court removed this case from the court of appeals to be considered with the two previously addressed cases herein.

The factual scenario involved a natural father passing away six months before the birth of his child. The mother and child stayed with the paternal grandparents for three months after the child's birth. Reasonable visitation continued with the grandchild until the child's mother remarried. The grandparents filed a petition for visitation which was subsequently granted. Following this measure, the stepfather adopted the child, discontinued the court ordered visitation and filed a motion to dismiss the grandparents' complaint and to deny future visitation.

ward of the state and custody vested in the cabinet or in any child-placing agency or child-caring facility licensed by the cabinet or in another person, if all persons with parental rights to the child under the law have had their rights terminated voluntarily or involuntarily. If the other person is unrelated to the child, a grant of custody shall be made only with the written approval of the secretary or his designee.

Id.
51. Hicks v. Enlow, 764 S.W.2d 68, 74 (Ky. 1989).
52. Id. at 71.
53. Id. at 74.
54. Id. at 74.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
The parents based this motion on K.R.S. § 199.520(2) whereby [u]pon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of the petitioners and shall be considered for ... all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies.63

Thus, after an adoption, the former familial and legal relations of the child are severed. The parents failed to address the remainder of this provision which provides for an exception in the event that a child is adopted by a stepparent.64 Accordingly, the trial court concluded that the “best interest of the child,” as defined by K.R.S. § 405.021, would be served and “the interest of the adoptive parent may be overcome, if the child will receive substantial and beneficial attention from the grandparents.”65

The Kentucky Supreme Court affirmed the trial court’s decision based upon the appellants’ failure to show that the decision was clearly erroneous.66 Specifically, the appellants failed to demonstrate that the trial court erred in its finding that visitation would be in the best interest of the child.67 Furthermore, the court acknowledged that it would only be correct for them to assume that the legislative body had the terms of the termination and the adoption statutes in mind when enacting K.R.S. § 405.021.68 Therefore, the court concluded that:

[given the language of the exception clause in K.R.S. § 199.520(2) it is reasonable to interpret the meaning of the new statute, K.R.S. § 405.021, as extending grandparents’ rights to seek court ordered visitation to cases where the surviving parent seeks to cut off the grandparents by using the device of stepparent adoption.69

The rationale behind this decision evolved from the conclusion that it is not necessary to construe an exception in this circum-

63. KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).
64. Id. The second sentence of this statute provides that, “[e]xcept where a biological parent is the spouse of an adoptive parent an adopted child from the time of adoption shall have no legal relationship to its birth parents in respect to either personal or property rights.” Id.
65. Hicks, 764 S.W.2d at 74.
66. Id. at 75.
67. Id.
68. Id. at 71.
69. Id. at 72.
stance because nothing occurred to sever the relationship between the grandparent and child.\textsuperscript{70}

The trilogy of cases considered by the Kentucky Supreme Court in \textit{Hicks v. Enlow} stands for the proposition that K.R.S. § 405.021 must be narrowly construed in order to curtail the possibility of infringing upon parents' fundamental right to rear their children. Specifically, the court held that (1) grandparents may not petition for visitation with their grandchildren upon their adoption by someone other than a stepparent; (2) familial relations are severed upon the termination of parental rights and therefore grandparents may not petition for visitation privileges following such an occurrence and (3) grandparents have standing to petition for visitation rights in the event that their grandchild is adopted by a stepparent married to one of the child's natural parents.\textsuperscript{71}


Kentucky's grandparent visitation statute\textsuperscript{72} also served as the central issue in \textit{Baker v. Perkins}.\textsuperscript{73} This case involved the issue of whether parental objection to a petition for visitation is sufficient to deny grandparents this right.\textsuperscript{74} The circuit court denied the paternal grandparents' petition for visitation.\textsuperscript{75} The court of appeals remanded this case upon the finding that the trial court's application of the grandparent visitation statute was clearly erroneous.\textsuperscript{76} Furthermore, the court stated that K.R.S. § 405.021 emerged as a tool of necessity which may only be implemented upon the custodial parent's failure to grant reasonable visitation to grandparents in accordance with the best interest of their child.\textsuperscript{77}

The court explained that the power to mandate grandparent visitation should be exercised with great discretion.\textsuperscript{78} Moreover, while it is appropriate to consider the custodial parent's feelings

\begin{flushleft}
\textsuperscript{70. Id.}\\
\textsuperscript{71. Id. at 68.}\\
\textsuperscript{72. KY. REV. STAT. ANN. § 405.021 (Baldwin 1990).}\\
\textsuperscript{73. 774 S.W.2d 129 (Ky. Ct. App. 1989).}\\
\textsuperscript{74. Id.}\\
\textsuperscript{75. Id.}\\
\textsuperscript{76. Id. at 130.}\\
\textsuperscript{77. Id. at 129.}\\
\textsuperscript{78. Id.}
\end{flushleft}
as well as potential conflict, the court's determination must not cease at this point and must allow for other relative circumstances.\textsuperscript{79} Thus, some type of risk/benefit analysis would be appropriate in this situation.\textsuperscript{80} Accordingly, the court ruled that the mere objection of a parent to grandparent visitation is not a sufficient basis in and of itself to warrant denial.\textsuperscript{81}

III. \textit{KING V. KING}

\textbf{A. Factual Summation of the Case}

This case emerged as a result of soured familial relations between W.R. King and his son and daughter-in-law, Stewart and Ann King.\textsuperscript{82} Stewart King, in addition to his employment with the R.R. Donally Company, worked for his father on the family farm.\textsuperscript{83} In exchange for working on the farm, W.R. King built a home for Stewart and his family in addition to paying him approximately $2,800 annually.\textsuperscript{84} During August, 1988, W.R. King decided that his son's hourly commitment to the family farm was inadequate and evicted him and his family from their home.\textsuperscript{85} As a result, Stewart and his wife denied W.R. King any type of visitation privileges with their daughter.\textsuperscript{86}

After making numerous unsuccessful requests for visitation with his granddaughter, W.R. King filed a petition pursuant to K.R.S. \textsection 405.021.\textsuperscript{87} Stewart and his wife filed an answer (1) denying the allegations made in Mr. King's petition and (2) attacking the constitutional validity of the visitation statute.\textsuperscript{88}

\textbf{B. The Proceedings}

After conducting a hearing, the Boyle Circuit Court referred the parties for an evaluation and recommendation.\textsuperscript{89} Upon receipt

\begin{itemize}
\item \textsuperscript{79} Id. at 130.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id. at 129.
\item \textsuperscript{82} King v. King, 828 S.W.2d 630 (Ky. 1992).
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 631.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.
\end{itemize}
of the evaluation, the court granted W.R. King's petition for visitation.\textsuperscript{90}

In response, Stewart and his wife filed a Motion to Alter, Amend or Vacate this decision.\textsuperscript{91} The trial court upheld the constitutionality of K.R.S. § 405.021 and held that it would be in the best interest of the child to award visitation with her grandfather.\textsuperscript{92}

Stewart and Ann King appealed the circuit court's decision to the court of appeals.\textsuperscript{93} The court of appeals failed to address the validity of K.R.S. § 405.021, although it reversed the circuit court's award of visitation, questioning whether these privileges were in the best interest of the child.\textsuperscript{94}

Subsequently, the Kentucky Supreme Court granted discretionary review.\textsuperscript{95} The issues presented to the court concerned (1) the constitutionality of K.R.S. § 405.021 and (2) whether the trial court erred in finding that such visitation would be in the best interest of the child.\textsuperscript{96}

C. The Kentucky Supreme Court Decision

1. The Majority Opinion

The King family feud came to an end with the Kentucky Supreme Court's decision on March 12, 1992.\textsuperscript{97} Contrary to the parents' argument, the court found that Kentucky's grandparent visitation statute\textsuperscript{98} did not mandate an unwarranted deprivation of parents' fundamental liberty to rear their children.\textsuperscript{99} While the court acknowledged that such a right existed,\textsuperscript{100} pursuant to the Fourteenth Amendment\textsuperscript{101} it also provided that parental rights

\textsuperscript{90} Id.
\textsuperscript{91} Id. at 631.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 630.
\textsuperscript{99} King v. King, 828 S.W.2d 630, 631 (Ky. 1992).
\textsuperscript{100} Id. at 631 (citing Meyer v. Nebraska, 262 U.S. 390 (1923) which laid the framework for interpreting the Fourteenth Amendment to include the right to raise one's children without undue governmental intrusion).
\textsuperscript{101} King, 828 S.W.2d at 631 (citing U.S. Const. amend. XIV).
are not absolute. The court illustrated this point with examples of governmental limitations upon parental authority such as compulsory education, mandatory inoculations, child labor laws and child abuse laws. Also, the court relied upon the assumption that a grandparent and grandchild relationship is beneficial to the child. Confirming its earlier holding, the court reiterated that "in an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds."

Consequently, the court concluded that a menial disagreement between a father and son should not result in the deprivation of a child's relationship with their grandparent. The court justified the statutory provision at issue upon the ground that it attempts to "balance the fundamental rights of the parents, grandparents and the child." Thus, the court upheld the validity of K.R.S. § 405.021 and reversed the court of appeals decision regarding visitation, thereby reinstating the circuit court's decision. On March 12, 1992, the United States Supreme Court denied certiorari, allowing the Kentucky Supreme Court's disposition of King to stand.

2. The Dissenting Opinions

(a) Justice Lambert

Justices Lambert and Wintersheimer joined one another in two separate dissenting opinions. The first dissenting opinion, written by Justice Lambert, primarily criticized the majority opinion for failing to conduct an adequate constitutional analysis in determining the validity of K.R.S. § 405.021. He asserted that the critical issue, in the King decision, concerned whether

102. Id.
103. Id.
104. Id.
105. Id. at 632 (citing Hicks v. Enlow, 764 S.W.2d 68, 70-71 (Ky. 1989)).
106. King, 828 S.W.2d at 632.
107. Id.
108. Id. at 633.
110. King, 828 S.W.2d at 633.
111. Id.
the grandparent visitation statute exceeded the scope of the state's legislative authority.\textsuperscript{112}

In addition, Justice Lambert disagreed with the court's conclusion that a fundamental right exists for grandparents to seek visitation with their grandchildren.\textsuperscript{113} Furthermore, he attacked the majority's assumption that a grandparent relationship is beneficial and in the best interest of the child.\textsuperscript{114} Accordingly, Justice Lambert argued that parents possess a fundamental liberty interest in the rearing of their children,\textsuperscript{115} which has been described as the "basic civil rights of man"\textsuperscript{116} and "far more precious than property rights."\textsuperscript{117} Thus, Justice Lambert reminds the court, "[w]hen the government intrudes on choices concerning family living arrangements, the court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."\textsuperscript{118}

The final point made by Justice Lambert extended the argument that if the statutory provision under consideration is constitutional, it opens the door to subsequent statutory provisions extending similar rights to other familial relations.\textsuperscript{119}

\textbf{(b) Justice Wintersheimer}

The dissenting opinion authored by Justice Wintersheimer and joined by Justice Lambert provided that the court of appeals made a correct disposition of this matter.\textsuperscript{120} Accordingly, Justice Wintersheimer agreed with the court of appeals' conclusion that parents of a nuclear family have the right to rear their children free from governmental intrusion, unless it can be shown that the parents' decisions are contrary to the child's best interest.\textsuperscript{121}

Justice Wintersheimer concluded that a clearly erroneous decision prevailed in the trial court.\textsuperscript{122} This conclusion arose from

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 634.
\item \textsuperscript{115} Id. at 633 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).
\item \textsuperscript{116} Id. (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
\item \textsuperscript{117} Id. (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).
\item \textsuperscript{118} Id. (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)).
\item \textsuperscript{119} Id. at 635.
\item \textsuperscript{120} Id. at 638.
\item \textsuperscript{121} Id. at 637.
\item \textsuperscript{122} Id. at 635.
\end{itemize}
the finding that W.R. King failed to show that visitation would
serve the best interest of his grandchild. Furthermore, Justice
Wintersheimer maintained that the focal point of this case is "to
what extent the statutorily-created right of grandparent visita-
tion will be permitted to override the fundamental natural in-
herent constitutional right of parents in an intact family unit." Thus, Justice Wintersheimer concluded that "K.R.S. § 405.021 is
unconstitutional in its application to the right of the parents to
raise their child when there has been no demonstration that the
child's best interest will be harmed by the decision of the par-
ents."128

IV. ANALYSIS

The day of the traditional nuclear family has met its demise
in many respects. Accordingly, state legislatures have taken
measures to alleviate problems which coincide with this familial
evolution. Grandparent visitation statutes were intended as one
of those measures.

The Kentucky legislature realized this need with the enactment
of Kentucky Revised Statute § 405.021. In practice, the Common-
wealth's grandparent visitation statute serves as a judicial tool
to ensure that grandparents are awarded reasonable relations
with their grandchildren. Constitutional challenge is inherent in
this statute because it allows the court system to make an
intrusive familial decision. Upon the circuit court's finding that
visitation would be in the best interest of the child, it is appro-
priate to grant reasonable visitation, despite parental wishes
to the contrary. It behooves one to wonder as to what other
arenas the legislature will deem parents unworthy to evaluate
the best interest of their children.

Kentucky courts, aware of this statute's potency, have been
cautious about extending its terms and implications. The con-

123. Id.
124. Id. at 636.
125. Id. at 637 (citing Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Pierce v. Society of
Sisters, 288 U.S. 510 (1944)).
126. See supra note 14.
127. KY. REV. STAT. ANN. § 405.021 (Baldwin 1990).
129. See supra note 20.
sistent, strict interpretations of K.R.S. § 405.021 emphasize the judicial belief that the realm of domestic relations prescribes deference. Consequently, Kentucky courts have relied upon the wisdom of the state legislature in construing the scope of grandparent visitation rights.

King presented the first constitutional challenge to Kentucky's grandparent visitation statute. The Kentucky Supreme Court rejected the argument that K.R.S. § 405.021 constituted an unjust deprivation of parents' liberty interest and upheld the constitutionality of this provision. Specifically, the court provided that the right to raise one's children independent of undue governmental intrusion is not absolute. From this statement, the court concluded that K.R.S. § 405.021 "seeks to balance the fundamental rights of the parents, grandparents and the child." As noted by Justice Lambert's dissenting opinion, the court failed to rely upon any authority in making the determination that a grandparent has a fundamental right to visitation privileges with their grandchildren. Furthermore, the validity of this provision opens the door to additional statutory provisions bestowing visitation rights upon other familial relations. Query as to whether parents will suffer further deprivation of their fundamental liberty interest under these provisions as well.

The majority opinion also made the assumption that "[i]f a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent." Upon forming this conclusion, the court alleviated Mr. King from the burden of proving that visitation would be in the best interest of his grandchild.

Contrary to the majority's opinion, a grandparent-grandchild relationship is not always in the best interest of children. Bitter
relations between parents and grandparents may subject children to a hostile and confusing domestic environment. Different practices in child rearing methods may also become a source of confusion for children. In many situations, the child's best interest may be served by the grant of visitation; although the lack of stringent guidelines concerning this burden make it subject to the whim of the judiciary. This arena is ripe for more specific guidelines defining the best interest standard as well as greater parental deference in making such determinations.

CONCLUSION

The demise of the traditional nuclear family triggered the recognition of grandparents' visitation rights. Accordingly, state legislatures have taken measures to alleviate the problems which coincide with this familial evolution. The enactment of grandparent visitation statutes is intended as one of those measures.

Under Kentucky's grandparent visitation statute, visitation is awarded upon the judicial determination that such is in the best interest of the child. This provision poses a considerable infringement upon fundamental parental liberty. The King decision recognized the constitutionality of Kentucky's grandparent visitation statute. Moreover, this decision recognized and created a fundamental right for grandparents to seek visitation with their grandchildren. Absent constitutional authority for the creation of this right, the Kentucky Supreme Court opened the door for other familial relations to seek such privileges. Consequently, the King decision implicated that grandparent visitation equivocates a lawful hardship upon parental authority and paved the road for future deprivation of the fundamental right to rear one's children. The fundamental liberties inherent to our citizenship must not be denied in an effort to reconstruct our society. In this arena it is appropriate to initiate more specific guidelines defining the best interest standard and to allow greater deference for parental authority in making such determinations.

142. Id.
143. Id.
I. INTRODUCTION

On April 30, 1992, the Supreme Court of Kentucky decided *Jones v. Commonwealth*, ruling that an injury inflicted upon a fetus that results in death after birth is sufficient to support a manslaughter conviction. Kentucky’s manslaughter statute contemplates the “death of another person.” The issue before the court was whether an infant born alive who sustained fatal injuries while in utero fits within the description of “another person” as used in Ky. Rev. Stat. Ann. (hereinafter K.R.S.) § 507.040.3

Justice Leibson drafted the majority opinion and was joined by Chief Justice Stephens and Justices Combs and Spain.4 They concluded that while the injury occurred prior to the live birth of the fetus, the statute contemplated independently wanton conduct resulting in the death of a person involving the requisite criminal *mens rea* at the time of the infliction of the injury.5 Since K.R.S. § 507.040 does not define “person,”6 and does not require that the victim attain the status of “person” at the time of the infliction of injury,7 the majority held that Kentucky’s criminal homicide statute encompasses a fetus injured in utero that subsequently dies from those injuries and accordingly upheld Jones’ murder conviction.8

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1. 830 S.W.2d 877 (Ky. 1992).
2. *Ky. Rev. Stat. Ann.* § 507.040 (Michie/Bobbs-Merrill 1985). It states: “Manslaughter in the Second Degree. (1) A person is guilty of manslaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person. (2) Manslaughter in the second degree is a Class C felony.” *Id.*
3. *Jones, 830 S.W.2d at 877.*
4. *Id.* at 881.
5. *Id.* at 878.
6. *Id.*
7. *Id.* at 880.
8. *Id.*
Although this is not a case of first impression in the Kentucky Supreme Court, this decision seeks to set forth in a focused and comprehensive opinion, the rationale underlying the imposition of the manslaughter statute upon actors who wantonly injure a fetus in utero that subsequently dies from the injuries inflicted. Kentucky has enacted Chapter 507 of the Kentucky Penal Code, advancing various criminal offenses constituting "Criminal Homicide" and the consequences of undertaking such conduct. Specifically, K.R.S. § 507.040(1), the section of the penal code under which Jones was indicted and convicted, specifically states: "Man-slaughter in the Second Degree. (1) A person is guilty of man-slaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person."

The language of this section does not appear on its face to be intricate or complicated. However, in Jones, the interpretation of the word "person," within the context of the manslaughter statute, has arisen for the second time in reported Kentucky case law. Jones illustrates the tension involved with the definition of life as it relates to attainment of personhood and the imposition of the manslaughter statute.

II. BACKGROUND

The common law regarding the killing of an unborn child has evolved through a long line of English case law beginning in the thirteenth century. In the seventeenth century, Coke first reported the English "born alive" rule. This rule postulated the requirement that a child must be born alive in order to make another criminally responsible for the infant's death as a result

9. See Jackson v. Commonwealth, 96 S.W.2d 1014 (Ky. 1936); See also Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).
11. Jones v. Commonwealth, 830 S.W.2d at 878.
13. See Jackson v. Commonwealth, 96 S.W.2d 1014 (Ky. 1936); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).
15. 3 Coke, Institutes 50 (1648).
of prenatally inflicted injuries. While this quickly became the accepted common law theory, there were significant difficulties in application of the principle. For example, infants were not required to take a first breath in order to be deemed alive. Independent circulation, an often difficult factual determination, however, was a necessity.

The stage for *Jones* in Kentucky case law was initially set by *Jackson v. Commonwealth* in 1936. This early case involved a factual dispute over the status of a baby born to Helen Jackson that was found floating dead in a millpond in London, Kentucky. The court of appeals affirmed the circuit court's conviction of Jackson for infanticide. In order to sustain her conviction, as an element of *corpus delicti*, the Commonwealth had to affirmatively prove that the child breathed or was alive upon birth.

The Kentucky Supreme Court in *Hollis v. Commonwealth* was faced with a different factual setting in which to apply existing case law and determine the applicability of the Commonwealth's criminal homicide statute. In that case, Robert Hollis was accused of attacking his estranged pregnant wife by shoving his...
hand up her vagina forcing the fetus to be expelled from her uterus into her abdomen.\textsuperscript{29} The court dismissed the murder indictment, holding that a fetus, unless born alive, could not have attained personhood as contemplated by K.R.S. § 507.020.\textsuperscript{30} This rule of law is consistent with Jackson,\textsuperscript{31} although resulting in a different outcome based upon factual determination.\textsuperscript{32} In its opinion, the court reasoned that it did not want to usurp legislative powers in expanding the class of victims contemplated by the murder statute\textsuperscript{33} and left open the possibility of Hollis' prosecution under the criminal abortion statute.\textsuperscript{34}

An antithetical line of cases has developed under a related theme whereby a fetus has been deemed a "person" for the purpose of wrongful death and personal injury actions.\textsuperscript{35} Notable in this series is Mitchell v. Couch,\textsuperscript{36} a case where damages were sought for the wrongful death of an unnamed infant whose death was allegedly caused solely by prenatal injury.\textsuperscript{37} In Mitchell, the injuries sustained by the fetus subsequent to its stillbirth were alleged to be the result of Couch's negligence in operating his vehicle, causing the truck in which the pregnant Mrs. Mitchell was riding to be wrecked.\textsuperscript{38} Couch argued that there could not be an action for wrongful death in Kentucky when the victim was in utero at the time of infliction of injury.\textsuperscript{39} The court, in a case of first impression, relied upon the language of § 241 of the Kentucky Constitution\textsuperscript{40} and K.R.S. § 411.130\textsuperscript{41} enacted pursuant
thereto to conclude that a fetus fell within the statutory interpretation of the term "person" for purposes of recovery in tort. 42

Subsequent to Mitchell, there have been other Kentucky cases allowing wrongful death actions for injuries in tort inflicted upon viable fetuses, resulting in the established precedent in the Commonwealth for this right of recovery. 43 Additionally, if a fetus is injured in utero and subsequently born alive, it is now permitted in every jurisdiction in the United States to maintain an action for the results of such injury. 44 Further, if a child dies of

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by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.
41. KY. REV. STAT. § 411.130 (Michie/Bobbs-Merrill 1985). It states:
Action for wrongful death — Personal representative to prosecute — Distribution of amount recovered.
(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including the attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:
(a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.
(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.
(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.
(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, on (i) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother is living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, “mother” and “father” shall mean the adoptive parents of the deceased.
(e) If the deceased leaves no widow, husband or child and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.
42. Mitchell v. Couch, 265 S.W.2d 901, 903-04 (Ky. 1955).
such prenatal injuries, there is a conclusively permitted action for wrongful death.45

III. THE COURT’S REASONING IN JONES

A. Facts

On June 4, 1989, Roy Lee Jones, while driving under the influence of alcohol, collided with another automobile driven by Kimberly Lynch who was 32 weeks pregnant.46 Five hours after the accident, the baby, Whitney Leigh Lynch, was born by caesarean section.47 Whitney Lynch died fourteen hours later as a result of the prenatal injuries sustained in the automobile collision.48

B. Procedure Below

Jones pled guilty to second-degree manslaughter as provided in K.R.S. § 507.04049 and was sentenced to a term of six years imprisonment.50 His plea was conditional, reserving the right to appeal the denial of his motion to dismiss the indictment on the basis that K.R.S. § 507.040 does not contemplate death resultant from prenatal injuries.51 Jones advanced two alternative theories for reversing his conviction.52 First, he relied on the decision in Hollis to support his contention that at common law destroying a viable fetus was not murder and that the statutory definition of murder did not enlarge the scope of the term “person” to include a viable fetus.53 Second, he argued that the criminal statute is void for vagueness in that the statute did not provide notice that a victim such as Whitney Lynch fell within its definitional boundaries.54 The court of appeals affirmed Jones’ con-

47. Id.
48. Id.
49. See supra note 12 and accompanying text.
50. Id., 830 S.W.2d at 877.
51. Id. See supra note 12 and accompanying text.
52. Id.
53. Id. at 878 (citing Hollis v. Commonwealth, 652 S.W.2d 61, 62 (Ky. 1983)).
54. Id.
viction and he sought and was granted review by the Supreme Court of Kentucky.55

C. The Supreme Court of Kentucky Decision

The Supreme Court of Kentucky granted review of Jones to determine its consistency or distinction between Hollis and Jackson.56 The court’s decision centered around the narrow question of applicability of the manslaughter statute to a baby born alive who dies as a result of the infliction of prenatal injuries. While, as in Hollis and Jackson, the conduct was committed prior to delivery of the fetus, Jones can be distinguished from Hollis and Jackson in that the baby was born alive.57 It is this distinction upon which the majority affirmed the court of appeals decision and sustained Jones’ conviction.58

The supreme court initially addressed the issue of the necessary elements of the manslaughter statute.59 It focused upon the impact of the interpretation of the word “person” in its reasoning.60 Following the “born alive” precedent established in Hollis, the court found a factual distinction in Jones in that the infant lived for fourteen hours postnatal.61 It determined that this logically supports a different result than in Hollis.62 The status of the victim at the time of death is the critical element in determining whether or not the conduct inflicted on the fetus was criminal in nature.63

The court relied on persuasive case law from a variety of jurisdictions to strengthen its opinion. The theme in Williams v. State,64 People v. Bolar65 and State v. Hammett66 is overwhelmingly

55. Id. at 878.
56. Id. (comparing Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) and Jackson v. Commonwealth, 96 S.W.2d 1014 (Ky. 1936)) (both cases sought to ascertain the applicability of the Kentucky manslaughter and infanticide statutes, respectively, to the death of infants).
57. Id.
58. Id.
60. Id.
61. Id. at 879.
62. Id.
63. Id.
64. 561 A.2d 216 (Md. 1989).
derived from the Coke-Blackstone “born alive” rule.\textsuperscript{67} Essentially, the “born alive” rule asserts that if someone inflicts injury upon an unborn child such that the fetus dies and is stillborn, it is not manslaughter of the child, even though it is a heinous act.\textsuperscript{68} But if the child is born alive and subsequently dies as a result of the injuries sustained in utero, that act causing the death of the child shall be deemed homicide and the offense chargeable as such.\textsuperscript{69}

In all three of these cases, there were criminal inflictions upon pregnant women who subsequently delivered babies who died some time after birth as a result of the prenatal injuries.\textsuperscript{70} The reasoning espoused in all three decisions is clearly analogous to that of the majority in Jones: the determining factor in upholding a conviction for homicide is the status of the victim at the time of death, not at the time of injury.\textsuperscript{71}

The court cites State v. Hammett\textsuperscript{72} in which the Georgia Court of Appeals draws a clarifying analogy to an infliction upon an adult victim, who subsequently expires.\textsuperscript{73} In that instance, the perpetrator is chargeable with homicide. However, if the adult survived, there could be no offense of homicide, by its very definition. This reasoning is consistent with the holding in Jones, albeit the victim was not an adult: had the child lived, Jones would not have been chargeable with homicide.\textsuperscript{74}

The court then illustrates the correlation of the common law holding to the Kentucky Penal Code, through an examination of the Commentary to the Model Penal Code, which indicates that in the absence of express contrary language regarding the fetal application of the offense of criminal homicide, the common law approach governs.\textsuperscript{75} Since the Commentary to the Model Penal Code is repeatedly referenced in the Commentary to K.R.S. Chapter 507\textsuperscript{76} and Kentucky’s statute is devoid of explicit limi-

\textsuperscript{67} Jones v. Commonwealth, 830 S.W.2d 877, 879 (Ky. 1992).
\textsuperscript{68} Williams, 561 A.2d at 218 (citing 3 Coke, Institutes 58 (1648)).
\textsuperscript{69} Id.
\textsuperscript{70} See supra notes 64-66.
\textsuperscript{71} Jones v. Commonwealth, 830 S.W.2d 877, 879 (Ky. 1992).
\textsuperscript{72} 384 S.E.2d 220, 221 (Ga. Ct. App. 1989).
\textsuperscript{73} Id.
\textsuperscript{74} See Jones, 830 S.W.2d at 877.
\textsuperscript{75} Id. at 878.
\textsuperscript{76} Id.
tations of applicability of homicide, it can be inferred that the common law "born alive" rule prevails in the Commonwealth.

The secondary issue raised by Jones was a due process challenge to K.R.S. § 507.040. He argued the invalidity of the statute on the grounds that he was provided insufficient notice that manslaughter contemplated victims injured in utero, born alive and who subsequently died as a result of the prenatal injuries. In Hardin v. Commonwealth, the Supreme Court of Kentucky reiterated the standards by which vagueness is measured: "The accepted test in determining the required precision of statutory language imposing criminal liability is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." This standard does not require that the accused know the specific, factual consequences to all parties of his acts. This standard merely requires the statute define the offense with such clarity so that men of common intelligence do not have to guess at its meaning. The court found that the proposition that K.R.S. § 507.040 was void for vagueness was presently inapplicable because it is clear from the language of the statute what conduct is prohibited.

The two minority opinions in Jones concurred with the majority in the decision, but upon different reasoning. Justice Lambert agreed that the court properly upheld Jones' conviction, but under less restrictive grounds. In his opinion he submitted that the majority's reliance on the "born alive" doctrine was "artificial and without a logical basis" since its utilization results in a time lapse between the act and the ability to determine if such act is criminal in nature. From his perspective, the criminality of the act is determined at the time of its commission. In the second

77. See supra note 12 and accompanying text.
78. Jones, 830 S.W.2d at 880. See also, supra note 12 and accompanying text.
79. Id.
80. 573 S.W.2d 657, 658 (Ky. 1978).
81. Id. (quoting Sasaki v. Commonwealth, 485 S.W.2d 897 (Ky. 1972) and Anderson v. United States, 215 F.2d 84 (6th Cir. 1954)).
83. Id.
84. Jones, 830 S.W.2d at 880. See also, supra note 12 and accompanying text.
85. Id. at 881 (Lambert, J., concurring).
86. Id.
87. Id.
minority opinion, Justices Reynolds and Wintersheimer, through a historical analysis of the definition of "person," including references to civil law applications of the term, stated that "no real distinction can be made among the various states of developing human life, before birth, or between prenatal or post-natal life."  

IV. ANALYSIS

The decision in Jones, while consistent with prior case law regarding criminal actions inflicted upon a fetus, fails to reconcile the parallel development of common law rights of recovery in tort for infliction of prenatal injury with Kentucky criminal law.

A. Decision of the Court

The Supreme Court of Kentucky properly upheld the conviction of Roy Lee Jones for the manslaughter of Whitney Lynch in a holding of extremely limited use of judicial extension of precedent. The greatest weakness of the opinion is in its narrow application.

Justice Leibson's decision of the majority seeks to clarify the meaning of the word "person" which is undefined in the criminal homicide statute. The reasoning predictably focuses upon the evolution of common law and its relevance to the penal code. The court definitively qualifies its decision with a caveat restricting the application of its holding to the criminal homicide statute. The court explicitly does not seek to expand its holding to include offenses such as criminal child abuse and does not examine the impact of its holding on other crimes against the unborn, such as injuries inflicted upon embryos being fertilized in vitro. This specific exclusion limits the usefulness of the decision in applying legal precedent to contemporary social problems. This restrictive approach also circumscribes the preceden-

88. Jones, 830 S.W.2d at 883 (Wintersheimer, J., concurring).
89. Id. at 880.
90. Id. at 878.
91. Id.
92. Id. at 880.
93. Id.
tial development of common law associated with criminal offenses compared to the civil causes of action.

This non-aggressive approach does not provide a criterion that will be comprehensively useful in evaluating conduct when a fetus in utero is fatally injured. The holding should have sought to reconcile the civil remedies94 and criminal remedies and punishments for intentional prenatal infliction of injuries. With the current dichotomy of judicial treatment there exists a macabre irony: the actor who inflicts such substantial injury upon a pregnant woman that the fetus within her is stillborn cannot be prosecuted under criminal homicide statutes. However, injuries that may result in a live birth and subsequent death of an infant are chargeable as murder.

Proponents of the limited nature of the majority opinion would point to the conflict between the legality of abortion and criminal homicide for injuries inflicted upon an unborn infant in supporting the narrow holding. However, the differentiating factor that exists between constitutionally protected abortion and civil actions would remain as distinguishing between abortion and criminal murder: criminal intent. As in all crimes, there must exist the requisite mens rea to sustain a criminal conviction.95 Thus, the majority did not extend its opinion far enough in its protection of criminal causes of action in infanticide.

B. Minority Opinion

In the minority opinions, Justices Lambert, Reynolds and Wintersheimer all argue for the inclusion of viable unborn "children" within the protection of criminal law.96 However, the criminal and civil inconsistency is only mentioned briefly in Justice Wintersheimer's concurrence.97 Instead, there is an attempt to focus on the definition of the beginning of life.98 This posture, albeit emotionally appealing, results in a polemical debate that is phil-
osophically inconsistent with the reasoning in Roe v. Wade.99 Acquiescence with the minority reasoning in Jones would be in conflict with the result of constitutionally protected abortion.100 The reasoning in the minority opinions would have been more persuasive had it focused on the inconsistencies between the criminal and civil treatment of the infliction of prenatal injury instead of focusing on when human life begins.

C. Impact of the Decision

The impact of the decision will primarily center around the factual difficulties in ascertaining the beginning of human personhood within the legal context. The holding in Jones epitomizes the difficult moral and philosophical issues that are increasingly before the court. In coming years, the advances in science and medicine will further blur the already fuzzy distinction between viable and non-viable fetuses.101 As Justice Wintersheimer articulated in his dissent in Southeastern Kentucky Baptist Hospital v. Gaylor,102 "the law must adapt to these ever-expanding medical opportunities."103 Additionally, the increased focus upon the independent rights of children will certainly bring forth additional challenges to the Jones result.

CONCLUSION

Jones v. Commonwealth104 offered an opportunity for the Supreme Court of Kentucky to conclusively rule not only upon the criminality of the infliction of prenatal injury, but to reconcile the long-standing difference between civil and criminal treatment

99. 410 U.S. 113 (1973). Roe did not seek to define the beginning of life, but rather to offer constitutional protection grounded in right to privacy to women seeking to terminate their pregnancy and to set limitations upon the states' power to regulate abortion. Id. at 163.

100. Although Justice Blackmun's opinion in Roe v. Wade, 410 U.S. 113 (1973) employed the power of "constitutional law" and the right to privacy extruded therefrom, contrary opinions assert that the basis for the holding in Roe was purely politically-motivated judicial fiat rather than reasoned upon the intent of the framers of the Constitution and the document they formulated which did not include a specific right of privacy. ROBERT H. BORK, THE TEMPTING OF AMERICA, THE POLITICAL SEDUCTION OF THE LAW, 111-12, 114 (1990).


102. 756 S.W.2d 467 (Ky. 1988).

103. Id. at 472.

104. 830 S.W.2d 877 (Ky. 1992).
for such actions. The reluctance of the court in Jones to reconcile the civil and criminal remedies for infliction of prenatal injuries upon an infant born alive that subsequently dies as a result of such injuries leaves open a considerable abyss for a wide variety of cases in the ever increasingly-sophisticated medical and technological environment in which we live.

The Kentucky General Assembly should legislatively seek to harmonize the legal treatment of such despicable conduct, whether in the civil or criminal arena. The citizens of the Commonwealth of Kentucky should have full protection of the law and the full availability of criminal prosecution for such socially abhorrent behavior inflicted upon human life, regardless of its state of development.