NORTHERN KENTUCKY LAW REVIEW

Volume 21 Winter 1994 Number 2

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DEDICATION TO PROFESSOR EMERITUS
WILLIAM R. JONES

David A. Elder*

Professor William R. Jones, "Bill" to his friends, is truly a multidimensional person with diverse interests, a diverse background, and diverse friends. Bill went to law school late in the game—early middle age—after successful careers in varying business endeavors. He graduated high in his law class in the three-year program at the University of Kentucky, attaining Coif status, despite working more than full-time. Shortly thereafter he went to the University of Michigan as a prestigious Cook Fellow, receiving the LL.M. in 1970.

Bill taught at the University of Indiana School of Law, Indianapolis, for a decade (with a couple of years off as a visitor elsewhere) before coming to Chase College of Law as its Dean in 1980. I will never forget my own first impression of Bill during the interview process and I finally put to him semi-humorously the question I had been considering since first meeting him—was the resume in error or was this youthful, energetic, intellectually curious person actually approaching retirement age?! He laughed and said the resume contained no inaccuracies! The Bill Jones we saw in the interview remained that way throughout his five plus years as our Dean. He was forthright, honest, consistent, open-minded and, most of all, fair. Bill had been hired as Dean, in large part, to ensure that Chase College of Law was approved for membership in the prestigious Association of American Law Schools. With this in mind he achieved a consensus on what was required—through task forces, a faculty retreat, and much spirited discussion—and made his resulting expectations of faculty eminently clear. He demanded quality endeavors and productivity from the faculty and was successful in his primary goal—Chase College of Law received AALS accreditation at the January meeting in 1983. Throughout the process Bill provided

* Professor of Law, Salmon P. Chase College of Law; A.B., Bellarmine; J.D., St. Louis; LL.M., Columbia.
consistent, fair, and determined leadership—doing in an exemplary fashion what he was hired to do.

After his tenure as Dean, Bill joined the faculty as a stimulating colleague and respected faculty member. Following the expectations he had set for all faculty, he produced two leading Kentucky texts—Kentucky Criminal Trial Practice, Kentucky Criminal Trial Practice Forms—which have been regularly supplemented and reissued. Bill also remained heavily involved in both service to the law school, serving as chair of several important committees, and in service in the public sector, functioning as member and, later, long-term chair of the Kentucky Public Advocacy Commission and in numerous ways in the A.B.A. accreditation process and in the Law School Admissions Council.

When compelled to retire under University policy, Bill decided to open a new career—buying, restoring, and reselling old homes. This he did with the same joie de vivre, enthusiasm, and competence with which he approaches all challenges. And, next year, he is teaching as a visitor at Nova Southeastern University Shepard Broad Law Center. His students and colleagues there will benefit greatly from his wit, sense of humor, calm and reasoned judgment, and his fertile mind and pen. I wish him luck there and hope he returns to rejoin us here a year later—as friend, mentor, and colleague. And, perhaps, most of all, as a ready reminder that age bears little or no resemblance to vitality and creativity.
THE SALMON P. CHASE AMERICAN INN OF COURT

The Salmon P. Chase American Inn of Court was founded in 1993 in honor of the one-hundredth anniversary of the founding of the Salmon P. Chase College of Law. Justice Donald Wintersheimer, Judge William Bertelsman, Professor Robert Bratton, E. Andre Busald, Esq., and Wm. T. Robinson III, Esq. submitted an application for a charter in the early part of 1993. A charter was granted on June 11, 1993 at the Ninth Annual Meeting of the American Inns of Court in Chicago, Illinois.

The American Inns of Court concept is designed to improve the skills, professionalism, and legal ethics of the Bench and Bar. The American Inns have adopted the traditional British model of legal apprenticeship. For centuries, young British barristers have learned the art of trial advocacy from senior members of their profession in the Inns of Court, a place where students aspiring to the Bar resided while working with experienced practitioners in the office and the court. The Inns have changed somewhat, but still serve as the home of the British legal profession.

The American Inn concept was the product of a discussion in the late 1970s among the United States members of the Anglo-American exchange of lawyers and judges, including Chief Justice Warren E. Burger. In 1980, the first American Inn of Court was created. In 1983, Chief Justice Burger created a Committee of the Judicial Conference of the United States to explore whether the American Inn concept was of value to the administration of justice in federal court. The Committee proposed a national organization: the American Inns of Court Foundation. In 1985, the Foundation was created. At present, there are 154 American Inns of Court nationally, located in 42 states and the District of Columbia, with some 9,000 judges, trial lawyers, and graduating law students involved as active members.

The founders of the American Inns modified the concept to fit the particular needs of the American legal system in an attempt to help trial and appellate lawyers and judges rise to higher levels of excellence, professionalism, and ethical awareness. Each American Inn of Court is comprised of three categories of members: Masters of the Bench, including judges, experienced master litigating lawyers, and law professors; Barristers, consisting of
less experienced lawyers; and Pupils, consisting of third-year law students. Members are grouped into "Pupilage Teams," with each team consisting of one or two Master litigators, one or two Barristers, and Pupils. Each Pupilage team is responsible for conducting one demonstration for the Inn per year.

The Salmon P. Chase American Inn of Court holds monthly meetings centering around a presentation focusing on a particular segment of the litigation process—from *voir dire* to closing arguments. These presentations are followed by discussion and critique, providing all members with the opportunity to offer their views and gain insight into the perspectives of other members of the Inn.

The Salmon P. Chase College of Law celebrated its one-hundredth year of operation on October 16, 1993. It was appropriate to celebrate this centennial event with the establishment of the Salmon P. Chase American Inn of Court.

Donna M. Bloemer,
Issue Editor
I. INTRODUCTION

Since we last visited the subject of state constitutional law in the previous issue of the *Northern Kentucky Law Review*’s Kentucky Law Survey, many interesting cases have arisen. As noted in my original article, there are some important principles that must be kept in mind when considering Kentucky constitutional law issues.

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 [by the people] are few and defined, those which remain in state government are [generally] numerous and indefinite.

Under these general guidelines, set out in our previous discussion, I will review some of the more interesting state constitutional law decisions.

II. THE DECISIONS

A. Jural Rights Revisited

In my first survey of Kentucky constitutional law in the *Northern Kentucky Law Review*, I briefly reviewed the questions of
jural rights in connection with the Kentucky Constitution. Since 1932, the concept of jural rights has been developed primarily through the opinions of the Kentucky Supreme Court. As originally noted, Section 14, Section 54, and Section 241 of the Kentucky Constitution are the foundations of the jural rights concept.

Ludwig v. Johnson initiated the modern consideration of jural rights. Saylor v. Hall reinforced that decision. Nine years later, Carney v. Moody held that the statute of repose in Saylor could be validly applied to prevent an action similar to the one in Saylor. Tabler v. Wallace took an entirely different position on the grounds that the legislation involved was special legislation in violation of Section 59(5) of the Kentucky Constitution. Ultimately, the case of Perkins v. Northeastern Log Homes overruled Carney and based the jural right theory on the "open courts" provision of the Kentucky Constitution, holding that the constitutional protections in Sections 14, 54, and 241 protected the jural rights of individual citizens of Kentucky in a generic sense, as distinguished from rights that are constitutionally protected by a written constitutional provision.

4. Wintersheimer, supra note 1, at 599-602.
5. Ky. Const. § 14 provides that the Commonwealth’s 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.”
6. Ky. Const. § 54 provides that Kentucky’s 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.”
7. Ky. Const. § 241 provides that damages may be recovered for wrongful death.
8. Wintersheimer, supra note 1, at 599-602.
9. 49 S.W.2d 347 (Ky. 1932) (holding that a statute which prohibited a guest passenger in an automobile accident from recovering against a negligent host driver was in violation of Kentucky Constitution §§ 14, 54, and 241).
10. 497 S.W.2d 218 (Ky. 1973) (holding that Kentucky’s legislature is prohibited by the state constitution from “abolishing common-law rights of action for injuries to the person caused by negligence or for death caused by negligence”).
11. 646 S.W.2d 40 (Ky. 1982).
12. Id. at 41. See also Wintersheimer, supra note 1, at 600.
13. 704 S.W.2d 179 (Ky. 1986).
14. Ky. Const. § 59(5) prohibits the general assembly from passing local or special acts that regulate the limitation of civil and criminal cases.
15. Tabler, 704 S.W.2d at 183. See also Wintersheimer, supra note 1, at 594.
16. 808 S.W.2d 809 (Ky. 1991).
17. Id. at 817-18.
A law review article authored by former University of Kentucky Law School Dean Thomas P. Lewis in the *Kentucky Law Journal* sharply criticizes the majority opinions of the Supreme Court of Kentucky concerning the development of jural rights because the concept is based on judge-made principles and does not seemingly contemplate action by the legislative branch. Dean Lewis observes in part that one of the major problems with the jural rights doctrine is that individual citizens cannot ordinarily appear before a judicial body except as a party or as amicus curiae. He argues that “judges are not generally equipped or expected to make textually generalized, interrelated rule-type decisions based on ‘legislative facts.’” Dean Lewis contends that “the formal jural rights doctrine is founded on a misconception of Kentucky’s 1891 Constitution” and that the concept “should be abandoned.”

**B. Search and Seizure**

Search and seizure questions continued to be of constitutional concern. In the case of *Baker v. Commonwealth*, a defendant was convicted of first-degree burglary. The court found that substantial evidence existed to support the jury’s verdict that the defendant was armed while in the victim’s house, even though the defendant admitted only that he was armed before and after. The police officer had probable cause to believe that the defendant was armed, so his search was reasonable and the defendant’s motion to suppress the handgun was properly denied. Further, in *Crayton v. Commonwealth*, the Kentucky Supreme Court held that Section 10 of the Kentucky Constitution does not require suppression of evidence seized pursuant to a search warrant erroneously issued by a judicial officer, where the underlying

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19. Id. at 954, 963, 973-75.
20. Id. at 983.
21. Id.
22. Id. at 985.
23. 860 S.W.2d 760 (Ky. 1993).
24. Id. at 761.
25. Id.
26. Id. at 762.
27. 846 S.W.2d 684 (Ky. 1993).
affidavit was made in "good faith" and in the absence of police misconduct. 28 This case followed the position established in United States v. Leon 29 and overruled prior decisions to the contrary. 30

C. Personal Security Rights

On the matter of personal security rights, two unanimous decisions of the Supreme Court of Kentucky related to the collection of blood, hair, and saliva samples from a criminal defendant. First, in Holbrook v. Knopf, 31 the court determined that the taking of blood and body samples from indicted defendants, as part of a criminal investigation, is not a violation of either their right, under the Kentucky Constitution, of personal security, 32 or their right, under Kentucky's Constitution, to be free from unreasonable search and seizure. 33 The prosecution on motion and affidavit supporting the potential relevance of the evidence sought, may obtain an order requiring the defendants, indicted for sexual offenses, to submit to the involuntary taking of physical specimens from their bodies. 34

In Mace v. Morris, 35 the Supreme Court of Kentucky decided that an order authorizing the Commonwealth to collect blood, hair, and saliva specimens from the defendant for a scientific comparison with other physical evidence 36 did not violate Section 11 37 of the Kentucky Constitution, nor did it compel the defendant to "give evidence against himself." 38

28. Id. at 689.
30. See Crayton, 846 S.W.2d at 689.
31. 847 S.W.2d 52 (Ky. 1953).
32. See Ky. CONST. § 1, which states that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First, The right of enjoying and defending their lives and liberties."
33. Holbrook, 847 S.W.2d at 54. See also, Ky. CONST. § 10, which provides that "[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Id.
35. 851 S.W.2d 457 (Ky. 1953).
36. The other physical evidence was obtained from an examination of the alleged victim. Id. at 458.
37. Ky. CONST. § 11 guarantees the accused in a criminal prosecution the right to meet all witnesses face to face.
38. Mace, 851 S.W.2d at 458.
Constitution does not "repeal the authority to seize physical evidence implied by Section 10." 39

Further, in Stanfield v. Hay, 40 the Kentucky Court of Appeals established that "there is no constitutional right to smoke in a jail or prison." 41 First, the court ruled that a policy which prohibits smoking in a jail is not punishment. 42 Moreover, a no-smoking policy is "reasonably related to [the] legitimate governmental objective" of controlling health and fire hazards in our prisons. 43 Therefore, a no-smoking policy is not a violation of the Due Process Clause of the Fourteenth Amendment. 44

Finally, in Commonwealth v. Raines, 45 the Kentucky Supreme Court determined that a pretrial suspension of a motor vehicle operator's license, pursuant to Kentucky Revised Statutes (KRS) section 189A.200, is not a violation of the due process clause. 46 Furthermore, the court held that the "pretrial license suspension provisions of KRS Chapter 189A" do not violate "the doctrine of separation of powers as provided by Sections 27 and 28 of the Kentucky Constitution." 47

D. Environmental Decisions

Three environmental law cases, under review by the Kentucky Supreme Court, provide interesting constitutional challenges. For example, in Monticello Co. v. Commonwealth, 50 the Kentucky Court of Appeals held that the requirement that private sewage companies connect to public comprehensive sewer systems is not a taking of property for which compensation is due. 51 Furthermore,

39. Id.
41. Id. at 553.
42. Id.
43. Id. (citing Bell v. Wolfish, 441 U.S. 520 (1979)).
44. Id.
45. 847 S.W.2d 724 (Ky. 1993).
46. Id. at 728.
47. Pursuant to Ky. Const. § 27, the power within Kentucky government is divided between the executive, legislative, and judicial departments.
48. Ky. Const. § 28 provides that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."
49. Raines, 847 S.W.2d at 728.
51. Id. at *4.
the court determined that the statute providing for such payment, KRS section 65.115, is "unconstitutional as special legislation in violation of Sections 59 and 60 of our present Kentucky Constitution." 5

In Ward v. Harding,55 the court held that a conveyance of minerals by means of a broad form deed did not include the right to strip mine.56 The amendment to the Kentucky Constitution covering broad form mineral deeds to be construed to permit coal extractions only by known methods in an area, at the time the documents were executed,57 did not violate the Contract Clause of the United States Constitution58 and the Kentucky amendment was not a taking of private property for public use without just compensation.59 This case is of immense importance to the coal mining regions of both Eastern and Western Kentucky. Ward noted that a constitutional amendment enacted by the people "necessarily annuls any and all former provisions of the constitution which conflict with it."60

The constitutional amendment requiring broad form mineral deeds to be construed to permit coal extraction only by known methods, at the time the documents were executed,61 did not violate the Contract Clause of the United States Constitution

52. Ky. Const. § 59.
53. Ky. Const. § 60.
55. 860 S.W.2d 280 (Ky. 1993).
56. Id. at 287 (overruling Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956)).
57. Section 19(2) of the Kentucky Constitution states as follows:
In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

Ky. Const. § 19(2).
59. Ward, 860 S.W.2d at 289.
60. Id. at 282 (citing Hatcher v. Meredith, 173 S.W.2d 665, 668 (Ky. 1993)).
61. See supra note 57.
because the parties could not have intended deeds to grant the right to strip mine at the time they were entered into. The case further held that the Contract Clause of the United States Constitution protects only those rights which are included in the contract at the time it is entered into. "Any unforeseen advantage is not entitled to constitutional protection."

Finally, in Proffitt v. Louisville & Jefferson County Metropolitan Sewer District, the Commonwealth's Supreme Court ascertained that "Kentucky has no case law, regulation, statute, or constitutional requirement which creates a duty upon a condemning authority to give consideration to the environmental impact of a proposed project beyond those requirements which are already in place pursuant to numerous federal laws on the subject of the environment." Therefore, without such a duty, it cannot be said that a sewer district acted arbitrarily and capriciously in failing to give such consideration.

E. State Powers

Hughes v. Wehr, involved the provocative and emotional legal issues of sexual abuse, church and state relations, and First Amendment rights. The case combined criminal and civil constitutional questions. The criminal defendant in Hughes is now serving a twenty-year sentence as a result of a guilty plea. In this case, the Bishop of the Roman Catholic Diocese of Covington sought to prevent the circuit judge from enforcing an order "requiring that certain specified material from the church archives be submitted to the Campbell County Grand Jury as part

62. Ward, 860 S.W.2d at 288.
63. Id. (citing Knights Templars' & Masons' Life Indem. Co. v. Jarman, 187 U.S. 197 (1902) and Texaco, Inc. v. Short, 454 U.S. 516, 531 (1982)).
64. Id. (citing El Paso v. Simmons, 379 U.S. 497 (1965) and Energy Resources v. Kansas Power & Light, 459 U.S. 400 (1983)).
65. 850 S.W.2d 852 (Ky. 1993).
66. Id. at 854.
67. Id. at 855.
69. Id.
70. Id. at *1.
71. The defendant was Earl Charles Bierman, a priest with the Covington diocese during the 1970s.
of its criminal investigation” of a retired priest. A three-judge panel of the court of appeals decided that the archival records of the diocese, when sought on discovery in a criminal investigation of alleged sexual abuse by a priest, could be discovered. The court of appeals also held, however, that the communications by alleged victims with the diocese were privileged and could not be discovered unless the privilege was waived.

In Hughett v. Housing & Urban Development Commission, another case involving the mixed questions of criminal and civil constitutional law, the court of appeals determined that some probable cause must exist to justify a city-housing inspector entering a citizen’s residence for the purpose of determining whether the person is in violation of a city building code. It is the responsibility of the city to show such cause.

F. State Action Defined

The right to freedom of expression and the authority of a festival committee to suppress such a right came into sharp focus in Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc. This case involved an annual civic promotional event on a downtown public plaza.

The Great Pumpkin Festival is conducted by a nonprofit corporation formed to promote the revitalization of Frankfort’s downtown area. It is interesting to note how this public celebration became the center of a constitutional confrontation regarding the emotionally-charged issues of right to life/right to abortion, as well as the major concerns of free speech.

In Capital Area Right to Life, a majority of the Kentucky Supreme Court held that this entity was engaged in state action when it denied a booth to the Capital Area Right to Life organ-

72. Hughes, 1993 WL 176979 at *1.
73. Id.
74. Id. at *2.
75. 855 S.W.2d 340 (Ky. Ct. App. 1993).
76. Id. at 342.
77. Id.
78. 862 S.W.2d 297 (Ky. 1993).
79. Id.
80. Id.
81. Id.
However, the court ruled that the denial did not abridge the group's constitutional right to free speech because, first of all, the right to communicate one's views is "subject to reasonable time, place and manner restrictions," and because the denial was "content neutral" in that opposing abortion groups had also been denied booth space. The majority opinion interpreted the phrase "content-neutral" in regard to the use of the public square. In the dissenting opinion, however, I noted that the majority opinion seemed to be at variance with the rationale of the federal decision in Heffron v. International Society of Krishna.

G. Court Service and Supervisory Activities

The appointment and service of special judges of the lower courts, as well as special justices of the supreme court have become a matter of scholarly inquiry on a constitutional level. There is little question that the supreme court and/or the chief justice of the supreme court have the authority to appoint special judges. The sticking point arises as to when and under what circumstances such appointment is to be made. A more important question involves the appointment of special justices as members of the supreme court. The use of a retired judge who is currently engaged in the active practice of law as a special judge is permissible under the Kentucky Constitution and statutes, and "is in the best interest of the operation of the Court of Justice." Additionally, such an appointment does not violate the Code of Judicial Conduct.

82. Id. at 299-300.
83. Id. at 300-301.
84. Id.
86. See Regency Pheasant Run Ltd. v. Hon. Edmund P. Karem, 860 S.W.2d 755 (Ky. 1993).
87. See Karem, 860 S.W.2d at 757. See also Ky. Const. § 110(5)(b) which states that the Chief Justice of the Kentucky Supreme Court "shall assign temporarily any justice or judge of the commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such an assignment necessary for the prompt disposition of causes." Id.
89. Karem, 860 S.W.2d at 757.
90. Id. at 758. See also Code of Judicial Conduct Canon 7 (1993).
In the case of *Kentucky Utilities Co. v. Southeast Coal Co.*, the court determined that "[an issue involving the administrative authority of [the Kentucky Supreme Court] must be determined by its Justices, rather than by executive appointees." The opinion relied on KRS section 26A.015(3)(a), which provides that "any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the chief justice." The Opinion and Order, which was signed by Deputy Chief Justice Leibson, attached an appendix which set forth the procedure for the appointment of a special justice for the Supreme Court of Kentucky.

In a separate concurring opinion, I agreed with the result achieved by the court because the motion for disqualification of the special justice was "nonprejudicial in view of the fact that the final vote was at least 4-2" and, consequently, at least four regularly elected members of the court were in the majority. However, as noted in my concurrence, "Section 110 of the Kentucky Constitution and K.R.S. 26A.015(3)(a) and Section 110(5)(b) of the Constitution relate only to courts other than the Supreme Court." Supreme Court Rule 1.020 "has long set out the rule to be followed when the [Kentucky Supreme Court] is equally divided."

In *Combs v. Huff*, it was established that Supreme Court Rule 1.060, requiring that candidates for the position of circuit clerk must pass a certifying examination before seeking office, is constitutional. Although Section 100 of the Kentucky Constitution is ambiguous as to whether a candidate for circuit clerk must have passed a certifying examination before or after the election, the Kentucky Supreme Court, under the judicial article,

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91. 836 S.W.2d 407 (Ky. 1992).
92. Id. at 408.
94. *See also Southeast Coal*, 836 S.W.2d at 409.
95. *Southeast Coal*, 836 S.W.2d at 410.
96. Id. at 411.
97. Id.
98. *See also KY. SUP. CT. R. 1.020."
99. 858 S.W.2d 160 (Ky. 1993).
100. Id. at 163. *See also KY. SUP. CT. R. 1.060, which is reproduced in Huff, 858 S.W.2d at 161 n.1.
101. KY. CONST. § 100.
may promulgate rules for certification so long as no constitutional right is infringed.\textsuperscript{102}

The administrative and supervisory authority of the supreme court came into play in \textit{In re Overstreet},\textsuperscript{103} a case of first impression involving the removal from office of a duly-elected circuit court clerk.\textsuperscript{104} The Kentucky Constitution states, in pertinent part, that the clerk of the circuit court shall be removable from office by the supreme court for good cause shown.\textsuperscript{105} "No other penalty is provided by the Constitution."\textsuperscript{106} The statutes place certain duties and responsibilities on the clerk in maintaining proper clerical and financial records.\textsuperscript{107} "Failure to do that will subject the Clerk to removal from office for good cause shown."\textsuperscript{108}

Finally, in \textit{Kraus v. Kentucky State Senate},\textsuperscript{109} the Kentucky Court of Appeals ruled that the statute concerning the appointment of Administrative Law Judges to the Workers' Compensation Board does not allow the General Assembly to actually make appointments, but merely to accept or reject an appointment and, therefore, does not violate the constitutional provisions of the law.\textsuperscript{110} Furthermore, the appointee had no standing to sue because his appointment, although subject to consent by the Kentucky Senate, was no more than a mere expectancy.\textsuperscript{111}

\textbf{H. Civil Procedure}

A redistricting statute which impacted Kentucky's three northernmost counties, Campbell, Boone, and Kenton, was challenged as unconstitutional in Campbell County by a Campbell County resident/taxpayer in \textit{Fischer v. State Board of Elections}.\textsuperscript{112} The general venue statute, KRS section 452.405,\textsuperscript{113} does not specifically state that all claims challenging the constitutionality of a
statute must be brought in Franklin County. A "cause of action does not ripen until a plaintiff has been harmed" and when it does vest, it should be brought where the cause of action arose.

In another important civil procedure decision, Waggoner v. Waggoner, the Kentucky Supreme Court established that the statute providing that teachers' contributions toward the Teachers Retirement System are nonmarital property is not invalid special legislation and does not violate the spouse's right under the Equal Protection Clause of the Federal and State Constitutions. Additionally, its application to contributions made before the enactment of the statute was not invalidly retrospective. Therefore, such contributions were not subject to discovery.

I. Legislative Authority

In Philpot v. Patton, two Kentucky state senators challenged the constitutionality of Senate Rule 48, which required a majority vote to "discharge" a bill from committee. The Kentucky Supreme Court declared the action moot because of the expiration of the rule at the end of each session of the General Assembly. The majority determined that the claim did not qualify for exception to the mootness doctrine as capable of repetition yet evading review because the rule, if reenacted, could be relitigated.

114. Fischer, 847 S.W.2d at 719-20.
115. Id. at 721.
116. 846 S.W.2d 704 (Ky. 1992).
118. Waggoner, 846 S.W.2d at 706. See also U.S. Const. amend. XIV.; Ky. Const. §§ 1-3, 39.
119. Waggoner, 846 S.W.2d at 709.
120. Id.
121. 837 S.W.2d 491 (Ky. 1992).
122. Senator Tim Philpot and Senator David Williams.
123. Philpot, 837 S.W.2d at 492.
124. Id. at 493.
125. Id.
CIVIL PROCEDURE

by Judge Gregory M. Bartlett*

I. INTRODUCTION

This survey reviews recent decisions of the Kentucky Supreme Court and the Kentucky Court of Appeals in civil cases wherein significant procedural issues were addressed. The cases included in this review are those reported in late 1992 and throughout 1993. These cases were reported in West’s South Western Reporter, Volumes 839-856. Since many case reports include rulings on procedural matters, along with announcements on substantive law, only those opinions in which the primary issue was 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.

II. SUMMARY JUDGMENT

It would appear that the Kentucky Supreme Court’s landmark decision in Steelvest, Inc. v. Scansteel Service Center, Inc., has not significantly decreased the amount of litigation over the entitlement to summary judgment. Indeed, the appellate courts continue to review quite a few cases in which summary judgment was granted or denied.

An explanation for the continuing frequency of summary judgment issues in litigation can be found in an analysis of the requirements of Civil Rule (CR) 56.03. This rule provides that, before summary judgment can be granted, the court must find that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Thus, there are multiple prerequisites which must be established.

* Judge Bartlett is a Judge of the Kenton Circuit Court, Third Division. He is a graduate of Thomas More College (A.B., 1967), Xavier University (M.A., 1971), and University of Kentucky (J.D., 1973).

1. 807 S.W.2d 476 (Ky. 1991).
2. Id. at 480.
before summary judgment may be granted, each providing a skilled advocate with the opportunity to argue for or against the applicability of the rule.

Occasionally, there is no dispute as to material facts, but the parties differ as to whether there is an entitlement to a judgment as a matter of law. More frequently, it is alleged that there is a genuine issue of fact to be determined by the trier-of-fact, usually a jury, which would prohibit the entry of summary judgment. To make matters more difficult, it is often difficult to determine what is a factual dispute as opposed to a legal dispute.

In the time period covered by this survey, the courts have been presented with a number of cases wherein the entitlement to summary judgment depended upon the classification of an issue as being one of fact or one of law. A good example is the case of Perry v. Motorists Mutual Insurance Co. In that case, Mr. Perry, as administrator of his daughter's estate, filed suit against Motorists Mutual for underinsured motorists benefits resulting from the death of his daughter in a vehicular accident. The insurance company had denied benefits upon the basis that the daughter was not a resident of her father's household on the date of her fatal accident, which had occurred twelve hours after her marriage. The undisputed facts of the case are that she had moved into the home of her fiancee's aunt some three to four weeks prior to the marriage. However, approximately ninety percent of her belongings were still at her father's house. Moreover, it was unsettled as to where the newlyweds would reside after the marriage.

A jury found that the daughter was a resident of her father's household and, therefore, was entitled to insurance benefits.

3. Two recent cases offer examples of this point. In Boykins v. Housing Auth. of Louisville, 842 S.W.2d 527 (Ky. 1992) and Bennett v. Jones, 851 S.W.2d 494 (Ky. Ct. App. 1993), employees who were terminated filed suit against their employers, claiming that their firing was retaliatory or for other illegal purposes which would exempt them from the "terminable at will" doctrine. Since the facts of these cases were undisputed or immaterial, the defendants were deemed to be entitled to a judgment as a matter of law.
4. 860 S.W.2d 762 (Ky. 1993).
5. Id. at 764.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
However, the court of appeals reversed that judgment, holding that the ultimate question of residency was a matter of law, and not a question of fact.11 Upon review, the supreme court reversed.12

Acknowledging that there was no Kentucky case directly on point, the court held that residency is a question of fact which was properly submitted to the jury.13 Noting that residency is based on fact and intent, the court declared that intent, where different inferences can be drawn from undisputed facts, is a question of fact.14 In this case, the court stated that the record would support several possible permissible inferences as to the decedent's intent.15 Thus, submission of the question of residency to the jury was proper.

In *Middleton Engineering Co. v. Mainstreet Realty, Inc.*,16 the supreme court deemed “agency” to be a question of fact to be determined by a jury.17 As a result, summary judgment was improper.18 In that case, the issue was whether a sub-contractor's mechanics lien was properly perfected.19 The resolution of that issue depended upon whether the owner's general contractor was its agent, since it was undisputed that the owner had not received the notice of lien required by the Mechanics Lien Statute.20 The circuit court had dissolved the sub-contractor's lien, but the court of appeals reversed, holding that “agency” of the contractor for the owner was a material issue of fact.21 On review before the supreme court, the sub-contractor argued that general contractors should be considered the agent of the owner as a matter of law.22 However, in affirming the decision of the court of appeals, the supreme court stated that agency continues to be a question

11. *Id.*
12. *Id.*
13. *Id.*
16. 839 S.W.2d 274 (Ky. 1992).
17. *Id.* at 276.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 276.
22. *Id.* at 276.
of fact to be determined from the circumstances and the conduct of the parties. 23

It is axiomatic that in negligence actions the plaintiff must prove a duty and a breach of that duty which can be considered a proximate cause of resulting damages. It is for the court to determine, as a matter of law, the existence, nature and extent of the legal duty. If the court determines that a defendant has no legal duty, then summary judgment is appropriate since there can be no liability under any set of facts.

The supreme court upheld the entry of summary judgment upon the basis that there was no duty owed by the defendant in the case of Mullins v. Commonwealth Life Insurance Co. 24 The plaintiff therein filed suit against his insurance company and its agent, alleging negligent failure to advise him as to the availability of underinsured motorists coverage and added reparation benefits. 25 Viewing the record in a light most favorable to the plaintiff, the court concluded that there was no genuine issue of material fact concerning the existence of a duty on the part of an agent to advise the plaintiff about available coverages. 26 The court commented that a question of duty is, in essence, a policy determination and thus presents an issue of law. 27

A party's legal duty can be established by common law or can be based upon statute. Indeed, in some instances, statutes can relieve a party of its legal duty. In Huddleston v. Hughes, 28 the courts were called upon to interpret Kentucky's Recreational Use Statute 29 in order to determine whether the defendant premises owner was protected from liability under that statute. 30 That act specifically provides that a land owner "owes no duty of care to keep the premises safe for entry or use by condition for recreational purposes ..." 31

In that case, the Diocese of Covington, as owner of a schoolyard, was sued by the plaintiff for injuries sustained when a basketball

23. Id.
24. 839 S.W.2d 245, 246 (Ky. 1992).
25. Id.
26. Id. at 247.
27. Id. at 248.
28. 843 S.W.2d 901 (Ky. 1992).
30. Huddleston, 843 S.W.2d at 902.
31. Id. at 903 (citing Ky. REV. STAT. ANN. § 411.190(3)).
goal fell upon him. The court of appeals agreed that the Recreational Use Statute applied, but reversed the summary judgment and remanded the matter to the trial court to determine whether or not the plaintiff's claim fell within an exception to the statute. Sub-paragraph 6 of the statute provides that a landowner's liability is not limited "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." From its review of the facts in the record, and after reviewing several sources for definitions of the terms "willful" and "malicious," the court concluded that a jury question existed as to whether the school's conduct could fit within the definition of these terms.

Another premises liability case in which a summary judgment was reversed is *Estep v. B.F. Saul Real Estate Investment Trust.* The facts of this case are fairly typical. The plaintiff fell on the sidewalk as she approached the entrance to a mall. It had snowed recently and the sidewalks had been cleared, but the plaintiff attributed her fall to ice concealed under the snow. Relying on the authority in *Standard Oil Co. v. Manis,* which held that the landowner has no duty to remove or warn against natural outdoor hazards which are as obvious to the invitee as to the owner, the trial court granted summary judgment. In short, the trial court found, as a matter of law, no duty on the part of the defendants.

On appeal, the court of appeals noted that not all natural outdoor conditions are equally apparent to the landowners and to the invitees. Whether such hazards are obvious depends upon

32. Id.
33. Id.
34. Id.
37. 843 S.W.2d 911 (Ky. 1992).
38. Id.
39. Id.
40. 433 S.W.2d 856 (Ky. 1968).
41. Estep, 843 S.W.2d at 913.
42. Id.
43. Id.
the unique facts of each case. Accordingly, the court of appeals held that there was a genuine issue of fact as to whether the defendants in this case knew of the ice that was allegedly hidden under the snow, which was not obvious to the plaintiffs. The issue regarding the obviousness of the natural hazard precluded summary judgment. In summary, the court decided that the defendants would be charged with a legal duty if the jury should determine that the defendants knew of a hazard of which the plaintiffs were unaware.

The court also held that, since the defendants attempted to remove the snow from the premises, they were charged with the duty to act in a reasonable manner. The court further commented that whether a person has acted "reasonably" is a "classic" jury question.

Once the court has determined that a defendant has a duty, it is normally for the jury to determine whether that duty has been breached and whether that breach can be considered the "proximate cause" of the damage sustained by the plaintiff. In Waldon v. Housing Authority of Paducah, the estate of a shooting victim filed suit against a housing authority and a city for negligence. The trial court granted the defendant's summary judgment based upon Kentucky Revised Statutes ("K.R.S.") section 411.155, which, in essence, provides that a person cannot be held liable for damages resulting from injuries to another as a result of the criminal use of a firearm by a third person.

When the court of appeals declared that statute to be unconstitutional, the defendants argued that they were entitled to a judgment as a matter of law based upon common law principles. Citing Grayson Fraternal Order of Eagles v. Claywell, the court

44. Id. (citing Schreiner v. Humana, Inc., 625 S.W.2d 580, 581 (Ky. 1982)).
45. Id.
46. Id. at 913-14. The court distinguished the case of Corbin Motor Lodge v. Combs, 740 S.W.2d 944 (Ky. 1987), noting that in Corbin the obviousness of the natural hazard was conclusively established.
47. Estep, 843 S.W.2d at 915.
48. Id. at 914.
49. Id.
51. Id. at 778.
52. Id. (citing KY. REV. STAT. ANN. § 411.155 (Baldwin 1993)).
53. Id. The Waldon court found K.R.S. § 411.155 to be in violation of Sections 14 and 54 of the Kentucky Constitution.
54. 736 S.W.2d 328 (Ky. 1987).
restated the rule that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." The court added that a landlord can be liable to his tenant for criminal acts of a third person if that landlord fails to take reasonable steps to avoid injury from a reasonably foreseeable criminal act.

From the record presented, the court concluded that the defendants could reasonably be charged with foreseeability of the criminal act which resulted in the death of the plaintiff's decedent. The court stated, "[c]learly a jury question is presented on the issue of proximate cause of Smith's death precluding summary judgment." Thus, on retrial, the jury would be required to determine as a matter of fact whether the defendants breached their duty of reasonable care and whether that breach could be considered the proximate cause of the damage sustained.

It should be noted that the court of appeals upheld the summary judgment as to the defendant city. Unlike the housing authority, the court could find no duty that could have been breached by the city. Thus, the city was rightfully entitled to a judgment as a matter of law.

Although proximate cause is usually a factual question for the jury, there are certainly cases where the court can rule as a matter of law that the defendant's conduct cannot be considered to have caused the plaintiff's injury or damages. One case of this kind is Farmer v. Heard. The material facts in that case were not in dispute. The plaintiff, a farm worker, fell from the tongue of a feed wagon and injured his knee. He climbed onto the tongue of the wagon in an attempt to set the wagon upright.

55. Waldon, 854 S.W.2d at 778.
56. Id. at 779.
57. Id.
58. Id.
59. Id. That a jury can find a breach of duty but no proximate cause of damage was illustrated in Hamby v. University of Kentucky Med. Ctr., 844 S.W.2d 431 (Ky. Ct. App. 1993), a medical malpractice case.
60. Waldon, 854 S.W.2d at 780.
61. Id.
62. Id.
63. 844 S.W.2d 425 (Ky. Ct. App. 1993).
64. Id. at 426.
65. Id.
Apparently, a contributing factor to his fall was manure on his shoes.\(^{66}\)

In upholding the summary judgment entered by the trial court, the court of appeals found no hazardous condition, nor any hidden danger.\(^{67}\) As a result, the court concluded that the defendant did not breach any duty.\(^{68}\) The court further stated that, assuming for the sake of argument, the defendant had breached some duty, that breach would be too remote to constitute a proximate cause of the plaintiff’s injury.\(^{69}\)

Finally, the court of appeals addressed a procedural issue concerning summary judgment in *Storer Communications v. Oldham County*.\(^{70}\) That case arose from a suit for declaratory judgment brought by the plaintiff alleging that the gross receipts utility tax imposed upon it by the Oldham County Board of Education was unconstitutional.\(^{71}\) After an initial round of pleadings were concluded, there was no activity in the record from July, 1991 until March 3, 1992, when the circuit court entered an order dismissing the complaint, *sua sponte*.\(^{72}\) This order was entered without notice to the parties, without a motion for dismissal by any party, and without briefs or arguments on the issues.\(^{73}\) After a motion to vacate the judgment was overruled, the plaintiffs appealed.\(^{74}\)

The court of appeals reversed, stating that, “it is fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard.”\(^{75}\) The court further added that Civil Rules 56.01 and 56.02 clearly provide that a “party” may seek summary judgment, but that the rules do not contemplate such a proceeding on the court’s own motion.\(^{76}\) Finally, the court cited CR 56.03 as allowing a minimum of ten days to respond to such motion and found that

\(^{66}\) Id. at 427.

\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) 850 S.W.2d 340 (Ky. 1993).

\(^{71}\) Id.

\(^{72}\) Id. at 341.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) Id. at 342.

\(^{76}\) Id.
requirement to be mandatory unless waived.\textsuperscript{77} The court concluded that “the trial court’s failure to afford the appellant the most basic procedural protections, notice of its intention and an opportunity to respond, is unjustifiable, constitutionally defective, and requires reversal.”\textsuperscript{78}

III. TRIAL PRACTICE

In four cases, the Kentucky Supreme Court addressed issues arising from the conduct of jury trials. These issues included: the right to a jury trial under the Kentucky Civil Rights Act; the effect of an attorney’s improper argument on a jury verdict; the trial court’s discretion in refusing to excuse allegedly biased jurors; and whether the court must advise the jury when several claims in a multi-claim case have been dismissed by directed verdict.

The right to a trial by jury for claims brought under the Kentucky Civil Rights Act was one of several issues considered by the Kentucky Supreme Court in \textit{Meyers v. Chapman Printing Co.}\textsuperscript{79} The plaintiff in that case, Kay Meyers, filed suit under the Kentucky Civil Rights Act\textsuperscript{80} against her former employer Chapman Printing, and its sole shareholder and CEO, Marshall Reynolds.\textsuperscript{81} Meyers alleged two separate causes of action, one for sexual harassment during her employment and one for gender-based discharge.\textsuperscript{82} Her case was tried before a jury of the Fayette Circuit Court, which returned a verdict in her favor on the sexual harassment count and awarded her $100,000 in damages for mental and emotional injuries.\textsuperscript{83} The jury, however, found against her on her gender-based discharge claim.\textsuperscript{84} The judgment entered in the circuit court also awarded attorney’s fees to the plaintiff in excess of $150,000.\textsuperscript{85} Both parties appealed to the court of appeals.\textsuperscript{86}

\textsuperscript{77} Id. (citing Equitable Coal Sales, Inc. v. Duncan Mach. Movers, Inc., 649 S.W.2d 415 (Ky. Ct. App. 1983)).
\textsuperscript{78} Id.
\textsuperscript{79} 840 S.W.2d 814 (Ky. 1992).
\textsuperscript{80} Ky. REV. STAT. ANN. §§ 344.010-.990 (Baldwin 1993).
\textsuperscript{81} Meyers, 840 S.W.2d at 816.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 824.
\textsuperscript{86} Id. at 816.
Noting that there were several important issues previously unresolved by appellate opinion, the supreme court granted the motion of the court of appeals to transfer the case to its docket.\textsuperscript{87} Included in these important questions was the issue of whether a trial by jury was authorized in a suit brought pursuant to the Kentucky Civil Rights Act.\textsuperscript{88} The court also considered whether the plaintiff's claims were pre-empted by the Kentucky Workers' Compensation Act.\textsuperscript{89} Other issues included were whether there was adequate proof to sustain an award for sexual harassment where there had been a finding of no gender-based discharge, and whether the instructions submitting the gender-based discharge claim were erroneous.\textsuperscript{90} Finally, the court reviewed the award of attorney's fees.\textsuperscript{91}

With regard to the jury trial issue, the court cited the Kentucky Civil Rights Act, which provides that any person injured by a violation of its provision "shall have a civil cause of action in circuit court" to recover actual damages sustained.\textsuperscript{92} The employer had contended that there was no right to a trial by jury unless such right is expressly provided in the statute.\textsuperscript{93} In response, the court referred to Section 7 of the Kentucky Constitution, which preserves "the ancient mode of trial by jury."\textsuperscript{94} The court added that a civil cause of action for damages is the "classical textbook paradigm of an action at law" for which the Constitution guarantees a trial by jury.\textsuperscript{95} Although the federal statute provides only for injunctive or other equitable relief, the Kentucky Civil Rights Act has an express condition authorizing damages suits.\textsuperscript{96} The court concluded that, once a cause of action for damages to be tried in the courts of the commonwealth has been created by statute, there is no need for further provisions relating to a trial by jury.\textsuperscript{97} That right is guaranteed by the Kentucky Constitution.\textsuperscript{98}

\textsuperscript{87} Id. at 817.
\textsuperscript{88} Id. at 816.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 824.
\textsuperscript{92} Id. at 819.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
The court proceeded to affirm the judgment in all respects, including the award of attorney's fees.\textsuperscript{99} One other observation by the court is worthy of mention in this survey of civil procedure. The employee complained regarding the jury instructions.\textsuperscript{100} Although it considered the instructions and found them to accurately set forth the law, the court further questioned whether the employee had preserved that issue for review.\textsuperscript{101} The court noted that the employee's objections to the instruction were limited to complaining about the "but for" language contained therein, and asking that it be rephrased to state "that her female sex was a substantial and motivating factor in her termination."\textsuperscript{102} Referring to Civil Rule 51(3), the court interpreted that rule as requiring,

That before a party may complain of error in the instructions, the party must accompany the objection with a fully correct instruction or, at least, must advise the court sufficiently so that the court can understand both the nature of the objection and what needs to be done to correct it.\textsuperscript{103}

In any event, despite its concern, the court did not expressly state that the employee's objection to the instructions were insufficient under Civil Rule 51(3), and, as stated above, the court did consider and approve the instructions given by the trial court.\textsuperscript{104}

It is generally accepted that, in order for an appellate court to reverse a jury verdict due to improper argument of counsel, the conduct of the attorney must be egregious. In \textit{Smith v. McMillan},\textsuperscript{105} the supreme court apparently concluded that the argument of counsel met that standard for reversal.\textsuperscript{106} That case

\begin{itemize}
  \item \textsuperscript{99} Id. at 826.
  \item \textsuperscript{100} Id. at 824.
  \item \textsuperscript{101} Id. at 823.
  \item \textsuperscript{102} Id. at 823-24.
  \item \textsuperscript{103} Id. Kentucky Rules of Civil Procedure 51(3) states:
    No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his opinion by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.
  \item \textsuperscript{104} Ky. R. Civ. P. 51(3).
  \item \textsuperscript{105} Meyers v. Chapman Printing Co., 840 S.W.2d 814, 823 (Ky. 1992).
  \item \textsuperscript{106} Id. at 175.
\end{itemize}
involved a malpractice action filed against a dermatologist arising out of a surgical biopsy which left a scar on the patient’s lip.\textsuperscript{107} Although the jury returned a verdict in favor of the plaintiff on her liability claim, it awarded her \textquotedblright\$0\textquotedblright in damages.\textsuperscript{108} Her motion for a new trial, in which she alleged improper argument by opposing counsel during summation, was overruled.\textsuperscript{109}

The court of appeals affirmed the judgment of the trial court, finding no prejudicial error in the opposing counsel’s comments, although it recognized that they were \textquotedblrightill advised\textquotedblright.\textsuperscript{110} That court also recognized the impropriety of counsel’s \textquoteleft golden rule\textquoteright type argument, but considered that to be harmless error, citing the case of \textit{Stanley v. Ellegood}.\textsuperscript{111}

On review, the supreme court reversed and remanded the case for retrial.\textsuperscript{112} The court commented that the summation of the doctor’s counsel was ample proof to demonstrate the occurrence of prejudicial error.\textsuperscript{113} As an example of the improper summation which justified reversal, the court recounted that Appellee’s counsel continued to impugn the integrity of the plaintiff and her counsel, and decried the litigation crisis.\textsuperscript{114} He also likened an allegation of malpractice against a doctor to charging him as being a criminal.\textsuperscript{115} Counsel’s \textquoteleft golden rule\textquoteright argument was raised in connection with the theory that the plaintiff would not have given consent to the biopsy had she known that a scar would result.\textsuperscript{116} Counsel referred to graphic photographs of cancer victims which had not been admitted into evidence, and then told the jury that he wished he could have shown the pictures to them.\textsuperscript{117} At that point, he queried, \textquoteleft I wonder how many of you all would have objected to a biopsy\textquoteright.\textsuperscript{118} Finally, counsel for the Appellee accused the plaintiff’s expert witness of earning his

\begin{footnotes}
\item[107] Id. at 173.
\item[108] Id.
\item[109] Id.
\item[110] Id. at 174.
\item[111] Id. (citing \textit{Stanley v. Ellegood}, 382 S.W.2d 572 (Ky. 1964)).
\item[112] Id. at 176.
\item[113] Id. at 174.
\item[114] Id.
\item[115] Id.
\item[116] Id.
\item[117] Id.
\item[118] Id.
\end{footnotes}
living by collaborating with all the plaintiff's lawyers in order to make money.\textsuperscript{119}

The court conceded the difficulty of ascertaining the probability of prejudice sufficient to warrant reversal of a judgment, and acknowledged that each case should be judged on its own facts.\textsuperscript{120} Nevertheless, the court had no reluctance to presume that the jury's failure to award damages, despite its finding of negligence, was influenced by the improper jury argument.\textsuperscript{121} Having determined that reversal and retrial were required, the court then proceeded to determine that the retrial would be limited to the issue of damages only.\textsuperscript{122}

In \textit{Altman v. Allen},\textsuperscript{123} another medical malpractice case, the supreme court held that there was no presumption of bias on the part of women jurors who were former patients of the defendant obstetricians/gynecologists. The \textit{Altman} court stated that the trial judge was not required to excuse such jurors from a medical malpractice case.\textsuperscript{124}

Following an eight-day jury trial, a nine-to-three jury verdict was returned in favor of the defendant doctors.\textsuperscript{125} Five of the members of that jury were former patients of the doctors.\textsuperscript{126} Of that five, three were challenged for cause.\textsuperscript{127} The trial court refused to excuse those three jurors, although one had been a patient for over twenty years, and a second had been a patient for twenty-five years.\textsuperscript{128} A third juror had been treated by both physicians several years earlier, and that care had included the delivery of her twin children plus a third child.\textsuperscript{129} Three of the former patients were among the nine who voted in favor of the defendant doctors, with two of those being jurors who had been challenged.\textsuperscript{130}

\begin{flushright}
119. \textit{Id.}
120. \textit{Id.} (citing \textit{Stanley v. Ellegood}, 382 S.W.2d 572 (Ky. 1964)).
121. \textit{Id.} at 175. The court cited the case of \textit{Risen v. Pierce}, 807 S.W.2d 945 (Ky. 1991), in support of its reversal of a judgment for misconduct by counsel.
122. \textit{Smith v. McMillan}, 841 S.W.2d 172, 175 (Ky. 1992) (citing \textit{Nolan v. Spears}, 432 S.W.2d 425 (Ky. 1968) and \textit{Deutsch v. Shein}, 597 S.W.2d 141 (Ky. 1980)).
123. 850 S.W.2d 44 (Ky. 1993).
124. \textit{Id.} at 46.
125. \textit{Id.} at 44.
126. \textit{Id.} at 45.
127. \textit{Id.}
128. \textit{Id.}
129. \textit{Id.}
130. \textit{Id.}
\end{flushright}
The court of appeals determined that the challenged jurors were biased as a matter of law since they were former patients of the doctors.\textsuperscript{131} That court cited the special relationship between a woman and her obstetrician/gynecologist as being such as to destroy her impartiality as a juror.\textsuperscript{132} Accordingly, the court of appeals reversed.\textsuperscript{133}

On discretionary review, the supreme court reversed the decision of the court of appeals, with Justice Wintersheimer writing the opinion for the court.\textsuperscript{134} In his decision, Justice Wintersheimer pointed to the fact that the record contained no basis for a "presumed" bias theory.\textsuperscript{135} He noted that during voir dire examination there was no comprehensive effort to explore or develop the doctor/patient relationship of the three jurors to the extent necessary to establish their bias.\textsuperscript{136} Likewise, there were no scientific treatises or other expert testimony introduced to support a theory of obstetrician/patient bonding.\textsuperscript{137}

The court relied upon the authority in \textit{Mackey v. Greenview Hospital, Inc.},\textsuperscript{138} a decision of the court of appeals that held it was not reversible error to overrule a challenge for cause when there was no current or continuing professional relationship between a juror and a physician involved in the case.\textsuperscript{139} The court preferred to follow the \textit{Mackey} case, as opposed to the decision in \textit{Davenport v. Ephraim McDowell Memorial Hospital},\textsuperscript{140} which is cited for the proposition that, where there is a close relationship between a prospective juror and a party, possible bias cannot be ignored and a presumption of bias must be recognized, regardless of the answers upon voir dire examination.\textsuperscript{141} The court distinguished the \textit{Davenport} case, as well as the case of \textit{Ward v. Commonwealth},\textsuperscript{142} upon the grounds that there was no evidence

\textsuperscript{131.} Id.
\textsuperscript{132.} Id.
\textsuperscript{133.} Id.
\textsuperscript{134.} Id. at 44-46.
\textsuperscript{135.} Id. at 45.
\textsuperscript{136.} Id.
\textsuperscript{137.} Id.
\textsuperscript{138.} 587 S.W.2d 249 (Ky. 1979).
\textsuperscript{139.} Id. at 253.
\textsuperscript{140.} 769 S.W.2d 56 (Ky. Ct. App. 1988).
\textsuperscript{141.} Id. at 59.
\textsuperscript{142.} 695 S.W.2d 404 (Ky. 1985).
that a close relationship was established in this case.\textsuperscript{143} The court refused to speculate so as to presume a special bond between a woman and her obstetrician, fearing similar unwarranted presumptions could be made about other professionals, such as psychiatrists, psychologists, clergy, and other counselors.\textsuperscript{144} Finally, the court stated that such decisions should be left in the hands of the trial judge, who must properly exercise discretion.\textsuperscript{145} The court commented that the trial judge has always been recognized as the person in the best position to determine whether a prospective juror exhibits bias or partiality.\textsuperscript{146}

In a highly critical dissenting opinion, Justice Leibson attacked the wisdom and authority of the \textit{Mackey} decision.\textsuperscript{147} He described that case as displaying an indifference to obvious bias.\textsuperscript{148} On the other hand, he applauded the decision of the court of appeals in this case as being progressive.\textsuperscript{149} He concluded by stating that the probability of bias on the part of the jurors who were former patients of the defendant physicians was not speculation, but a matter of common sense.\textsuperscript{150}

In a less heated decision, the supreme court, in \textit{Hanson v. American National Bank & Trust Co.},\textsuperscript{151} upheld a jury verdict for compensatory damages of $1,000,065 and punitive damages of $5,775,000 in favor of a borrower against a lender in a lender liability action.\textsuperscript{152} In essence, the borrower claimed that the defendant bank had forced him out of business.\textsuperscript{153} The plaintiff's complaint alleged breach of fiduciary duty, rescission of contract, and fraud and misrepresentation.\textsuperscript{154} At the conclusion of the evidence, the trial court directed a verdict for the defendant bank on the issue of fiduciary duties and rescission of contract.\textsuperscript{155}

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\footnotesize
\textsuperscript{143} Altman v. Allen, 850 S.W.2d 44, 46 (Ky. 1993). \\
\textsuperscript{144} Id. \\
\textsuperscript{145} Id. \\
\textsuperscript{146} Id. (citing Davidson v. Grigsby, 451 S.W.2d 632 (Ky. 1970)). \\
\textsuperscript{147} Id. at 47 (Leibson, J., dissenting). \\
\textsuperscript{148} Id. \\
\textsuperscript{149} Id. \\
\textsuperscript{150} Id. \\
\textsuperscript{151} 844 S.W.2d 408 (Ky. 1992). \\
\textsuperscript{152} Id. at 417. \\
\textsuperscript{153} Id. at 411-12. \\
\textsuperscript{154} Id. at 412. \\
\textsuperscript{155} Id.
\end{flushleft}
The case was submitted to the jury solely on the issue of fraud and misrepresentation.\textsuperscript{156}

On appeal, the bank argued that the trial court committed error in not advising the jury that it had directed a verdict against the plaintiff on several of the plaintiff's claims.\textsuperscript{157} The bank contended that the jury was allowed to consider evidence on these other claims when it awarded the compensatory and punitive damages.\textsuperscript{158} However, the supreme court, finding no authority in Civil Rule 50.01 requiring any special instructions to the jury when entering a directed verdict, rejected the bank's argument.\textsuperscript{159} The court noted that the case was submitted to the jury on interrogatories for a special verdict which thereby limited the jury in its fact finding function.\textsuperscript{160} The court commented that such special verdicts in response to written questions under CR 49.01 prevents the jury from considering immaterial issues.\textsuperscript{161}

IV. LIMITATION OF ACTIONS

The time within which an action must be brought was the subject of one supreme court decision and two court of appeals decisions. In two of these cases, the courts refused to dismiss actions based on the defense of limitations, indicating a preference for having disputes decided on the merits. On the other hand, in another case, the court of appeals declined to adopt a plaintiff's novel argument for tolling the statute of limitations in a decision which could have far-reaching impact.

In order to resolve genuine confusion as to the appropriate statute of limitations in an action against a trustee for breach of fiduciary duty, the supreme court granted discretionary review in the case \textit{First Kentucky Trust Co. v. Christian}.\textsuperscript{162} The circuit court had granted summary judgment dismissing the claim filed by the trust beneficiaries upon the grounds that the action was barred by the five-year statute of limitations set forth in K.R.S.

\begin{itemize}
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} 849 S.W.2d 534 (Ky. 1993).
\end{itemize}
CIVIL PROCEDURE

section 413.120(5). The court of appeals had reversed, holding that the case was governed by the provisions of K.R.S. sections 386.735 and 413.340. The former statute provides that beneficiaries have six months from the final accounting of a trust within which to bring their action, unless there is a lack of full disclosure, in which case they have three years. The latter statute provides that the Chapter on limitations of actions does not apply to a continuing or subsisting trust.

On review, the supreme court agreed with the court of appeals. In his opinion, Justice Wintersheimer distinguished and declined to follow the decision in the earlier case, Potter v. Connecticut Mutual Life Insurance Co., which arguably had been followed by the courts of Kentucky and reflected the general law of trust from other jurisdictions. Justice Wintersheimer noted that the trust in the Potter case had terminated, whereas the trust sub judice was “continuing and subsisting.”

The court proceeded to summarize the law of limitations as applied to actions brought by beneficiaries against trustees. It made the distinction between trusts that are continuing in nature and those which have been terminated. When a trust has been terminated, K.R.S. section 386.735 applies and provides that the beneficiaries have six months from the final accounting to bring their action unless there is a lack of full disclosure, in which event they have three years. On the other hand, when a trust is continuing and subsisting, the statute of limitations is tolled in accordance with K.R.S. section 413.340. However, if a trustee of a continuing or subsisting trust repudiates the trust, then the five-year statute of limitations set forth in K.R.S. section 413.120

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163. Id. at 535. K.R.S. § 413.120(5) states: “Actions to be brought within five years.—The following actions shall be commenced within five years after the cause of action accrued . . . (5) An action for the profits of or damages for withholding real or personal property.” KY. REV. STAT. ANN. § 413.120(5) (Baldwin 1993).
164. First Kentucky Trust, 849 S.W.2d at 535.
165. KY. REV. STAT. ANN. § 386.735 (Baldwin 1993).
166. KY. REV. STAT. ANN. § 413.340 (Baldwin 1993).
167. First Kentucky Trust, 849 S.W.2d at 538.
168. 361 S.W.2d 515 (Ky. 1962).
169. First Kentucky Trust, 849 S.W.2d at 537.
170. Id.
171. Id.
172. Id.
173. Id.
would apply. In essence, the cause of action would be deemed to have accrued at the time of repudiation by the trustee.\textsuperscript{174}

In a dissenting opinion, Justice Reynolds proposed that, when beneficiaries have a cause of action against a trustee, the trust cannot, by definition, be a subsisting trust. As a result, K.R.S. section 413.340 would not prevent the running of the statute of limitations.\textsuperscript{175} Justice Reynolds would have the court follow the decision in the \textit{Potter} case, which would require an action be brought against a trustee within the five year period of limitations under K.R.S. section 413.120(5).\textsuperscript{176} However, his comment that the rule in the \textit{Potter} case is just, workable, and reasonable is not convincing. There does not appear to be any compelling reason why beneficiaries should have to file suit against the trustee, absent a repudiation of the trust, while the trust continues in existence. The majority opinion seems to be more reasonable.

A simpler factual situation was presented to the court of appeals in \textit{Mitchell v. Mercy Ambulance Service, Inc.}\textsuperscript{177} That litigation arose from alleged injuries sustained by Carl J. Mitchell, Sr. on September 19, 1989 while he was using an ambulance owned by the appellee, Mercy Ambulance Service, Inc.\textsuperscript{178} The original complaint filed in April of 1990 named Mr. Mitchell, Sr. as the sole plaintiff.\textsuperscript{179} However, unbeknownst to his counsel, Mr. Mitchell died two days prior to the filing of the complaint.\textsuperscript{180} The appellants, as co-executors of his estate, filed a motion in August of 1990 to substitute them as plaintiffs.\textsuperscript{181} They also filed a motion for leave to amend their complaint in order to add Mr. Mitchell's widow as a named party plaintiff.\textsuperscript{182} The order sustaining these motions was filed on September 17, 1990, two days prior to the anniversary of the auto accident.\textsuperscript{183}

\textsuperscript{174} \textit{Id.} The court cited the case of Bates v. Bates, 206 S.W. 800 (Ky. 1918), wherein the court defined repudiation as "a rejection or refusal of an offer or available right or privilege or of a duty or relation." The court also stated that repudiation must be "unequivocal and in violation of the duties of the trust."

\textsuperscript{175} First Kentucky Trust, 849 S.W.2d at 537.

\textsuperscript{176} \textit{Id.} at 538 (Reynolds, J., dissenting).

\textsuperscript{177} 847 S.W.2d 65 (Ky. Ct. App. 1993).

\textsuperscript{178} \textit{Id.} at 66.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.}
In October of 1991, more than two years after the accident, the appellee filed a motion to dismiss, claiming that the suit was void ab initio because the complaint was filed in Mr. Mitchell's name after his death; that the court had no jurisdiction to allow a substitution or amendment; and that the statute of limitations had passed without revival of an existing action. The trial court granted the appellee's motion to dismiss.

In reversing the trial court's dismissal, the court of appeals first observed that at common law an action brought in the name of a deceased person was a nullity and not amenable to substitution of an existing party having capacity to sue. Nevertheless, the court recognized that the Rules of Civil Procedure have an overriding policy of allowing claims to be decided on their merits. The court further cited the case of McBride v. Moss, in which substitution was permitted where the new party bore some relationship to the original party. In light of this precedent, and in the spirit of the Civil Rules, the court held that the amended complaint naming the co-executors of Mr. Mitchell's estate as plaintiffs and asserting the same cause of action as the original complaint was properly filed.

Although it may be in the spirit of the Civil Rules to allow controversies to be settled on the merits, the court of appeals demonstrated in the case of Rigazio v. Archdiocese of Louisville that there is a limit to this liberal policy and that the statute of limitations is still a viable defense. Donald Rigazio filed suit against a former teacher, James Griffith, as well as against the Archdiocese of Louisville and others, claiming that he was abused by Griffith when he was a student at a parochial grade school operated by the Archdiocese. His suit alleged battery, intentional infliction of emotional distress, and negligence.

184. Id. K.R.S. § 395.278 provides: "An application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." KY. REV. STAT. ANN. § 395.278 (Baldwin 1993).

185. Mitchell, 847 S.W.2d at 66.

186. Id.

187. Id.

188. 437 S.W.2d 726 (Ky. Ct. App. 1969).

189. Id. at 729.

190. Mitchell, 847 S.W.2d at 67.


192. Id.

193. Id. at 296.

194. Id.
Rigazio's complaint was filed on September 8, 1988. He had turned eighteen years of age on January 30, 1982 while he was in the Army. He was discharged from the Army in January of 1985. In November of 1990, the circuit court entered an order dismissing Rigazio's claims based on the one-year statute of limitations set forth in K.R.S. section 413.140(1)(a). In December of 1990, the court amended its judgment in accordance with Civil Rule 59, in order to grant summary judgment in favor of all defendants, except Griffith. In short, the trial court dismissed the claims against all defendants, other than Griffith, based on both the limitations defense and on the merits. The court did not decide whether the plaintiff's claims were sustainable against Griffith, but dismissed those claims as being barred by a one-year statute of limitations.

On appeal, Rigazio argued several grounds for tolling the statute of limitations. He first argued that he was entitled to relief under K.R.S. section 413.170(1), which tolls limitations if, at the time the action accrued, the person entitled to sue was of unsound mind. Rigazio argued that he suffered from post-traumatic stress disorder and had a repressed memory of the abuse until 1987 when he attempted suicide. The court of appeals rejected this argument and refused to equate repression syndrome with being of unsound mind. In addition, the court noted that Rigazio did not suppress the memory of his abuse until much later and thus was not suffering from suppression syndrome when the cause of action accrued.

He next argued the statute of limitations was tolled by reason of K.R.S. section 413.190(2), which prevents the use of limitations as a defense by one who obstructs the prosecution of the action.

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194. Id.
195. Id.
196. Id.
197. Id.
198. Id. See also KY. REV. STAT. ANN. § 413.140(1)(a) (Baldwin 1993).
199. Rigazio, 853 S.W.2d at 296.
200. Id.
201. Id.
202. Id.
203. Id.
204. Id. at 297.
205. Id.
206. Id.
Rigazio asserted that Griffith obstructed his cause of action when Griffith told him not to tell anyone else about the abuse.\textsuperscript{207} Again, the court rejected this argument.\textsuperscript{208}

Rigazio also claimed he did not "discover" his injury until after his suicide attempt in September of 1987, which was less than one year before the filing of his complaint.\textsuperscript{209} The court likewise rejected this discovery argument, noting that Rigazio knew of the abuse at the time of the occurrence and for some time thereafter, and only later suppressed the memory.\textsuperscript{210}

His final argument as to the statute of limitations was that the Soldiers and Sailors Civil Relief Act tolled limitations during the time he was in the military.\textsuperscript{211} Since he was in the Army when he turned eighteen in January of 1982 and was discharged in 1985, he contended he was under a legal disability until 1985.\textsuperscript{212} The court apparently accepted this proposition, but noted that, since Rigazio's suit was brought more than one year after his discharge, any actions which were required to be brought within the one year were barred.\textsuperscript{213} However, Rigazio had made a claim against the defendants based on the tort of outrage which, under the authority of the case of \textit{Craft v. Rice},\textsuperscript{214} has a five-year limitation period.\textsuperscript{215} Accordingly, if the facts of this case supported a claim for tort of outrage, that claim would not be time-barred.\textsuperscript{216}

The court of appeals concluded there was no evidence whatsoever that the other defendants engaged in extreme and outrageous conduct or recklessly inflicted emotional distress so as to be charged with the tort of outrage.\textsuperscript{217} On the other hand, the court had no problem in finding that Griffith's conduct was extreme and outrageous.\textsuperscript{218} Nevertheless, the court refused to apply the tort of outrage since Griffith's conduct amounted to

\begin{flushright}
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 298.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} 671 S.W.2d 247 (Ky. 1984).
\textsuperscript{215} \textit{Rigazio}, 853 S.W.2d at 298.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\end{flushright}
commission of a traditional tort such as assault, battery, or negligence, for which recovery for emotional distress is already allowed. The court reasoned that the tort of outrage was intended to supplement existing torts, not to swallow them up. Since Rigazio's emotional distress was incidental to the torts of assault, battery, or negligence, he would not be entitled to claim the tort of outrage.

In summary, although the court of appeals rejected several of his novel arguments for tolling the statute of limitations, such as suppressed memory syndrome, the court did accept his proposition that the Soldiers and Sailors Civil Relief Act could be added to other legal disabilities so as to toll limitations. Nevertheless, this extension did not save his claims since the court of appeals agreed with the trial court that all claims were barred by the one-year statute of limitations.

V. PRE-TRIAL AND POST-JUDGMENT PROCEDURE

The appellate courts of Kentucky have recently considered a variety of pre-trial procedural issues. These decisions have covered such topics as standing, voluntary dismissals, discovery, and third party practice. In addition, in one decision, the court was called upon to review post-judgment motion practice.

A. Standing

In the case of City of Louisville v. Stock Yards Bank & Trust, the City of Louisville filed suit against the trustees of the policemen's retirement fund and others, including a bank, brokerage firm and investment advisors, alleging breach of fiduciary duties. The appellees filed a motion to dismiss on the ground that the City lacked standing to bring the action. When the motion to dismiss was sustained, the City appealed to the court of appeals. Thereafter, a motion filed by the City to transfer to the supreme court was sustained.

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219. Id. at 299.
220. Id.
221. Id. at 298-99.
222. 843 S.W.2d 327 (Ky. 1992).
223. Id. at 328.
224. Id.
225. Id.
226. Id.
In reversing the trial court's dismissal, the court first recited the standard for standing to sue as being "a judicially recognizable interest in the subject matter" of the litigation.\(^{227}\) Furthermore, the interest may not be remote and speculative, but must be a present and substantial interest in the subject matter.\(^{228}\) Finally, the court recognized the difficulty of formulating a precise standard for standing and that the issue must be decided on the facts of each case.\(^{229}\)

In an opinion in which all concurred, Justice Lambert stated that the court had no doubt the appellant, City of Louisville, had the requisite interest in the subject matter of the litigation.\(^{230}\) He pointed to the fact that the City had made direct payments to the fund in order to maintain its fiscal soundness and also had the duty to guarantee that the police officers have a dependable pension plan, free of waste and mismanagement.\(^{231}\) In short, the court held that the obligation of the City to indemnify the fund against insufficiency of assets gave it standing to bring the action to recover for and prevent waste of the fund assets.\(^{232}\)

**B. Voluntary Dismissals**

It might seem unusual, at first blush, that an attempt to voluntarily dismiss a claim should result in protracted litigation. Nevertheless, such was the case in *Louisville Label, Inc. v. Hildesheim.*\(^{233}\) In that case, an employee filed a tort action against her employer, Louisville Label, which in turn filed a third party complaint against other employees, including the appellee, Hildesheim.\(^{234}\) After the employer settled the plaintiff's claim, it moved for a voluntary dismissal of its third-party complaint against Hildesheim pursuant to CR 41.01(2).\(^{235}\) Hildesheim responded to the motion by requesting the court either to dismiss the third-party complaint against him with prejudice or, in the alternative, to condition dismissal without prejudice upon pay-

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\(^{227}\) Id.
\(^{228}\) Id. at 329.
\(^{229}\) Id.
\(^{230}\) Id.
\(^{231}\) Id.
\(^{232}\) Id.
\(^{233}\) 843 S.W.2d 321 (Ky. 1992).
\(^{234}\) Id. at 322.
\(^{235}\) Ky. R. Civ. P. 41.01(2).
ment to him of attorney's fees and litigation expenses which he had incurred in defending the action. The trial court entered an order dismissing the third-party complaint without prejudice, but with leave to refile, provided all of Hildesheim's costs and expenses were paid as a condition to refiling. From this order, Hildesheim appealed.

The court of appeals did not specifically address the issue of whether Hildesheim was entitled to dismissal with prejudice, but focused on the conditions imposed by the trial court in ordering dismissal without prejudice. It concluded that the trial court abused its discretion by conditioning payment of costs upon refiling. That court stated that Hildesheim would suffer substantial injustice or be substantially prejudiced if the claim against him was not foreclosed by dismissal with prejudice, or if he was not restored to his prior position by an award of full costs.

The court of appeals then remanded the case, not for a determination as to costs and fees, but for an entry of an order dismissing the case without prejudice and awarding Hildesheim the costs and fees as previously set forth in the trial court's conditional order.

Upon discretionary review, the supreme court reversed the decision of the court of appeals and reinstated the final order of the trial court. The court stated it could find no authority in the Civil Rules that would allow the appellate court to impose attorney's fees and litigation expenses as a condition of voluntary dismissal. Justice Leibson, writing for the court, explained the trial court's options when presented with a motion for voluntary dismissal under Civil Rule 41.01(2). Those options are: to deny the voluntary dismissal, to impose appropriate terms as a condition for voluntary dismissal, or to sustain the motion without conditions. However, the one option unavailable to the trial

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236. Hildesheim, 843 S.W.2d at 322-23.
237. Id. at 323.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id.
243. Id. at 327.
244. Id. at 326.
245. Id. at 325.
246. Id.
court was to convert a motion for voluntary dismissal under Civil Rule 41.01(2) into an involuntary dismissal under Civil Rule 41.02.247

Finally, it should be noted that this decision suggests that an appropriate condition to an order of voluntary dismissal may be the award of costs and attorney's fees. Justice Leibson cited the case of Northern Kentucky Port Authority v. Cornett.248 In that case, a condemnation action was voluntarily dismissed.249 The matter was remanded to the trial court to consider whether the plaintiff had acted in bad faith, which would justify an award of fees and litigation expenses as a condition of dismissal.250 It remains to be seen whether the trial court's discretion to impose attorney's fees and expenses as a condition of a voluntary dismissal order would extend beyond instances of bad faith.

C. Discovery

Two interesting cases involving discovery issues were presented to the supreme court by way of a Petition for Writ of Prohibition in one case, and by way of a Petition for Mandamus in another.

The right of a plaintiff in a malpractice action to compel disclosure of peer review records from a defendant hospital was the issue presented to the supreme court in the case of Appalachian Regional Health Care, Inc. v. Johnson.251 In that case, the plaintiff filed suit against the hospital, alleging failure to exercise reasonable care with respect to its screening and evaluation of staff physicians, including the defendant doctor.252 When the trial court ordered it to produce peer review records pertaining to the doctor, the hospital sought a Writ of Prohibition from the court of appeals.253 When that court denied the Writ, the hospital took an appeal, as a matter of right, to the Kentucky Supreme Court.254

The supreme court upheld the denial of the Writ of Prohibition, finding the appellants had not demonstrated they would suffer

247. Id.
248. 700 S.W.2d 392 (Ky. 1985).
249. Id.
250. Id. at 395.
251. 862 S.W.2d 868 (Ky. 1993).
252. Id. at 869.
253. Id. at 870.
254. Id.
irreparable harm from the discovery of the requested documents, nor had they shown their remedy on appeal would be inadequate.\textsuperscript{255} With regard to the merits, the hospital had argued in the court of appeals the provisions of K.R.S. section 311.377 made peer review records privileged and not discoverable.\textsuperscript{256}

The court of appeals disagreed, citing the case of \textit{Sweasy v. King's Daughters' Memorial Hospital},\textsuperscript{257} which had held this privilege of confidentiality was limited to suits against members of peer review boards and did not provide a privilege against discovery in a medical negligence action by a patient against a doctor and hospital.\textsuperscript{258} The supreme court agreed with the court of appeals and stated the \textit{Sweasy} decision was still effective and controlling.\textsuperscript{259}

In \textit{Volvo Car Corp. v. Hopkins},\textsuperscript{260} the owners of an automobile brought a products liability suit against the manufacturer alleging injuries when the vehicle suddenly and inexplicably accelerated while in park gear.\textsuperscript{261} As part of a discovery order, the trial court required the manufacturer to make available to the plaintiffs all information in its possession regarding similar incidents involving that model.\textsuperscript{262} However, the trial judge had orally added the provision that the plaintiffs could not personally contact the individuals involved in the other incidents without court permission.\textsuperscript{263}

Although the manufacturer provided the plaintiffs with approximately two hundred incident reports, the plaintiffs repre-
sented to the court that their experts had advised them that they needed to personally interview the individuals involved in the other incidents in order to determine the similarities to the accident in question.\textsuperscript{264} Accordingly, the plaintiffs moved for permission to conduct such personal interviews.\textsuperscript{265} The manufacturer objected and requested a protective order, which was granted by the trial court.\textsuperscript{266} The trial judge commented he could not permit the plaintiffs or their expert to “scour the countryside, talking with all the people that have ‘sudden acceleration’ incidents in an attempt to discover a legal theory.”\textsuperscript{267}

The plaintiffs sought and received a Writ of Mandamus from the court of appeals directing the trial court to allow the plaintiffs to contact, in any manner consistent with the rules of discovery, the Volvo customers who had reported sudden acceleration events.\textsuperscript{268} The manufacturer appealed the issuance of the Writ to the supreme court, which affirmed.\textsuperscript{269}

Justice Leibson, writing the opinion for a unanimous court, observed that the only limit in the Civil Rules on matters that are not privileged is that the information sought must appear reasonably calculated to lead to the discovery of admissible evidence.\textsuperscript{270} He further noted that one of the matters discoverable under the rules is the identity and location of people having knowledge of any discoverable matter.\textsuperscript{271} This is precisely what the trial court’s order prohibited.\textsuperscript{272}

The manufacturer argued in the trial court that the plaintiffs had to show a connection between the accident in question and the other incidents before discovery from those other witnesses would be permitted.\textsuperscript{273} This indeed seemed to be putting the cart before the horse, as argued by the plaintiffs.\textsuperscript{274} Justice Leibson stated that discovery includes the right to investigate to deter-

\begin{footnotes}
\item 264. Id.
\item 265. Id.
\item 266. Id.
\item 267. Id.
\item 268. Id.
\item 269. Id.
\item 270. Id. (citing KY. R. Civ. P. 26.02(1)).
\item 271. Hopkins, 860 S.W.2d at 778.
\item 272. Id.
\item 273. Id. at 779.
\item 274. Id.
\end{footnotes}
mine similarity and that the plaintiffs are not required to have a scientific explanation for the accident before gathering information. 275 "On the contrary, the only valuable opinions are those arrived after factual information has been gathered and evaluated." 276

Finally, since mandamus is an extraordinary remedy, a finding of irreparable harm and the absence of an adequate remedy at law is a prerequisite to obtaining a Writ. 277 The court found the plaintiffs could be irreparably harmed if they were required to await the outcome of a trial before arguing this discovery issue on appeal since the delay could result in the loss of information which is now available. 278

D. Third Party Practice

The relationship between third party practice and the law of apportionment of liability among parties was the subject of the decision in Kevin Tucker & Associates v. Scott & Ritter. 279 The plaintiff therein, City of Bowling Green, brought negligence and breach of contract actions against appellant Tucker, an architectural firm, for faulty construction of a golf course. 280 The city had entered into separate contracts with Tucker and with Scott & Ritter, the contractor which performed the work on the golf course. 281 Apparently, the city filed suit only against Tucker since its contract with Scott & Ritter contained an arbitration clause. 282 Tucker filed a third party complaint against Scott & Ritter alleging that the city’s damages were the fault of the contractor. 283 Tucker appealed from the trial court’s dismissal of its third party complaint. 284

In affirming the action of the trial court, the court of appeals concluded that the motion to dismiss the third party complaint

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275. Id.
276. Id.
277. Id.
278. Id. (citing Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961), a landmark case allowing appellate intervention in discovery proceedings by way of a Writ of Prohibition).
280. Id.
281. Id. at 273-74.
282. Id. at 874.
283. Id.
284. Id.
was proper since the third party plaintiff was not entitled to relief under any set of facts.\textsuperscript{285} A third party complaint is authorized under Civil Rule 14 when the third party defendant may be liable to the defendant for all or part of the plaintiff’s claim.\textsuperscript{286} However, the court acknowledged that recent case law on apportionment of liability among parties has eliminated the right of contribution among parties who are jointly liable to another.\textsuperscript{287} Since Tucker’s liability to the plaintiff was limited to its own fault, it was not entitled to contribution from Scott & Ritter.\textsuperscript{288} Accordingly, Tucker could suffer no prejudice from the dismissal of its third party complaint, and the dismissal was proper.\textsuperscript{289}

The court further held that, with regard to the plaintiff’s contract claim, Tucker would be entitled to an apportionment instruction if it were established that Scott & Ritter caused some of the damages to the city.\textsuperscript{290} Nevertheless, Tucker would not be prejudiced by the dismissal of the third party complaint, as Scott & Ritter could not be liable to Tucker under any circumstances.\textsuperscript{291}

\textbf{E. Post-Judgment Motion Practice}

The timing and effect of post-judgment motions were discussed in Kentucky Farm Bureau Insurance Co. v. Gearhart.\textsuperscript{292} In that case, Gearhart was an insured of Kentucky Farm Bureau and

\textsuperscript{285} Id. at 875. The appellant contended that Scott & Ritter argued the facts in supporting their motion, but even if matters outside the pleadings were argued, they merely converted the motion to one for summary judgment. However, the court observed that there can be no issue of a material fact if the claimant cannot recover under any set of facts. \textit{Id.} at 874 n.1.

\textsuperscript{286} Id. at 874.

\textsuperscript{287} Id. (citing Floyd v. Carlisle Const. Co., Inc., 758 S.W.2d 430 (Ky. 1988); Dix & Assoc. v. Key, 799 S.W.2d 24 (Ky. 1990); and Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985)). The court further commented that it did not agree with these rules and referred to Justice Leibson’s dissents in the Dix and Moody cases, but noted that it was bound to follow these precedents in accordance with SCR 1.030(8). \textit{Kevin Tucker & Assoc.}, 842 S.W.2d at 874 n.3.

\textsuperscript{288} \textit{Kevin Tucker & Assoc.}, 842 S.W.2d at 874-75. The court commented by way of a footnote that the law of apportionment may force defendants to file third party complaints even though they may be subject to dismissal. This is due to the fact that fault cannot be apportioned against a party against whom a claim has not been asserted. \textit{Id.} at 874 n.5.

\textsuperscript{289} Id. at 874.

\textsuperscript{290} Id. at 875.

\textsuperscript{291} Id.

\textsuperscript{292} 853 S.W.2d 907 (Ky. Ct. App. 1993).
brought suit against the company alleging that he was damaged by an attempted cancellation of his policy. A judgment pursuant to a jury verdict in favor of Gearhart was entered on February 25, 1991, but that judgment did not mention pre-judgment interest. On March 7, 1991, within ten days of the entry of the judgment, Farm Bureau filed and served motions for judgment notwithstanding the verdict and for a new trial. On March 16, 1991, Gearhart filed a motion for pre-judgment interest. On May 20, 1991, the circuit court overruled Farm Bureau's motions, but sustained Gearhart's motion for pre-judgment interest.

The court of appeals observed that, on its face, Gearhart's motion to alter or amend the judgment so as to award pre-judgment interest was untimely, since it was served on March 14 and filed on March 16, which was more than ten days after the entry of the final judgment on February 25. Civil Rule 59.05 provides that such a motion "shall be served not later than 10 days after entry of the final judgment." Gearhart attempted to avoid the mandate of the rule by noting that the trial court had, prior to trial, "reserved" on whether it would allow pre-judgment interest. Gearhart also argued that Farm Bureau's motion for a new trial or a judgment notwithstanding the verdict made the original judgment interlocutory and thus subject to amendment.

The court of appeals reversed the trial court's award of pre-judgment interest. It held that, regardless of whether the trial court "reserved" on the question of pre-judgment interest, it was incumbent upon Gearhart to timely move the court under Civil Rule 59 to alter or amend the judgment when pre-judgment interest was not included. The court likewise dismissed the plaintiff's argument that Farm Bureau's motion made the judgment interlocutory. The court stated that the trial court lost
control of the judgment as of March 7, 1991, except to the extent of Farm Bureau's motion.\textsuperscript{305} In short, Gearhart could not take the benefit of Farm Bureau's timely motion, but rather was required to file a timely motion of its own.\textsuperscript{306}

\section*{VI. JURISDICTION/VENUE}

\subsection*{A. Venue}

During the period of time encompassed by this survey, the Kentucky Supreme Court released two decisions in which venue was the primary issue. The first considered the proper location for filing suits to challenge legislation. The other clarifies the law of venue in intrastate custody disputes. Also during this time, the court of appeals waded into the murky waters of jurisdiction in interstate custody contests and seized the opportunity to analyze the procedures to be followed in accordance with the Parental Kidnapping Prevention Act (PKPA)\textsuperscript{307} and the Uniform Child Custody Jurisdiction Act (UCCJA).\textsuperscript{308}

In \textit{Fischer v. State Board of Elections},\textsuperscript{309} the constitutionality of the 1991 Re-Apportionment Act was the subject of a declaratory judgment action and motion for injunctive relief filed in the Campbell Circuit Court.\textsuperscript{310} The plaintiff alleged that the act violated Section 33 of the Kentucky Constitution pertaining to the boundaries of legislative districts.\textsuperscript{311} The legislature had redistricted the three northernmost counties of Kentucky: Boone, Campbell, and Kenton. The appellant Fischer, a citizen of Campbell County, filed suit in the Campbell Circuit Court for declaratory and injunctive relief, naming as defendants the Secretary of State and the State Board of Elections, as well as local officials.\textsuperscript{312} Although the Campbell Circuit Court initially dismissed the case for improper venue, that order of dismissal was vacated upon reconsideration.\textsuperscript{313} The appellees then sought and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{305} Id.
\item \textsuperscript{306} Id.
\item \textsuperscript{307} 28 U.S.C. § 1738A (Supp. 1980).
\item \textsuperscript{308} Ky. Rev. Stat. Ann. §§ 403.400-.630 (Baldwin 1993).
\item \textsuperscript{309} 847 S.W.2d 718 (Ky. 1993).
\item \textsuperscript{310} Id. at 719.
\item \textsuperscript{311} Id.
\item \textsuperscript{312} Id.
\item \textsuperscript{313} Id.
\end{itemize}
\end{footnotesize}
received a Writ of Prohibition from the court of appeals which held that Campbell County was not the proper venue for the action and directed that the suit be dismissed.\textsuperscript{314}

Fischer exercised his right to appeal to the Kentucky Supreme Court, which dissolved the Writ of Prohibition and injunction.\textsuperscript{315} The question addressed by the court was whether venue lies exclusively in the Franklin County Circuit Court when challenging any statute on state constitutional grounds.\textsuperscript{316} The court cited the general venue statute, K.R.S. section 452.405, which provides in part that, "\textquotedblleft[a]ctions must be brought in the county where the cause of action, or some part thereof, arose ... [a]gainst a public officer for an act done by him ...\textquotedblright\textsuperscript{317} Expressing no serious doubt that all or part of the action vested in his home county of Campbell, the court deemed it a logical construction of the venue statute to allow Fischer to challenge the constitutionality of the reapportionment statute in the Campbell Circuit Court.\textsuperscript{318}

In a dissenting opinion, Justice Leibson expressed concern over the potential impact of the majority decision which would subject the reapportionment statute to being litigated in 120 different counties.\textsuperscript{319} He noted that if the reapportionment is unconstitutional, the entire citizenry of the state, not just of one county, have been injured.\textsuperscript{320} Justice Leibson would not give as broad an interpretation of the general venue statute as did the majority.\textsuperscript{321} In his opinion, that statute was designed to localize actions against public officials who wrongfully or unlawfully carry out their duties.\textsuperscript{322} In the case before the court, the public officials were no more than nominal parties.\textsuperscript{323} Accordingly, the real party defendant is the state government which legislated the redistricting, sitting in Frankfort.\textsuperscript{324} Justice Leibson concluded that common sense suggests that the only appropriate venue for a

\begin{itemize}
\item \textsuperscript{314} Id. at 119-20.
\item \textsuperscript{315} Id. at 721-22.
\item \textsuperscript{316} Id. at 720.
\item \textsuperscript{317} Id. (quoting KY. REV. STAT. ANN. § 452.405 (Baldwin 1993)).
\item \textsuperscript{318} Id. at 721.
\item \textsuperscript{319} Id. at 722 (Leibson, J., dissenting).
\item \textsuperscript{320} Id.
\item \textsuperscript{321} Id.
\item \textsuperscript{322} Id.
\item \textsuperscript{323} Id. at 723.
\item \textsuperscript{324} Id. at 722-23.
\end{itemize}
constitutional question of such a matter is in Franklin County, the seat of government.\(^{325}\)

Confusion between the concepts of jurisdiction and venue was central to the decision of the Kentucky Supreme Court in *Pettit v. Raikes*.\(^{326}\) In that case, the parties were divorced in 1986 by a judgment of the Hart Circuit Court.\(^{327}\) In 1992, appellant Tina Pettit filed an action for an increase in child support in the Jefferson Circuit Court.\(^{328}\) Approximately one month later, the appellee, Johnny Hawkins, filed a request for custody modification in the Hart Circuit Court.\(^{329}\) When the appellant's motion to dismiss the proceedings in Hart County was denied, she sought a Writ of Prohibition from the court of appeals, which was likewise denied.\(^{330}\)

The appellant argued that jurisdiction over child custody and support was now vested solely in the Jefferson Circuit Court where she and the children resided.\(^{331}\) She cited language in an earlier supreme court case, *Quisenberry v. Quisenberry*,\(^{332}\) to the effect that a court which entered an original decree may be required, under the UCCJA as adopted by Kentucky in K.R.S. sections 403.400-630, to refuse jurisdiction over a subsequent motion to change custody because of the child's present living arrangements and place of residence.\(^{333}\) The Kentucky Supreme Court rejected the appellant's argument that the jurisdictional provisions of the UCCJA controlled this case and stated that, when a custody dispute is holding intrastate, the real issue is venue, not jurisdiction.\(^{334}\) The court then concluded that an action for prohibition was not a proper vehicle to challenge a venue determination, and thus affirmed the court of appeals' denial of the Writ.\(^{335}\) She would have to address her argument that the Hart Circuit Court was an improper venue by way of an appeal from the final judgment.\(^{336}\)

\(^{325}\) *Id.* at 723.
\(^{326}\) 858 S.W.2d 171 (Ky. 1993).
\(^{327}\) *Id.*
\(^{328}\) *Id.*
\(^{329}\) *Id.*
\(^{330}\) *Id.* at 171-72.
\(^{331}\) *Id.*
\(^{332}\) 785 S.W.2d 485 (Ky. 1990).
\(^{333}\) *Id.* at 488.
\(^{334}\) *Pettit v. Raikes*, 858 S.W.2d 171, 172 (Ky. 1993).
\(^{335}\) *Id.*
\(^{336}\) *Id.*
B. Jurisdiction

In Cann v. Howard,\footnote{337} the Kentucky Supreme Court considered an interstate child custody dispute. In this case, the question was whether a court in Kentucky, where the children had been brought by their mother, could exercise subject matter jurisdiction and personal jurisdiction over the father, an Ohio resident, so as to modify the Ohio decree with regard to child support and visitation.\footnote{338}

In March of 1989, the parties were divorced by a decree of the Allen County Court in Ohio.\footnote{339} Prior to the entry of the decree, the appellee, Tonda Howard, moved to Kentucky with her children.\footnote{340} One month after the divorce was final, the appellant, Steven Cann, filed a motion in the Allen County Court to have Tonda held in contempt for interfering with his visitation rights.\footnote{341} The Ohio court did not decline jurisdiction and entered an order in August of 1989 holding Tonda in contempt and setting specific visitation.\footnote{342}

In April of 1990, Tonda filed an action in the Greenup Kentucky Circuit Court seeking modification of the divorce decree.\footnote{343} Steven received notice of these proceedings by mail and objected to any increase in child support, arguing that the court lacked personal jurisdiction.\footnote{344} However, he conceded that Kentucky had subject matter jurisdiction concerning the visitation issue.\footnote{345} The Greenup Circuit Court modified the Ohio decree as to visitation and, after first finding that it lacked personal jurisdiction, finally held that Steven had waived any objection to personal jurisdiction by making a general appearance and asking for increased visitation.\footnote{346}

The first issue considered by the Kentucky Court of Appeals was subject matter jurisdiction. Although Steven had conceded jurisdiction in the Greenup Circuit Court, the court of appeals,
noting that subject matter jurisdiction cannot be conferred by waiver or agreement, disagreed.\textsuperscript{347} The court then analyzed the jurisdiction issue in light of the PKPA and the UCCJA, as adopted by Kentucky in K.R.S. sections 403.400-630.\textsuperscript{348} The court acknowledged that Kentucky could modify the Ohio decree only if Ohio no longer had jurisdiction or had declined to exercise jurisdiction.\textsuperscript{349} Kentucky could be considered the “home state” for purposes of jurisdiction and could modify the Ohio decree only if Ohio had lost or declined to exercise “continuing jurisdiction.”\textsuperscript{350} In short, before proceeding to exercise jurisdiction, the Kentucky court is required, by the PKPA’s full faith and credit provisions to determine whether Ohio has lost or declined jurisdiction.\textsuperscript{351}

In the case at hand, the court of appeals noted that Ohio had exercised continuing jurisdiction as late as August of 1989, only seven months before Tonda filed her action in the Greenup Circuit Court.\textsuperscript{352} In addition, Ohio was the residence of one parent, and that parent and the child still had connections with that state.\textsuperscript{353} Concluding that Ohio still had jurisdiction under its own law and had not declined that jurisdiction, the court of appeals held that the order of the Greenup Circuit Court modifying the Ohio decree was void.\textsuperscript{354}

The court further noted that, on remand, the trial court should deal with the problem in one of two ways.\textsuperscript{355} First, it may refuse to modify the Ohio decree until Tonda shows that Ohio lacks jurisdiction or has declined to exercise it.\textsuperscript{356} In the alternative, the trial court may communicate with the Ohio court and determine how that court wants to proceed.\textsuperscript{357} Finally, the court commented that the primary responsibility in these matters lies with counsel in Kentucky to establish on the record that Ohio
has lost jurisdiction or has declined to exercise jurisdiction. If the other state continues to assert jurisdiction, the Kentucky party's remedy is to appeal through the appellate court of that state.

Having resolved the issue of subject matter jurisdiction, the court of appeals then considered the appellant's objection to personal jurisdiction. The court concluded that Steven did not submit himself to the personal jurisdiction of the Kentucky court by appearing to contest the issue of visitation with his children. As a result, the court held that the Greenup Circuit Court could not enforce its order increasing child support.

The provision of K.R.S. section 403.450(3), requiring a circuit court of this state to communicate with a court of another state where a child custody matter is pending, was deemed to be mandatory and sufficient grounds to vacate a child custody order in the case of Karahalios v. Karahalios. In that case, the parties were married in Tennessee and separated while residing in that state. The appellee, Sheila Karahalios, then moved to Kentucky and filed a petition for dissolution in the Wayne County Circuit Court. Prior to her filing in Kentucky, the Appellant, Michael Karahalios, filed an action for divorce in the state of Tennessee. In due course, an order dissolving the marriage and granting custody of the parties' child was entered by the Wayne Circuit Court. When that court refused to set aside its order, Michael Karahalios appealed.

On appeal, Michael argued that the Wayne Circuit Court had no jurisdiction to award custody of the child to Sheila. He contended that the court failed to comply with K.R.S. section 403.450(3) which requires a court of this state, when informed that a proceeding concerning custody is pending in another state,

358. Id.
359. Id.
360. Id.
361. Id.
362. Id. at 63.
363. 848 S.W.2d 457 (Ky. Ct. App. 1993).
364. Id.
365. Id.
366. Id.
367. Id.
368. Id.
369. Id. at 459.
to communicate with the court of that other state in order to
determine the more appropriate forum.\textsuperscript{370} K.R.S. section 403.480(3)
also imposes an obligation on the parties to inform the court of
the pendency of the proceedings in the other state.\textsuperscript{371} Michael
complained that Sheila failed to inform the Wayne Circuit Court
of the Tennessee action, although she had acknowledged the
existence of the Tennessee divorce case in a deposition filed in
the circuit court.\textsuperscript{372}

The court of appeals deemed it of no import as to whose fault
caused the failure of the circuit court to communicate with the
court in Tennessee.\textsuperscript{373} The fact remained that this failure to
comply with K.R.S. section 403.450(3) resulted in a predicament
that the UCCJA was designed to prevent, namely jurisdictional
competition and lack of cooperation between states.\textsuperscript{374} For this
reason, the court of appeals vacated the custody award and
remanded the matter back to the Wayne Circuit Court with
directions that it communicate with the court in Tennessee as
required by the statute.\textsuperscript{375}

\section*{VII. GUARDIAN AD LITEM}

The role of the guardian ad litem was evident in three reported
cases. In one, the court of appeals held that the trial court is
required in all cases to appoint an attorney to defend a party
who is incarcerated and fails or is unable to defend an action. In
another decision, the court of appeals ruled that a guardian ad
litem lacked the authority to file a suit for declaration of the
ward’s rights under a will. On the other hand, the supreme court
reported a decision in a “right to die” case in which the named
defendant was the guardian ad litem of the comatose patient.

The decision in \textit{Davidson v. Boggs}\textsuperscript{376} should have an impact in
the manner in which practitioners handle civil actions, particu-
larly domestic cases, where the defendant is a prisoner. In that
tort case, which arose out of a boundary dispute, the appellant
Davidson was incarcerated in prison in September of 1990 when

\begin{itemize}
\item \textsuperscript{370} Id.
\item \textsuperscript{371} Id.
\item \textsuperscript{372} Id.
\item \textsuperscript{373} Id.
\item \textsuperscript{374} Id. at 461.
\item \textsuperscript{375} Id.
\item \textsuperscript{376} 859 S.W.2d 662 (Ky. Ct. App. 1993).
\end{itemize}
the matter was set for jury trial. His former counsel had withdrawn from the case, but Davidson was given ample time to find a substitute attorney when the order scheduling the trial was entered in May of 1990. When the case was called for trial in September, neither Davidson nor an attorney on his behalf appeared. As a result, a judgment was entered against him in an amount in excess of $100,000.

Davidson filed, pro se, a motion to vacate the judgment and for a new trial pursuant to Civil Rule 59.01. He argued that the trial court prevented him from having a fair trial by its failure to appoint a practicing attorney as guardian ad litem to defend him in accordance with Civil Rule 17.04. Appellee Boggs countered by arguing that Davidson's absence and failure to defend was voluntary and that a new trial would allow him to benefit from his delay and neglect in obtaining counsel. Boggs noted that Davidson possessed ample funds with which to hire an attorney had he chosen to do so. The trial court agreed with Boggs and overruled Davidson's motion.

The court of appeals, however, reversed and remanded the matter for a new trial. The court interpreted Civil Rule 17.04 as mandatory, rather than discretionary, requiring that a guardian ad litem be appointed for an imprisoned defendant who fails or is unable to defend an action. The court observed that the rule does not distinguish between voluntary and involuntary absences, nor does the rule allow consideration of whether the

377. Id. at 663.
378. Id.
379. Id. at 664.
380. Id.
381. Id.
382. Id. Kentucky Rule of Civil Procedure 17.04 reads:

Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense.

383. Davidson, 859 S.W.2d at 664.
384. Id.
385. Id. at 665.
386. Id.
387. Id.
prisoner has sufficient funds to hire an attorney. The express terms of the rule are absolute in requiring the appointment of a guardian ad litem if the prisoner fails to defend for any reason. Accordingly, the failure of the trial court to comply with Civil Rule 17.04 was found to be sufficient basis to grant a new trial under Civil Rule 59.01(a).

The court of appeals rejected the appellee’s argument that Davidson waived his rights. Although agreeing that right to a hearing may be waived, the court observed that such waiver must be made voluntarily, intelligently, and knowingly, with a fairness of the legal consequences. The court further commented that the requirement of Civil Rule 17.04 is intended, in part, to prevent the failure of a prisoner to obtain counsel as being deemed a waiver of his due process rights.

The impact of the Davidson decision will certainly be felt in the area of domestic relations law. Quite often, courts are presented with dissolution or custody proceedings where one of the parties is incarcerated. If the prisoner is not represented, it would seem that better practice would be to have a guardian ad litem appointed even where the prisoner is not opposing the relief sought. This would prevent a future argument by the prisoner that he did not voluntarily and knowingly waive his defenses.

In Sparks v. Boggs a guardian ad litem filed suit on behalf of an incompetent seeking a declaration of her rights under her husband’s will, which had left the husband’s entire estate to one of two sons. Another son had been appointed as legal guardian for his incompetent mother. The special guardian ad litem had been appointed by the district court in the incompetency pro-

388. Id.
389. Id.
390. Id. Kentucky Rule of Civil Procedure 59.01(a) provides: “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.” Ky. R. Civ. P. 59.01(a).
391. Davidson, 859 S.W.2d at 665.
392. Id.
393. Id.
395. Id.
396. Id.
ceedings.\textsuperscript{397} The guardian ad litem filed a renunciation of the will and thereafter filed a petition for declaration of rights in the circuit court naming the two sons as defendants.\textsuperscript{398}

As part of his petition, the special guardian asked the court to consider whether the legal guardian had a duty to renounce the will on behalf of his mother and whether he had breached that duty and, therefore, should be relieved.\textsuperscript{399} The circuit court granted the motion of the defendant-legal guardian to dismiss the complaint, and the guardian ad litem appealed.\textsuperscript{400}

In affirming the dismissal, the court of appeals held that the duties of a guardian ad litem appointed in an incompetency proceeding in district court do not authorize the bringing of a declaratory judgment lawsuit on behalf of the ward.\textsuperscript{401} The court could find no authority in the statutes, Civil Rules, or case law which would permit the filing of such an action.\textsuperscript{402} The court referred to K.R.S. section 387.305, authorizing the appointment of a guardian ad litem and setting forth his duties, and noted that the statute does not include the legal authority to maintain a separate action as plaintiff on behalf of the ward.\textsuperscript{403} Furthermore, although Civil Rule 17.03(2) allows for a guardian ad litem to defend an action on behalf of an incompetent, Civil Rule 17.03(1) provides that an action on behalf of a person of unsound mind shall be brought by the guardian, or if none, by a next friend.\textsuperscript{404} The clear distinction is that a guardian ad litem is expressly authorized to defend, but not to prosecute an action on behalf of an incompetent.\textsuperscript{405} The court further cited the case of Jones v. Cowan,\textsuperscript{406} in which the court of appeals acknowledged the difference between a next friend and a guardian ad litem as being that the former promulgates the ward's interests by suing, while the latter defends lawsuits.\textsuperscript{407}

\textsuperscript{397} Id.
\textsuperscript{398} Id.
\textsuperscript{399} Id.
\textsuperscript{400} Id.
\textsuperscript{401} Id. at 583.
\textsuperscript{402} Id.
\textsuperscript{403} Id. (citing Ky. Rev. Stat. Ann. § 387.305 (Baldwin 1993)).
\textsuperscript{404} Id.
\textsuperscript{405} Id.
\textsuperscript{406} Id. (citing Jones v. Cowan, 729 S.W.2d 188 (Ky. Ct. App. 1987)).
\textsuperscript{407} Id.
Although not an issue in the decision, the role of the guardian ad litem was evident in the case of DeGrella v. Elston.\textsuperscript{408} In that case, which has implications far beyond the scope of civil procedure, the mother and legal guardian of a comatose patient filed suit for a declaration that she had the right to discontinue life sustaining treatment.\textsuperscript{409} Her daughter had been in a vegetative state for approximately ten years with no significant possibility of improvement.\textsuperscript{410}

The guardian ad litem who was appointed by the court to defend the patient attended the trial and appropriately cross-examined witnesses.\textsuperscript{411} He likewise filed a final report recommending that the court deny the relief sought.\textsuperscript{412} When the trial court granted the plaintiff's relief, the guardian ad litem appealed that decision, which was transferred from the court of appeals to the supreme court, and vigorously presented issues on behalf of his ward challenging the right of the legal guardian to withdraw the life sustaining procedures.\textsuperscript{413} The DeGrella case provides an excellent example of the role of the guardian ad litem as envisioned by Rule 17.03(2).

\textbf{VIII. CONCLUSION}

It is evident from the recent decisions on summary judgment, discovery, and limitations that the appellate courts of Kentucky continue to adhere to a liberal interpretation of the rules of procedure which promote the ends of justice and allow the parties to have their disputes tried on the merits. Although the courts have expressed a preference to allow litigants to have their day in court, the time and expense of modern litigation has forced our court system to consider other methods to resolve conflicts. It remains to be seen whether the Kentucky Supreme Court will adopt rules of mandatory alternative dispute resolution which had been proposed and which will be considered during 1994.

\textsuperscript{408} 858 S.W.2d 698 (Ky. 1993).
\textsuperscript{409}  Id. at 700.
\textsuperscript{410}  Id.
\textsuperscript{411}  Id. at 701.
\textsuperscript{412}  Id.
\textsuperscript{413}  Id.
1993 KENTUCKY CRIMINAL LAW UPDATE

by Harry D. Rankin and Mary Lee Muehlenkamp*

I. INTRODUCTION

The criminal law area saw some important developments and clarifications in 1993. This article will review the Kentucky cases that dealt with warrantless searches of automobiles,¹ and court orders to provide samples of blood and saliva.² It will also discuss various issues in child sexual abuse cases, including physician, psychiatrist, and social worker testimony,³ consolidation of multiple sexual abuse charges into a single trial,⁴ and court ordered psychological examination of the complaining witness.⁵

Issues important in the driving while under the influence area will next be featured: first, pretrial suspension of a driver's license;⁶ second, admissibility of prior DUI convictions in the guilt phase of a felony DUI trial;⁷ and third, a jury instruction defining "under the influence."⁸

Finally, three miscellaneous cases will be discussed: the arrest powers of police officers in fourth class cities;⁹ the classification

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² Mace v. Morris, 851 S.W.2d 457 (Ky. 1993).
³ Sharp v. Commonwealth, 849 S.W.2d 542 (Ky. 1993); Alexander v. Commonwealth, 862 S.W.2d 856 (Ky. 1993); Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993).
⁴ Rearick v. Commonwealth, 858 S.W.2d 185 (Ky. 1993).
⁵ Mack v. Commonwealth, 860 S.W.2d 275 (Ky. 1993).
⁶ Commonwealth v. Raines, 847 S.W.2d 724 (Ky. 1993).
⁸ Bridges v. Commonwealth, 845 S.W.2d 541 (Ky. 1993).
⁹ Commonwealth v. Monson, 860 S.W.2d 272 (Ky. 1993).
of an offense as a felony or misdemeanor;\textsuperscript{10} and the criminality of abuse of a fetus.\textsuperscript{11}

II. EVIDENCE AND SEARCHES

A. Warrantless Search of Automobile

Whether a warrantless search of an automobile violated the Kentucky Constitution and the Fourth Amendment of the United States Constitution was the focus of \textit{Clark v. Commonwealth}.\textsuperscript{12} Mr. Clifford Nutter was driving a vehicle in which Mr. Phillip Clark was a passenger, and was pulled over by a Kentucky State trooper for speeding.\textsuperscript{13} Mr. Nutter had a learner’s permit, which required that there be a licensed driver as a passenger in the car.\textsuperscript{14} However, Clark’s license had been suspended.\textsuperscript{15} The trooper arrested Mr. Nutter and searched the entire vehicle.\textsuperscript{16} The trooper initially searched the front seat and glove compartment and found what he believed to be hashish in the glove compartment.\textsuperscript{17} He then examined the items in the back seat, which included a large, round cardboard box and several packages that had names other than Clark’s or Nutter’s on the invoices or packing slips.\textsuperscript{18}

The court found this search to be unreasonable because it did not fit within one of the exceptions to the rule that a search must rest upon a valid warrant.\textsuperscript{19} First, the search did not meet the “plain view” exception which validates searches when the evidence itself, as well as the incriminating character of the evidence, is visible to the officer who has lawful access to the object.\textsuperscript{20}

\textsuperscript{10} Commonwealth v. Lundergan, 847 S.W.2d 729 (Ky. 1993).
\textsuperscript{11} Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993).
\textsuperscript{12} 868 S.W.2d 101 (Ky. Ct. App. 1993).
\textsuperscript{13} \textit{Id.} at 103.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.} at 105.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 108.
\textsuperscript{20} \textit{Id.} at 105-06. The large, round cardboard box with someone else’s name on it and labeled “Sears & Roebuck” which was in the back seat was not incriminating per se, because the vast majority of similar situations involve transporting a package for a friend, in-law, or the like. \textit{Id.} at 106.
Second, the search could not be called an “inventory” search because there was nothing in the record to establish that the Kentucky State Police had a standard policy for conducting such a search.\textsuperscript{21}

Third, the search did not fall within the “automobile” exception which allows a search of the entire automobile, including compartments and containers which might contain the object of the search.\textsuperscript{22} The key to this exception is whether there was probable cause—whether the totality of the circumstances then known to the officer created a fair probability that contraband or evidence of a crime was contained within the automobile.\textsuperscript{23} Because the trial court did not specifically find that probable cause was established, this court was bound to conclude that probable cause was not established and therefore, the “automobile” exception was not available.\textsuperscript{24}

Finally, the search did not meet the “search incident to arrest” exception to a warrant requirement.\textsuperscript{25} The arrest of Mr. Nutter was for traffic violations, which normally do not involve custodial arrest. Therefore, the court concluded that the decision to arrest was based on the officer’s arbitrary and capricious discretion; thus, a search of the automobile was not authorized.\textsuperscript{26}

B. Order To Provide Samples of Blood, Hair, and Saliva

In \textit{Mace v. Morris}, \textsuperscript{27} Mr. Clarence Mace was indicted for rape in the second degree and for sexual abuse in the first degree.\textsuperscript{28} The Commonwealth wanted to collect blood, hair, and saliva specimens from Mr. Mace for scientific comparison with physical

\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 106. An inventory search is valid if done for purposes other than investigation, and pursuant to a standardized policy which provides standardized criteria to restrict or eliminate an officer’s discretion as to what to search. \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.} at 106-07. Probable cause must exist at the time of the search and be known to the investigating officer at the time of the search. \textit{Id.} at 106.
\item \textsuperscript{24} \textit{Id.} at 107.
\item \textsuperscript{25} \textit{Id.} This exception provides that when there is probable cause to support a custodial arrest, that same probable cause supports a search of the entire automobile passenger compartment. \textit{Id.}
\item \textsuperscript{26} \textit{Id.} Additionally, the court did not feel that the search was in fact “incident to arrest.” The arrest of Nutter occurred outside of the automobile, so the search of the automobile was not properly limited to the area within his immediate control. \textit{Id.} at 108.
\item \textsuperscript{27} 851 S.W.2d 457 (Ky. 1993).
\item \textsuperscript{28} \textit{Id.} at 458.
\end{itemize}
evidence obtained from examination of the victim. The trial court and court of appeals both ruled that the Commonwealth could obtain a court order authorizing the collection of the specimens from Mr. Mace.

The supreme court held that the trial court's order requiring Mr. Mace to provide samples of blood, hair, and saliva for scientific comparison did not violate the Kentucky Constitution. Mr. Mace argued that the court ordered procedure violated Section 11 of the Kentucky Constitution by forcing him to give evidence against himself, and urged the court to read Section 11 to guarantee that a defendant may not be compelled to "give up evidence on which criminal liability can be imposed." The court declined to adopt this interpretation.

III. CHILD SEXUAL ABUSE

A. Physician, Psychiatrist, and Social Worker Testimony

Hearsay testimony of a psychiatrist and a social worker in a child sexual abuse case was the focus of the Kentucky Supreme Court in Sharp v. Commonwealth. The psychiatrist had been hired by Social Services to interview and evaluate the children who were possibly sex abuse victims. At defendant's trial for rape, sodomy, and sexual abuse, the psychiatrist testified as to what the children had told him during the interviews about what defendant had done to them, and described the children's use of anatomically correct dolls to portray defendant's actions. This was held to be reversible error.
The court applied the analysis first set forth in *Drumm v. Commonwealth* which somewhat expanded the hearsay exception for statements made for purposes of medical diagnosis or treatment. Statements made to a non-treating physician have less inherent reliability than traditional patient history, so the court must decide whether "from the totality of the circumstances the probative value of the evidence outweighs its prejudicial effect." The court concluded that the probative value of the psychiatrist's testimony did not outweigh its prejudicial effect, due in part to its diminished reliability by virtue of the origin and limited relationship between the doctor and children, and moreover due to the limited probative value of the psychiatrist's testimony due to the children themselves testifying effectively.

The social worker who interviewed the children was also permitted to testify at trial concerning statements and drawings made by the children concerning what defendant did to them, as well as to her conclusions regarding the meaning of the children's acts and statements. Again, the court determined that allowing this testimony was reversible error, reiterating that "[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations." The business records exception to the hearsay rule and opinion testimony by an examining physician were discussed in *Alexander v. Commonwealth*. An investigative social worker was permitted to testify at trial regarding her report, which contained the contents of an interview she conducted with a victim of alleged sexual abuse. The trial court ruled the testimony admissible as a business record, but the supreme court reversed, holding the testimony inadmissible. The social worker's testimony did not

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38. 783 S.W.2d 380 (Ky. 1990).
39. Sharp v. Commonwealth, 849 S.W.2d 542, 544 (Ky. 1993). The recognized exception to the hearsay rule for statements made to a treating physician was not applicable because the psychiatrist was not a treating physician. *Id.*
40. *Id.* Probative value is determined by testimony carrying the quality of proof and having fitness to induce a conviction of truth. *Id.* (citing *Drumm v. Commonwealth*, 783 S.W.2d at 386 (Vance, J., dissenting)).
41. *Id.*
42. *Id.*
43. *Id.* at 546 (citing *Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986)).
44. 862 S.W.2d 856 (Ky. 1992).
45. *Id.* at 860.
46. *Id.* at 861. The business record exception to the hearsay rule is now codified at
meet the requirements of the business records exception because the report was not made under circumstances of trustworthiness.\textsuperscript{47} This case was distinguished from \textit{Cabinet for Human Resources v. E.S.},\textsuperscript{48} which permitted testimony about a social worker's records, because in that case, the social worker had personally visited the home, and her records contained factual observations and conclusions as to what she saw.\textsuperscript{49}

In \textit{Alexander}, the trial court committed reversible error when it allowed an examining physician to testify that it was his opinion the sexual abuse occurred.\textsuperscript{50} The physician obtained a medical history from the alleged victim and, after examining her, concluded that the physical injury was consistent with what he had been told in the medical history and with the offense charged.\textsuperscript{51} This was held to be improper and prejudicial opinion evidence on the ultimate issue of whether the defendant was guilty of rape.\textsuperscript{52}

In \textit{Hall v. Commonwealth},\textsuperscript{53} the trial testimony of a psychologist that, in her opinion, a child was sexually abused and, in her opinion, the child was telling the truth was found to be reversible error.\textsuperscript{54} Defendant's six year old niece complained to her aunt that she had been sexually molested.\textsuperscript{55} The aunt reported what the six year old had said and an investigation ensued.\textsuperscript{56} At trial, defendant Joshua Hall was convicted of first degree sodomy and first degree sexual abuse.\textsuperscript{57} A psychologist testified at trial that

\textit{KY. REV. STAT. ANN. § 422A.0803(6) (Michie/Bobbs-Merrill 1992). However, the opinion construes the business record exception prior to codification. Alexander, 862 S.W.2d at 861.}

\textsuperscript{47} Alexander, 862 S.W.2d at 861. Both the maker of the record and the person providing the information must be acting under a business duty. Just as a police report is inadmissible, because although the officer is acting in the regular course and under a duty, the supplier of information is not. \textit{Id.} (citing Johnson v. Lutz, 170 N.E. 517 (N.Y. 1930)). A social worker's report is inadmissible because the alleged victim had no duty to report. \textit{Id.}

\textsuperscript{48} 730 S.W.2d 929 (Ky. 1987).

\textsuperscript{49} Alexander, 862 S.W.2d at 861.

\textsuperscript{50} \textit{Id.} at 862.

\textsuperscript{51} \textit{Id.} at 861.

\textsuperscript{52} \textit{Id.} at 862.

\textsuperscript{53} 862 S.W.2d 321 (Ky. 1993).

\textsuperscript{54} \textit{Id.} at 323.

\textsuperscript{55} \textit{Id.} at 322.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.}
in her opinion the child was sexually abused and that, in her opinion, the child was telling the truth.\textsuperscript{58}

The supreme court reversed the trial court.\textsuperscript{59} First, the opinion that sexual abuse had occurred was improper because a psychologist, like a social worker, is not qualified to express an opinion as to whether sexual abuse occurred.\textsuperscript{60} The opinion that the child was telling the truth was also improper, because no expert is permitted to vouch for the truth of an out-of-court statement, since that impermissibly invades the province of the jury.\textsuperscript{61}

\section*{B. Consolidation of Multiple Charges}

Consolidation into a single trial of charges from three separate indictments alleging child sexual abuse was found to have been improper in \textit{Rearick v. Commonwealth.}\textsuperscript{62} Theodore Rearick was indicted separately for crimes against three different victims.\textsuperscript{63} The first indictment consisted of one count of sexual abuse and one count of attempted sexual abuse.\textsuperscript{64} Rearick was accused of putting the hand of C.H., his girlfriend's daughter, in his pants and exposing himself to her.\textsuperscript{65} The second indictment consisted of four counts of first degree sodomy, and single counts of third degree sodomy and first degree sexual abuse.\textsuperscript{66} Rearick was accused of having anal intercourse with his biological child.\textsuperscript{67} The third indictment consisted of four counts of first degree sexual abuse.\textsuperscript{68} Rearick was accused of exposing himself and touching K.M. during a game.\textsuperscript{69} The trial court consolidated the three indictments.\textsuperscript{70}

\textsuperscript{58} Id.
\textsuperscript{59} Id. at 323.
\textsuperscript{60} Id. at 322.
\textsuperscript{61} Id. The court noted the reasoning set forth in \textit{Hellstrom v. Commonwealth}, 825 S.W.2d 612, 614 (Ky. 1992) (citing State v. Rimmasch, 775 P.2d 388 (Utah 1989)): "[These witnesses] are not ... experts at discerning the truth. [They] are trained to accept facts provided by their patients, not to act as judges of patients’ credibility." \textit{Hall}, 862 S.W.2d at 322.
\textsuperscript{62} 858 S.W.2d 185 (Ky. 1993).
\textsuperscript{63} Id. at 186.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 186-87.
\textsuperscript{70} Id. at 187.
The Kentucky Supreme Court agreed that the defendant was unduly prejudiced by the trial court’s consolidation of the charges into a single trial.\(^7\) An important factor in identifying the prejudice is the extent to which evidence of one offense would be admissible in a separate trial of the other offense.\(^2\) The trial court felt that the offenses charged in the three indictments were sufficiently indicative of a common plan or scheme to be admissible in the event of separate trials, and concluded that joinder was appropriate.\(^3\) The supreme court disagreed.\(^4\)

Common plan or scheme evidence must satisfy the same criteria as if such evidence were offered to indicate modus operandi—"evidence of other acts of sexual deviance offered to prove the existence of a common scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime."\(^5\) The three offenses were not strikingly similar to each other, so without consolidation, evidence of the crimes charged in the indictments other than the charge on trial, would not have been admissible.\(^6\) Because of the substantial likelihood the inadmissible "other crimes" evidence prejudiced the defendant, his conviction was reversed.\(^7\)

C. Psychological Examination of Complaining Witness

Reversible error was found in Mack v. Commonwealth\(^8\) due to the trial court’s denial of defendant’s motion to have the child who was the complaining witness in a sexual abuse trial examined by a psychiatrist.\(^9\) The defendant was charged with sodomy and sexual abuse of a nine year old, who had been physically and sexually abused at the hands of others when she was five years.

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71. Id. at 188. The defendant was charged with child sexual abuse in three separate indictments involving three separate children, and the charges were consolidated for trial, where the heart of the State’s case was testimony from the three victims. Id. at 186.

72. Id.

73. Id. at 187. The trial court relied extensively on Anastasi v. Commonwealth, 554 S.W.2d 869 (Ky. 1988), which the supreme court distinguished on the basis that the striking similarity between the offenses in Anastasi was not present in the case at bar. Rearick, 862 S.W.2d at 188.

74. Rearick, 862 S.W.2d at 188.

75. Id. at 187 (citing Billings v. Commonwealth, 843 S.W.2d 890, 893 (Ky. 1992)).

76. Id. at 188.

77. Id.

78. 860 S.W.2d 275 (Ky. 1993).

79. Id.
Defense filed a motion to have the child examined by a psychiatrist, arguing that under Kentucky Rule of Civil Procedure 35.01, her mental condition was in issue, due to the previous abuse and her exhibition of propensities to lie and manipulate. The trial court denied the motion for a psychological examination, holding that the child was not a “party,” and therefore, that Kentucky Rule of Civil Procedure 35.01 was not applicable.

The supreme court reversed defendant’s conviction, in part because of the improper denial by the trial court of the motion for a psychological examination. Although Kentucky Civil Rule of Procedure 35.01 does not expressly provide for a psychological examination of a complaining witness who is not a party, “due process and fundamental fairness may, depending on the circumstances, entitle the defendant to have the alleged victim examined by an independent expert, if not a defense expert.”

Ever mindful of the potential for invasion of the victim’s privacy, or harassment of the victim, the court applies a balancing test when determining whether to permit an examination. There was a possibility in Mack that the examination of the child would produce relevant evidence on the issue of concoction or transference resulting from her past, with minimum potential for harm or harassment. The defendant was entitled to have the child examined, at least by an independent expert, as a matter of due process and fundamental fairness.

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80. Id. at 277.
82. Mack, 860 S.W.2d at 277. Rule 35.01 of the Kentucky Rules of Civil Procedure provides in part as follows:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination....

Ky. R. Civ. P. 35.01.
83. Mack, 860 S.W.2d at 277.
84. Id.
85. Id. (citing Turner v. Commonwealth, 767 S.W.2d 557 (Ky. 1989)).
86. Id. In Turner v. Commonwealth, the court permitted an examination of the alleged victim of rape by an independent gynecologist. The examination may have disclosed evidence to completely refute the charge, or to assist the defendant during the course of the trial. These benefits were held to outweigh the potential for harm. Turner, 767 S.W.2d at 557.
87. Mack, 860 S.W.2d at 277.
88. Id.
IV. DRIVING UNDER THE INFLUENCE

A. Pretrial Suspension of Driver's License

Pretrial suspension of a driver's license if a person charged with drunk driving refuses to take an alcohol concentration or substance test, or is a repeat offender, was found to be constitutional in Commonwealth v. Raines. Defendant, Wanda Raines, was charged with driving under the influence on July 1, 1991. The prosecution requested, pursuant to Kentucky Revised Statutes ("K.R.S.") section 189A.200, that Ms. Raines' license be suspended prior to trial since she refused to take an alcohol concentration or substance test. Section 189A of the K.R.S. authorizes the court to suspend a person's motor vehicle operator's license at the arraignment, and allows a person whose license was suspended to file a motion for judicial review, which must occur within thirty days of the motion.

The Kentucky Supreme Court looked to the Due Process Clause of the Fourteenth Amendment because the deprivation of a driver's license by the state is state action which adjudicates important interests of the licensees. A three-prong test has been established to determine what process is due to protect against an erroneous deprivation of one's property interest. First, a court looks at "[t]he nature and weight of the private interest that will be affected by the official action challenged." The nature and weight of the private interest that will be affected by the official action is the suspension of a driver's license, which is a property interest protected by the Due Process Clause of the Fourteenth Amendment.

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89. 847 S.W.2d 724 (Ky. 1993).
90. Id. at 726.
91. Id. (citing KY. REV. STAT. ANN. § 189A (Michie/Bobbs-Merrill 1992). Kentucky Revised Statutes § 189A.200 provides in relevant part:

[T]he court shall at the arraignment or as soon as such relevant information becomes available suspend the motor vehicle operator's license and motorcycle operator's license and driving privileges of any person charged with a violation of KRS 189A.010 who has refused to take an alcohol concentration or substance test as reflected on the uniform citation form.

92. Raines, 847 S.W.2d at 727.
93. Id. The three-prong test of what process is due and when, originally set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), was adopted by Kentucky courts in Division of Driver Licensing v. Bergman, 740 S.W.2d 948 (1987). Raines, 847 S.W.2d at 727.
94. Raines, 847 S.W.2d at 727 (citing Eldridge, 424 U.S. at 321).
95. Id.
The second prong inquires into "[t]he risk of an erroneous deprivation of such interest as a consequence of the summary procedures used." 96 The risk of erroneous deprivation is low, because although the statute itself does not provide a standard for determining whether a pretrial suspension is warranted, the prosecution must present some prima facie evidence that one of the factors warranting pretrial suspension is present. 97 The third prong looks at "[t]he governmental function involved and the state interests served by such procedures, as well as the administrative and fiscal burden, if any, that would result from the additional or substituted procedures sought." 98 Finally, the state interest in removing drunk drivers from the roads pending resolution of their drunk driving charges is compelling. 99 After considering the three factors under the Eldridge balancing test, the court found that the post-deprivation right to judicial review of the suspension within thirty days was sufficient due process to uphold the statute. 100

B. Evidence of Prior DUI Conviction in Guilt Phase of Trial

Collison v. Commonwealth101 held that evidence of prior DUI convictions is admissible during the guilt phase of a felony DUI

96. Id. (citing Eldridge, 424 U.S. at 321).
97. Id. Kentucky Revised Statutes § 189A.200 lists three factors which warrant pretrial suspension of a drivers license. Pretrial suspension of a driver's license is warranted if a person in violation of K.R.S § 189A.010:
(a) Has refused to take an alcohol concentration or substance test as reflected on the uniform citation form;
(b) Is under the age of 21 years, and has not refused to take an alcohol concentration or substance test as reflected on the uniform citation form; or
(c) Has been convicted of one (1) or more prior offenses as described in KRS 189A.010(e) or has had his operator's license revoked or suspended on one or more occasions for refusing to take an alcohol concentration or substance test in the five (5) year period immediately preceding his arrest.

KY. REV. STAT. ANN. § 189A.200 (Michie/Bobbs-Merrill 1992). Merely stating that the defendant had prior offenses is insufficient; some prima facie evidence of one of these offenses must be presented, and the judge must adjudicate that there is a sufficient evidentiary basis. Raines, 847 S.W.2d at 728.
98. Raines, 847 S.W.2d at 728 (citing Eldridge, 424 U.S. at 321).
99. Id.
100. Id. at 728. The statute was found not to violate procedural or substantive due process under the Fourteenth Amendment to the United States Constitution, nor Sections 10 or 11 of the Kentucky Constitution. Id.
trial to show jurisdiction of the circuit court.\textsuperscript{102} Sherman Wayne
was charged with driving under the influence for the fourth
time.\textsuperscript{103} Wayne made a motion before trial to exclude evidence
of his prior DUI convictions. The trial court denied his motion
and Wayne pleaded guilty but reserved his right to appeal the
admissibility of his prior DUI convictions.\textsuperscript{104} The defendant
argued, and the court agreed, that proof of the prior DUI convictions
was not an element of the charged DUI.\textsuperscript{105} However, the
court admitted evidence of the prior DUI convictions to show
circuit court jurisdiction over the case.\textsuperscript{106} While K.R.S. section
189A.010(4), which creates the Class D felony, is a mere sentenc-
ing statute, it is also the means by which a circuit court obtains
jurisdiction over what is otherwise a misdemeanor, and proof of
prior convictions is admissible to show jurisdiction.\textsuperscript{107}

C. Jury Instruction Defining “Under the Influence”

\textit{Bridges v. Commonwealth} dealt with a jury instruction defining
“under the influence.”\textsuperscript{108} Robert Bridges was convicted in the
Christian Circuit Court of driving under the influence.\textsuperscript{109} The trial
court instructed the jury that the term “under the influence”
referred to a person having consumed “some alcohol or other
intoxicating beverage of any type which may impair his driving
ability.”\textsuperscript{110} The trial court further instructed that the Common-
wealth was not required to prove impaired driving ability or that
the defendant was “drunk.”\textsuperscript{111}

The Kentucky Supreme Court ruled that the trial court’s
instructions were improper because they equated “under the influence” with mere consumption, thereby incriminating anyone
who drives having consumed any amount of alcohol at any time.\textsuperscript{112} Additionally, the trial court's instruction on what the Commonwealth was \textit{not} required to prove was held to be confusing and unnecessary since proof that a driver was "under the influence" is proof of impaired driving ability.\textsuperscript{113} The statutory language as to the elements of operating a motor vehicle while under the influence is unambiguous; therefore, an instruction framed in terms of the statute is a sufficient jury instruction, and the court need not elaborate on what the Commonwealth need not prove.\textsuperscript{114}

V. GENERAL LAW

A. Arrest Powers of Police Officers in Fourth-Class Cities

Police officers in fourth-class cities were found to have county-wide arrest powers in \textit{Commonwealth v. Monson}.\textsuperscript{115} The defendant, Jerome Monson, was arrested in the fourth-class city of Park Hills, Kentucky, by a police officer from Fort Wright, a nearby city.

\begin{itemize}
\item \textsuperscript{112} Id. The implication that anyone who consumes any alcohol is under the influence defies the defining statute, which statutorily presumes that anyone with a blood alcohol level of 0.05 percent or less is not under the influence. \textit{Id.}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. (citing \textit{JOHN S. PALMORE \& ROBERT G. LAWSON, INSTRUCTIONS TO JURIES IN KENTUCKY} § 9.16 (1990)). K.R.S. § 189A.010(c) provides that no person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability. \textit{KY. REV. STAT. ANN.} § 189A.010(c) (Michie/Bobbs-Merrill 1992). Kentucky Revised Statutes § 189.520(3) provides:
\begin{itemize}
\item (a) If there was 0.05 percent (5/100%) or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages;
\item (b) If there was more than 0.05 percent (5/100%), but less than 0.10 percent by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages.
\end{itemize}
\textit{KY. REV. STAT. ANN.} §§ 189.520(3)(a), (b) (Michie/Bobbs-Merrill 1992).
\item \textsuperscript{115} 860 S.W.2d 272 (Ky. 1993). Section 156 of the Kentucky Constitution divides cities into six classes as follows:
\begin{itemize}
\item To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand.
\end{itemize} \textit{KY. CONST.} § 156.
\end{itemize}
fourth-class city. Monson was convicted in the district court of driving under the influence and reckless driving. The court of appeals reversed the driving under the influence conviction because the arresting officer did not have the legal power to arrest Monson. Since the arrest was illegal, the court of appeals held that the breathalizer results were inadmissible.

The Kentucky Supreme Court reviewed the arrest powers of officers of other classes of cities, noting that four of the five largest classes of cities have county-wide arrest power. The court's review of K.R.S. section 95.740(1), including its history, led to the conclusion that the arrest was legal because under the statute, police in fourth-class cities statutorily have county-wide arrest powers.

B. Classification of Offense as a Felony or Misdemeanor

The proper method to determine whether an offense not otherwise designated is a felony or misdemeanor was set forth in Commonwealth v. Lundergan. Gerald Lundergan was convicted at trial of violating the Legislative Ethics Act section which prohibited use of influence by a legislator. However, the prosecution would have been time barred because of the statute of limitations if the violation was considered a misdemeanor. A non-penal code, criminal offense was created for violations of the Legislative Ethics Act, with penalties that did not satisfy the

116. Monson, 860 S.W.2d at 272.
117. Id.
118. Id.
119. Id. at 273.
120. Id. at 274. The court felt that the legislature did not intend to only have officers of fourth-class cities, out of the five largest classes, to be denied county-wide arrest powers. Id. at 275.
121. Id. Kentucky Revised Statutes § 95.740(1) states:
The chief of police and every member of the police force in cities of the fourth and fifth classes may, whether directed to them or not, execute warrants of arrest, processes, subpoenas, and attachments for witnesses. They may arrest as prescribed by law for offenses against ordinances or municipal regulations of the city, and shall have the same power of arrest for offenses against the state as a sheriff.
122. 847 S.W.2d 729 (Ky. 1993).
123. Id.
124. Id.
Penal Code's definition of a felony or misdemeanor. The offense was held to be a misdemeanor because of the minimum permissible sentence of six months. This case overruled a 1987 case that dealt with a similar issue and which determined that the greatest possible penalty allowed by a criminal statute determines whether the crime is a felony or misdemeanor. In reaching its decision that it is the minimum, rather than the maximum penalty that determines the classification, the court noted the long-standing principal that when there is an ambiguity or conflict in a penal statute, notions of fairness require that the "rule of lenity" be applied.

C. Abuse of Fetus Under Criminal Abuse Statute

In Commonwealth v. Welch, Connie Welch was arrested on November 7, 1989 when police found her with oxycodone, a schedule II narcotic. She was under the influence of the drug and eight months pregnant at the time of the arrest. At birth, her child suffered from neonatal abstinence syndrome. The child had a mild temperature, was irritable, tremulous and jittery, and cried a lot. Welch was convicted of criminal abuse for taking the drugs during her pregnancy.

The Kentucky Supreme Court held that under the criminal abuse statute, a fetus is not a "person," and therefore, a mother...
who was addicted to drugs while pregnant was not guilty of criminal abuse when her baby was born with neonatal abstinence syndrome. The court first looked to its decision in *Hollis v. Commonwealth*, which held that the defendant could not be charged with murder, because the viable fetus he killed was not a "person" under common law, since common law murder was limited to the killing of one who was born alive.

However, because criminal child abuse was not a crime at common law, the court could not simply rely on *Hollis*. In making its decision, the court considered whether the legislature intended to prohibit prenatal injury from a pregnant woman's self abuse, and whether the legislature intended to criminalize injury to the fetus by third persons. The court also considered the Maternal Health Act of 1992 which was amended to provide special punishment to a drug dealer who supplies drugs to a pregnant woman, but not to punish the woman on the basis of taking the drugs while pregnant. Balancing these factors, the court decided the conviction could not stand. Criminal abuse of a fetus, like murder of a fetus, is not punishable as a discrete criminal offense separate from the crime committed against the mother.

VI. CONCLUSION

In 1993, the Kentucky Supreme Court decided several issues that have significant impact on criminal law in Kentucky. The court held that an officer searching an automobile must satisfy one of four exceptions or the search will be in violation of the Fourteenth Amendment to the Constitution. The court found that one accused of rape can be forced to provide blood, hair, and saliva samples for scientific comparison. Furthermore, the court

135. *Id.* at 282.
136. 652 S.W.2d 61 (Ky. 1983).
137. *Id.* at 63. Kentucky adopted the Model Penal Code, which contains commentary that, absent express statutory statement to the contrary, statutes following the Model Penal Code may be expected to carry forward the common law approach. See *Commonwealth v. Welch*, 652 S.W.2d 280, 281 (Ky. 1993). In *Hollis*, the defendant forced his hand up his pregnant wife's vagina, thereby killing the fetus and damaging his wife's uterus and vagina. *Hollis*, 652 S.W.2d at 63.
138. *Welch*, 864 S.W.2d at 283.
139. *Id.* at 284.
140. *Id.* at 285.
141. *Id.*
upheld a statute which allowed pretrial suspension of a driver's license where a person charged with driving under the influence refuses to take an alcohol concentration test. Finally, the court found that police officers in fourth class cities have county-wide arrest powers, and that criminal abuse of a fetus is not punishable as an offense separate from the crime against the mother.
I. INTRODUCTION

This article summarizes significant court decisions in the area of workers' compensation, as well recent changes in the workers' compensation regulations. This article was written before the 1994 Legislative Session and does not encompass any statutory changes made during that session.

II. REGULATORY CHANGES

As is the case in the Commonwealth of Kentucky and the country in general, medical treatment and the payment for that treatment is an issue of major concern among those within the workers' compensation system. Kentucky Revised Statutes ("K.R.S.") section 342.020 provides that the employer or its insurer ("employer") is responsible for payment for medical services rendered to an injured employee ("employee"). Such payment must be made within thirty days of receipt of a statement for services, or the employer waives the right to contest the compensability of the statement.

This requirement has been problematic for employers. Health care providers ("providers"), employees, and/or their attorneys often submitted a statement for services with no explanation as to what service was performed or the reason for the service. The employer then had to attempt to obtain, within thirty days, such an explanation from the provider. Once the requested

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1. Please note that, unless otherwise stated, any cases cited from the Kentucky Law Summaries are not final and should not be cited as authority in any court. These cases are included since they often signify trends in statutory interpretation and may prove useful to practitioners in arguing similar issues. Some of the cases cited from the Kentucky Law Summaries may have become final and published by the time this article appears in print and should be checked prior to citation.


information was obtained, the employer then had to decide whether or not to pay the statement.\(^5\)

However, the only clear procedural guidance an employer had if it chose to contest such a statement was in claims that had already been litigated. The court of appeals, in *National Pizza Co. v. Curry*,\(^6\) stated that the burden in such cases was on the employer to file a motion to reopen. Anyone who has practiced as a defense attorney knows that the thirty-day deadline was difficult, if not impossible, to meet. Employers found themselves in the position of having to pay for medical treatment with little or no supporting evidence that it was compensable or of having to file to reopen a claim with little or no supporting evidence that the treatment was not compensable. Obviously, faced with the high cost of medical care or the threat of sanctions for filing frivolous pleadings,\(^7\) the employer found itself between the proverbial rock and a hard place.

The situation was even worse in claims that were not yet in litigation, claims that were in litigation, or claims that were on appeal, since there were no clear procedural guidelines. Furthermore, it was unclear if the employer had to contest each statement from each provider separately or if it could contest future treatment in general.

The Workers' Compensation Board took it upon itself in 1993 to attempt to cure these "glitches" in the system. As of March 9, 1993, 803 Kentucky Administrative Regulation ("K.A.R.") 25:012 took effect.\(^8\) This regulation states that an employee, a provider, or an employer may seek adjudication of a dispute regarding payment of any medical expense by filing a Request to Resolve Medical Fee Dispute (Form 112) with the Board.\(^9\) A Form 112 must be filed within thirty days of receipt of a provider's statement and may be used to resolve questions regarding the reasonableness, necessity, or work-relatedness of

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\(^{5}\) *Id.*

\(^{6}\) 802 S.W.2d 949 (Ky. Ct. App. 1991).

\(^{7}\) *Ky. Rev. Stat. Ann.* § 342.310 (Baldwin 1993) (stating that if the administrative law judge, board, or court finds that proceedings have been brought without reasonable ground, he may assess the costs of the proceeding, including court costs, travel expenses, deposition costs, and all other out-of-pocket costs, to the party who brought such proceeding).


\(^{9}\) *Id.* § 1(1).
any treatment already rendered or any treatment about to be rendered.\textsuperscript{10}

If the claim is not yet in litigation, the request will be assigned to the general motion docket for a decision by an administrative law judge ("ALJ").\textsuperscript{11} If the claim is already in litigation, the request will become part of the litigated proceedings and, if the claim has been resolved, the request must be accompanied by a motion to reopen.\textsuperscript{12} Furthermore, if a claim is on appeal, the Form 112 must be accompanied by a motion for partial remand unless the issue on appeal will resolve the dispute.\textsuperscript{13}

A single request may be used to encompass statements for services already rendered, as well as for services to be rendered in the future.\textsuperscript{14} In order to make the request so all-encompassing, the employer need only note its intent to do so in the Form 112.\textsuperscript{15}

If a final award has not been entered, the employee or provider bears the burden of proving entitlement to the disputed services, for example, that the services were rendered for treatment of a work injury.\textsuperscript{16} The employer bears the burden of proving that the services were either unreasonable or unnecessary.\textsuperscript{17}

In order to provide some relief from the thirty-day requirement, the Board promulgated 803 K.A.R. 25:095. Pursuant to this regulation, a provider's statement must be on a Form HCFA or, if a hospital, Form UB-82.\textsuperscript{18} Furthermore, the provider must submit a Kentucky Workers' Compensation Medical Provider's Certification, stating that the services rendered were the result of a work injury or occupational disease.\textsuperscript{19}

If the provider does not comply with these requirements, the thirty-day time in which to contest a submitted statement is tolled.\textsuperscript{20} However, the employer must notify the provider that

\textsuperscript{10} Id. §§ 1(2), (3).
\textsuperscript{11} Id. § 1(4)(a).
\textsuperscript{12} Id. § 1(4)(c).
\textsuperscript{13} Id. § 1(4)(d).
\textsuperscript{14} Id. § 2(1).
\textsuperscript{15} Id.
\textsuperscript{16} Id. § 2(2).
\textsuperscript{17} Id.
\textsuperscript{18} 803 KY. ADMIN. REGS. 25:095 (1993).
\textsuperscript{19} Id. § 1.
\textsuperscript{20} Id. § 2(1).
it is refusing to pay the statement and the reason(s) for such refusal.\footnote{Id. § 2(3).} Once the employer obtains the necessary documentation, it must pay the statement, or contest it, within twenty days.\footnote{Id. § 2(2).}

This regulation makes it easier for employers to adequately evaluate whether to contest statements for medical services. Furthermore, it clarifies and streamlines the procedure for doing so, a procedural change which is long overdue.

Also of concern to workers' compensation practitioners in the area of medical benefits is what has been perceived as "doctor shopping" on the part of some employees. Certain employees have been known to treat with two or three different orthopaedic surgeons, two or three different neurosurgeons, and two or three different general practitioners. Quite often these various providers treat the employee simultaneously and are unaware of each other's involvement, leading to duplication of services and potential harm to the employee through overmedication, etc. Furthermore, there is the perception by some of those involved in the system that some physicians over-treat employees and have no specific goal for treatment.

Title 803 of the K.A.R., chapter 25:096, attempts to alleviate these perceived problems by requiring an employee to choose a physician as his or her "designated" physician.\footnote{803 Ky. Admin. Regs. 25:096, § 3(1) (1993).} This physician may make referrals to other physicians as necessary but will act as a coordinator of the employee's treatment.\footnote{Id.} The employee may change designated physicians one time without approval from the employer, but any further changes must be with written approval from the employer or the ALJ.\footnote{Id. § 3(3).}

Furthermore, if an employee receives, or is projected to receive, treatment for more than three months; is kept off work for more than sixty days; receives treatment with "passive modalities" (manipulations, adjustments, electronic stimulation, etc.); is being referred to a resident work hardening, pain management, or medical rehabilitation program; or is to undergo elective surgery, the designated physician must prepare a treat-
ment plan. Such plan must set forth the course of ongoing and recommended treatment and the projected results.

This regulation should enable both the employee and the employer to determine if the treatment being rendered is reasonable, necessary, and helpful. Furthermore, it should help alleviate the perceived abuses of the system by so-called doctor-shopping employees and "over treating" physicians.

III. CASE LAW

I have attempted to summarize the cases I found to be interesting, unique, or informative from the Kentucky Law Summaries for 1992 and 1993. As indicated earlier, some, but not all, of these cases may be published by the time this article is printed. Any case referred to in this article that is not published is not to be cited as authority in any court of this Commonwealth.

The cases reviewed herein are categorized by common issues as much as possible. It is hoped that this will assist the reader in using the cases for research and reference purposes.

A. Medical Benefits

In August 1992, the Kentucky Court of Appeals issued a decision that sent shock waves through the workers' compensation defense community. In Tipton v. Square D Co., the employee had undergone two surgical procedures for treatment of thoracic outlet syndrome, including the removal of a rib. Her surgeon wanted to perform a scalenectomy (removal of muscle tissue); however, the employer's three physicians testified that they would not recommend such a procedure for the employee.

The ALJ found that the suggested procedure was unreasonable and unnecessary and did not order the employer to pay for it. The court of appeals reversed the ALJ, finding that the

26. Id. § 4.
27. Id. §§ 1(4) and 4(2), (3).
30. Id. at 14.
31. Id.
32. Id.
burden of proof in contesting the reasonableness of medical treatment lies with the employer.33 Despite this, the court of appeals held that testimony by the employer's physicians that the suggested procedure was only fifty percent effective and generally would not result in rendering the employee pain free was not sufficient to meet this burden.34 According to the court of appeals, the employee was entitled to reasonable relief, even when no cure was possible and the treatment would only result in an easing of the employee's pain.35 Furthermore, the court of appeals held that if a competent physician and informed patient reasonably believe that the benefits of treatment outweigh the risks, then the treatment is reasonable and should be paid for by the employer.36

Taking this holding literally, an employer could never successfully contest the reasonableness of medical treatment. While this would certainly ease the burden on the system created by medical fee disputes, it would do nothing to aid in employers' attempts to contain medical costs.

Fortunately for employers, the Kentucky Supreme Court reversed the court of appeals' finding that employers need not pay for treatments or procedures that are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case.37 The decision of whether or not a procedure falls in this category is one for the ALJ, and the ALJ's decision cannot be overturned on appeal unless it is clearly erroneous.38 This standard is certainly more equitable to the employer, relieving the employer from the duty to pay for procedures and treatments that are generally accepted as ineffective.

B. Fraud

Kentucky Revised Statutes section 342.316(6) provides that an employer has a defense to an occupational disease claim if an employee has falsely misrepresented the state of his health

33. Id. at 15.
34. Id.
35. Id.
36. Id.
37. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993).
38. Id. at 309-10.
at the time of entering employment. However, there is no such statutory provision relating to injury claims. In two 1993 cases, the supreme court and court of appeals upheld fraud as a defense to injury claims.

In *Honaker v. Duro Bag Manufacturing Co.*, the employee was required to pass a physical examination as a condition of employment. The employee had a history of back problems and believed that his back condition had interfered with his ability to obtain a job in the past. Therefore, rather than taking the physical himself, the employee sent his cousin. The cousin passed the physical exam and the employee was hired. Approximately six months later, the employee suffered a back injury. The physician testified that, based on the condition of the employee's back, he would not have recommended the employee for employment.

The ALJ dismissed the claim, finding that there was no employer/employee relationship since the employee had not passed the physical examination. The decision was affirmed by the Workers' Compensation Board, the court of appeals, and the supreme court.

The specific language relied on by the supreme court was in the employer's Consent and Authorization of Pre-Employment Physical, which said, "It has been explained, and I fully understand, that before I can receive serious consideration for a position with the ... Company, I must pass the company's pre-employment physical, which will include a drug and alcohol screen." Since the employee did not even take the physical, the court held that he could not be considered an employee.

Finding the *Honaker* decision to be somewhat cumbersome in application, the court of appeals adopted a more utilitarian test

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40. 851 S.W.2d 481 (Ky. 1993).
41. *Id.* at 481-82.
42. *Id.* at 482.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 482-83.
47. *Id.* at 483-84.
48. *Id.* at 482.
49. *Id.* at 483-84.
in *Divita v. Hopple Plastics*. In *Divita*, the employee lied on his job application, denying previous back problems. He then suffered a work-related back injury while working for the employer. At the hearing, the employee admitted that he had been turned down for other jobs when he revealed his history of back problems. The employer testified that, had it known of the employee's prior back problems, it would not have placed him in a job that involved stress and strain to the back. The ALJ found that the employee's misrepresentation was not a bar to recovery; however, the ALJ was reversed on appeal by the Board.

In reversing the ALJ, the Board relied on a three-prong test. According to that test, benefits will be barred if: (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. The Board found that the first two prongs of the test had been met, but there were insufficient findings of fact to make a determination as to the third prong. Therefore, the case was remanded to the ALJ for further findings of fact.

The court of appeals upheld the Board's decision and, in dicta, adopted the three-prong standard set forth above. The court appeared to rely on K.R.S. section 342.316(6), which bars recovery in occupational disease claims when there has been a material misrepresentation on an employment application, finding no reason why this protection should not be extended to injury claims.

50. 858 S.W.2d 214 (Ky. Ct. App. 1993).
51. Id. at 214.
52. Id.
53. Id.
54. Id. at 215.
55. Id.
56. Id. (quoting Arthur Larson, *The Law of Workmen's Compensation* § 47.53 (1991)).
57. Id.
58. Id.
59. Id.
60. Id. at 216.
61. Id.
C. Temporary Total Disability

One of the most vexing pre-litigation questions confronting workers' compensation practitioners is when temporary total disability ("TTD") benefits may properly be terminated. There are no statutory or regulatory guidelines, and employees have argued that such benefits should not be terminated until the employee is capable of returning to his or her last job. On the other hand, employers have argued that such benefits should be terminated as soon as a physician indicates that the employee has reached maximum medical improvement, regardless of the employee's ability to return to any type of gainful employment.

The court of appeals clarified this issue in *W. L. Harper Construction Co. v. Baker*, stating that:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, and the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local market.

This means that maximum medical improvement is not the sole factor in determining when to terminate TTD benefits; however, the employee is not necessarily entitled to TTD benefits until he or she is capable of returning to his or her last job. If the employee has reached maximum medical improvement and is capable of performing some type of work, then, and only then, may TTD benefits be properly suspended.

Another question regarding TTD benefits that arises quite often is entitlement to those benefits while undergoing vocational rehabilitation. In *Epling v. Four B & C Coal Co.*, the court of appeals reiterated the standard for receiving TTD benefits set forth in *Baker*. Furthermore, the court held that vocational rehabilitation and TTD are not interrelated. According to the court, vocational rehabilitation is designed to assist the employee, after he has reached medical stability, to obtain job skills to

63. *Id.* at 205.
64. *Id.* at 204.
65. *Id.* at 204-05.
66. 858 S.W.2d 216 (Ky. Ct. App. 1993).
67. *Id.* at 219.
perform work. The award of vocational rehabilitation benefits does not, in and of itself, entitle the employee to additional TTD benefits. To be entitled to those benefits, the employee must also be incapable of performing work for which he has the training and experience. However, vocational rehabilitation benefits are generally awarded under the premise that the employee is incapable of performing work for which he has training and experience. Despite this apparent inconsistency, the court ruled that it is not incongruous to award vocational rehabilitation benefits while denying additional TTD benefits.

D. Notice

In Dawson Springs Manufacturing v. Adcock and Newberg v. Dawson Springs, the court of appeals stated that a failure to give timely notice is only fatal if the employer can show some prejudice by the delay. In doing so, the court adopted the reasoning in Jones v. Bituminous Casualty Corp., a non-workers' compensation case.

This reasoning appears to overrule, without specifically mentioning it, Blue Diamond Coal Co. v. Stepp, wherein the court held that lack of prejudice is not one of the specifically listed excuses for failure to timely give notice in a workers' compensation claim and should not be a consideration.

E. Appeals

Under Kentucky law, there is an automatic right of appeal to the supreme court. However, in Western Baptist Hospital v. Kelly, the supreme court, in no uncertain terms, warned work-

68. Id. at 220.
69. Id.
70. Id.
71. Id.
72. Id.
73. 40 Ky. L. Summ. 8 (Summ. Corp.) 1 (Ky. Ct. App. Sept. 8, 1993) (This opinion was ordered withdrawn on a Grant of Rehearing on Dec. 3, 1993.).
74. Id.
75. 821 S.W.2d 798 (Ky. 1991).
76. 445 S.W.2d 866 (Ky. 1969).
77. Id. at 867-68 (citing Ky. Rev. Stat. Ann. § 342.200 (Baldwin 1993)).
79. 827 S.W.2d 685, 687 (Ky. 1992).
ers' compensation practitioners to avail themselves of that right judiciously. The function of the supreme court in the appellate process is to address new or novel questions of statutory construction, to reconsider precedent when such appears necessary, or to review questions of constitutional magnitude. The supreme court strongly expressed that its review will be so limited and all parties should be advised and proceed accordingly. Sanctions may be imposed if the supreme court is continually called upon to determine, all things being equal, that the ALJ or the Board should have chosen to believe one party's evidence rather than the other's.

Those practitioners who put things off to the last minute should spend some time reading Workers' Compensation Board v. Siler. In Siler, the employee's claim was dismissed by the ALJ in a decision entered on October 16, 1990. The employee mailed a Notice of Appeal to the Board on November 14, 1990 and the Notice was received on November 16, 1990.

The Board regulations clearly state that an appeal must be taken within thirty days of the decision and that the date of filing is the date the pleading is received by the Board, not the date mailed. Since the Board did not receive the Notice of Appeal until thirty-one days after entry of the decision, the appeal was properly dismissed. Substantial compliance will not be a sufficient argument to overcome missing a filing deadline.

F. The Special Fund

In several cases the court clarified issues regarding payment of disability benefits by the Special Fund. When an employee settles with the employer for a lump sum, then obtains an award

80. Id. at 688.
81. Id.
82. Id.
83. 840 S.W.2d 812 (Ky. 1992).
84. Id.
85. Id.
87. Id. § 1.
88. Siler, 840 S.W.2d at 813.
89. Id.
90. The Special Fund is a statutorily created entity responsible for compensating injured workers for any portion of their disability due to the arousal of a pre-existing, dormant, non-disabling disease or condition. Ky. Rev. Stat. Ann. § 342.120 (Baldwin 1993).
against the Special Fund, the Special Fund's duty to begin making payments under the award commences upon approval of the settlement. 91

Can the employer and employee agree to a percentage of permanent partial disability, settle the claim, and then litigate the issue of apportionment? In Newberg v. Arnett, 92 the employee suffered a wrist injury. Medical testimony established a fifty percent liability on the part of the Special Fund. 93 During the pre-hearing conference, the Special Fund refused to contribute any amount toward settlement. 94 A hearing was held, but the Special Fund did not make an appearance. 95 Following the hearing, a settlement was reached wherein the employee agreed to accept a seventy-five percent permanent partial disability. 96 The employer agreed to pay the entire settlement amount and to have the ALJ determine how the settlement should be apportioned between itself and the Special Fund. 97 The Special Fund did not file any objection to this settlement, and the ALJ found equal liability between the employer and the Special Fund. 98 Since the employer had already paid the employee, the Special Fund was ordered to reimburse the employer for its share of the settlement. 99

This decision was upheld by the Board and the court of appeals. 100 Both appellate bodies cited that one of the purposes of the workers' compensation statutes is to encourage settlement, and the employer, employee, and ALJ were merely forwarding that purpose. 101 Furthermore, to let the Special Fund avoid its liability by claiming that the employer had voluntarily paid the Special Fund's share would be patently unfair and contrary to the above-stated statutory purpose. 102

91. Newberg v. Chumley, 824 S.W.2d 413, 416 (Ky. 1992).
93. Id. at 7.
94. Id. at 6.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. at 6-7.
101. Id.
102. Id.
This procedure worked this time for the employer; however, the Special Fund did not object to the settlement. There is no indication what would have occurred had the Special Fund objected. The better practice, in unilateral settlements, would be to settle only that portion of the liability which is the employer's and to let the employee proceed against the Special Fund.

In *Pennwalt Corp. v. Beale*, the employee's widow was awarded benefits for approximately twenty-three years, with liability being divided equally between the employer and the Special Fund. The employer was ordered to pay during the first portion of the twenty-three years, and the Special Fund was to pay during the remaining portion. During the first portion of the award period, the widow remarried, thus ending her entitlement to continuing benefits. The employer paid the statutorily required lump sum and then sought reimbursement from the Special Fund for the Special Fund's share of the liability.

The court held that the employer has no recourse against the Special Fund in such situations. Kentucky Revised Statutes section 342.120(6) clearly states that the employer must pay all benefits during the initial portion of the award for a period of the award proportionate to its percentage of liability. If the liability for payment terminates during the employer's period of responsibility, then the Special Fund's liability is also terminated, and the Special Fund has no responsibility to reimburse the employer for amounts paid. The court stated that the employer, if it felt the result was unjust, could seek recourse with the legislature or could console itself in the knowledge that the Special Fund sometimes pays more than its proportionate share when the claimant outlives his/her life expectancy.

One of the most hotly-contested anatomical questions in recent years was settled by the court of appeals in June of 1993.

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104. Id. at 831.
105. Id.
106. Id.
108. *Pennwalt*, 840 S.W.2d at 832.
109. Id.
110. Id.
111. Id.
112. Id.
Kentucky Revised Statutes section 342.1202 provides that back injuries are automatically apportioned fifty percent to the Special Fund and fifty percent to the employer if there is any evidence of the arousal of a pre-existing dormant condition.\(^\text{113}\) In its earlier decision, the Board ruled that the neck is not the back and, therefore, neck injuries are exempt from mandatory apportionment.\(^\text{114}\) This ruling led to some confusion among practitioners, physicians, and the ALJs. However, the court of appeals, in Newberg v. Thomas Industries,\(^\text{115}\) reversed the Board's ruling. Henceforth, the neck is considered to be a part of the back for apportionment purposes.\(^\text{116}\) Therefore, neck injuries which arouse pre-existing dormant conditions will be apportioned fifty percent to the employer and fifty percent to the Special Fund.\(^\text{117}\)

Finally, in Newberg v. Armour Food Co.,\(^\text{118}\) the supreme court reiterated the standard of proof for establishing Special Fund liability. The employee began working for Armour Packing Company in August of 1988.\(^\text{119}\) After several days on the job, the employee was assigned the task of cutting meat and bones with a vibrating knife.\(^\text{120}\) Four or five days after beginning this job, the employee began to experience pain, numbness, and swelling in his hands and wrists.\(^\text{121}\) Six weeks after his employment, the employee reported to Armour's medical department and was diagnosed as suffering from bilateral carpal tunnel syndrome.\(^\text{122}\) Medical evidence indicated that the employee should not have developed carpal tunnel syndrome after only working at Armour for such a short period of time.\(^\text{123}\) The ALJ made an award of fifteen percent occupational disability and indicated that he did not believe that the medical testimony that the claimant had a predisposition to carpal tunnel syndrome was sufficient to place any liability on the Special Fund.\(^\text{124}\)

\(^{113}\) KY. REV. STAT. ANN. § 342.1202 (Baldwin 1993).
\(^{115}\) Id.
\(^{116}\) Id.
\(^{117}\) Id.
\(^{118}\) 834 S.W.2d 172 (Ky. 1992).
\(^{119}\) Id. at 173.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id. at 174.
On appeal, the Workers' Compensation Board reversed the ALJ on the issue of apportionment. The Board cited evidence in the record indicating that the claimant had a narrow carpal tunnel which became inflamed when the claimant performed rapid, repetitive wrist and hand movements. The court of appeals affirmed the Board's decision, and the supreme court reversed.

The critical issue, according to the supreme court, is to determine under what circumstances a predisposition to a particular type of injury constitutes a dormant, non-disabling condition capable of being aroused into disabling reality by work. In previous cases, notably Yocum v. Jackson, the court has held that a dormant non-disabling condition must constitute a departure from the normal state of health. The court noted that predisposition is defined in the medical dictionary as the "potential to develop a certain disease or condition in the presence of specific environmental stimuli." Such a definition would encompass a potential created by "virtually any human characteristic regardless of whether or not that characteristic was a departure from the normal state of health." For this reason, the court held that a predisposition, in and of itself, does not constitute a dormant non-disabling condition for the purposes of apportionment. To determine if a predisposition should result in apportionment, the question is whether or not the "underlying medical condition which caused the predisposition" was a departure from the normal state of health.

Obviously, with the increasing number of carpal tunnel syndrome claims, this supreme court case must be carefully studied. In the past, some ALJs have ruled that carpal tunnel syndrome disability is apportionable based on the "narrow carpal tunnel" theory. If this theory is going to be put forth to support a claim for Special Fund liability, there must be some testimony that

125. Id.
126. Id.
127. Id. at 175.
128. Id.
129. 554 S.W.2d 891 (Ky. Ct. App. 1977).
130. Newberg, 834 S.W.2d at 175.
131. Id.
132. Id.
133. Id.
this narrow carpal tunnel is a departure from the normal state of health.

G. Settlement

In September 1974, an employee injured his back while at work and underwent two surgical procedures.\textsuperscript{134} He settled with the employer only for twenty percent permanent partial disability.\textsuperscript{135} In 1982, the employee was again injured and underwent two surgical procedures.\textsuperscript{136} He settled this claim for an additional thirty-one and twelve hundredths percent, with the Special Fund contributing one-third of the settlement, and the employer contributing the other two-thirds.\textsuperscript{137} In 1986, the employee was again injured, and the parties stipulated that he was totally disabled after this injury.\textsuperscript{138} The employee filed a claim for the 1986 injury and moved to reopen the two previous injuries.\textsuperscript{139}

The supreme court held that in a reopening of a settled claim, the percentage of occupational disability contained in a settlement agreement is not conclusive as to the actual disability on that date.\textsuperscript{140} Therefore, any fact contained in a settlement agreement cannot be res judicata in a reopening.\textsuperscript{141} The court used the same reasoning in holding that the terms of a settlement agreement are not res judicata in litigation regarding a second injury.\textsuperscript{142}

These holdings worked to the disadvantage of an employee in a reopening in \textit{Commercial Drywall v. Wells}.\textsuperscript{143} The employee fell, fracturing both elbows, in 1987.\textsuperscript{144} In 1988, he reached a settlement agreement with the employer for a fifty and one-half percent disability, a settlement which was approved by the Board.\textsuperscript{145} Following this settlement, the employee reopened, claiming that he was now totally disabled.\textsuperscript{146}

\begin{itemize}
  \item \textsuperscript{134} Beale v. Faultless Hardware, 837 S.W.2d 893, 894 (Ky. 1992).
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id. at 896 (citing KY. REV. STAT. ANN. § 342.125(3) (Baldwin 1993)).
  \item \textsuperscript{141} Id. at 896.
  \item \textsuperscript{142} Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992).
  \item \textsuperscript{143} 860 S.W.2d 299 (Ky. Ct. App. 1993).
  \item \textsuperscript{144} Id. at 300.
  \item \textsuperscript{145} Id. at 299-300.
  \item \textsuperscript{146} Id. at 300.
\end{itemize}
Evidence indicated that the employee was not able to work between the time of the settlement and the reopening, although he had attempted to return to work on several occasions.\textsuperscript{147} On each such occasion, the employee was only able to work for approximately two weeks.\textsuperscript{148} The employee's treating physician testified that he released the employee to return to work on light duty after the settlement, but he never released him to return to his past work.\textsuperscript{149}

Based on this evidence, the ALJ found that the employee was totally occupationally disabled.\textsuperscript{150} However, the ALJ also determined that the employee had been totally disabled at the time he entered into the settlement.\textsuperscript{151} Therefore, the employee had failed to meet his burden of showing any increase in occupational disability.\textsuperscript{152}

The court held that there was substantial evidence to support the ALJ's findings.\textsuperscript{153} Both K.R.S. section 342.125(3) and \textit{Beale v. Faultless Hardware}\textsuperscript{154} clearly indicate that an approved settlement agreement is binding on the parties, but is not res judicata on a reopening. As set forth in K.R.S. section 342.125(3), "[t]he parties may raise any issue upon reopening and review of [a settlement] which could have been considered upon an original application for benefits."\textsuperscript{155}

In dicta, the court indicated that approval of a settlement should not be merely a rubber stamp.\textsuperscript{156} The ALJ should look behind the settlement agreement and use his or her approval power to deny the settlement if it is in the best interest of the worker to do so.\textsuperscript{157} However, the court recognized that, due to the sheer volume of claims, the ALJs cannot be expected to look behind every settlement agreement.\textsuperscript{158} The duty to look behind

\begin{flushleft}
\textsuperscript{147} Id. \\
\textsuperscript{148} Id. \\
\textsuperscript{149} Id. \\
\textsuperscript{150} Id. \\
\textsuperscript{151} Id. \\
\textsuperscript{152} Id. \\
\textsuperscript{153} Id. \\
\textsuperscript{154} 837 S.W.2d 893 (Ky. 1992). \\
\textsuperscript{155} \textit{Commercial Drywall}, 860 S.W.2d at 301 (quoting \textit{Ky. Rev. Stat. Ann.} § 342.125(3) (Baldwin 1993)). \\
\textsuperscript{156} Id. at 302. \\
\textsuperscript{157} Id. \\
\textsuperscript{158} Id.
\end{flushleft}
the agreement will only arise if there is sufficient reason to do so. As an example, the court cited the case at bar. The settlement agreement only recited the type of injury and the amount of settlement in barest terms, thus giving no reason for the ALJ to look beyond the agreement to see if it was equitable.

H. Death Benefits

The supreme court clarified an anomaly in the death benefit statutes in Layne v. Newberg. The issue presented was whether a widow is entitled to continued payment of benefits upon remarriage after the non-work-related death of her spouse. Kentucky Revised Statutes section 342.730 provides for payment of benefits to a spouse following the non-work-related death of an employee. Kentucky Revised Statutes section 342.750 provides for payment of benefits to a spouse following the work-related death of an employee. This latter statute also provides that such benefits will terminate upon remarriage of the surviving spouse, with the surviving spouse being entitled to a two-year indemnity upon remarriage. Kentucky Revised Statutes section 342.730 contains no such provisions.

The court held that permitting a widow whose spouse died of non-work-related causes to continue receiving benefits while stopping such benefits to a widow whose spouse "died in the line of duty" would be an absurdity. Therefore, a widow whose spouse dies of non-work-related causes will cease to receive benefits upon remarriage.

I. Retraining Incentive Benefits

In Peabody Coal Co. v. Hicks, the issue on appeal was whether or not an employee awarded retraining incentive benefits ("RIB")
may also be awarded medical benefits. The court held that RIB are compensation awards and may give rise to the obligation to pay medical benefits for treatment reasonably required either at the time of the award or in the future, even if the employee required no medical treatment at the time of the award. Such a result furthers the purpose of permitting the employee to obtain medical treatment as it becomes required rather than foregoing such treatment due to lack of funds.

However, the court of appeals denied a widow’s claim to RIB in Millay v. Kentucky Department of Mines and Minerals. The appellant was the widow of a mine inspector who contended that she was entitled to the RIB that her husband could have claimed. The ALJ found that the widow was entitled to fifty percent of those benefits, but the Board reversed, and the court of appeals affirmed. The court reasoned that K.R.S. section 342.732 provides that RIB is an award made with no regard to a worker’s disability. RIB are meant to encourage coal miners who have early stages of pneumoconiosis to seek employment outside of the coal industry; they are not disability-based benefits. However, the intent of the statutes granting continued benefits to survivors of a disabled worker is to supplement the loss of income the worker suffered by virtue of his or her disability. Since RIB do not serve this income replacement function, they are not payable to survivors of deceased workers.

J. Teledyne

The supreme court expanded its Teledyne-Wirz v. Willhite holding somewhat in Jett v. Peabody Coal Co. In Jett, the

170. Id. at 412-13.
171. Id. at 413.
173. Id. at 29.
174. Id. at 28-29.
175. Id. at 29.
176. Id.
177. Id.
178. Id.
179. 710 S.W.2d 858 (Ky. Ct. App. 1986). In Teledyne, the worker was found to be 100% occupationally disabled, but fifty percent of the disability was due to a preexisting, noncompensable injury. The prior noncompensable injury is included in the determination of whether there is total disability. It is only excluded in the apportionment of liability process.
180. 828 S.W.2d 646 (Ky. 1992).
employee was awarded a thirty-five percent disability in 1985, based on psychiatric impairment and degenerative disc conditions. Subsequently, the employee reopened his claim alleging an increase in disability. The ALJ, on reopening, found that the employee was 100% occupationally disabled. Fifteen percent of the additional disability was attributed to aggravation of the psychiatric impairment due to stresses of the injury, and the remainder was attributed to aggravation of the psychiatric impairment by stresses not related to the injury. The ALJ awarded lifetime benefits for the fifty percent disability related to the injury.

The court upheld the ALJ and stated that where a compensable condition is aggravated by work-related as well as non-work-related factors, the entire condition, including the non-work-related portion which became manifest concurrently with the work-related aggravation, must be considered when determining the disability rating.

K. Positional Risk Doctrine

The employee in Sewell v. Fayette County Board of Education was shot by her estranged husband while she was at work. The dispute which caused the shooting arose from the couple's pending divorce and was not in any way related to the employee's work activities. The ALJ dismissed the employee's claim and was upheld by the Board and the court of appeals. In upholding the prior decisions, the court discussed in detail the "positional risk" doctrine.

There are three categories of risk to which an employee can be exposed while in the course of employment: risks distinctly associated with employment (e.g., loss of a limb in a machine); risks distinctly personal (e.g., being shot by an estranged spouse);
and risks which are neutral.\textsuperscript{191} The first is compensable, the second is not compensable, and the third may be compensable if the employment puts the employee in a position to be injured by the neutral risk.\textsuperscript{192} Examples of this neutral risk category include an employee, on employer's work premises, who is injured by a stray bullet, a hurricane, or a mad dog.\textsuperscript{193} In these instances, there is no "reason" for the "assault" on the employee.\textsuperscript{194} The "assault" and attendant injuries are merely happenstance.\textsuperscript{195}

The determining factor appears to be whether or not the acts causing the injury are rational.\textsuperscript{196} If they are not rational and the employee was placed in the position of risk by his employment, then the injury is compensable.\textsuperscript{197} The positional risk doctrine treats only neutral risk cases and finds compensable those injuries which result from assaults whose origins are either wholly unknown (stray bullet) or not rationally explainable (attack by a mad dog).\textsuperscript{198}

\textbf{L. Occupational Disease}

There have been numerous stories in the media recently regarding "new building syndrome."\textsuperscript{199} In \textit{Champion v. Beale}, \textsuperscript{200} the supreme court dealt with the factors necessary to prove that an allergic reaction to a "new building" is compensable.

The employee in \textit{Champion} had a history of upper respiratory difficulties dating back to 1969.\textsuperscript{201} In 1977, she consulted with an allergist and was diagnosed as being allergic to numerous commonly-found substances.\textsuperscript{202} From 1984 to 1986, the employee taught in the new gymnasium at Farley Elementary School and was diagnosed in 1986 as suffering from bronchial intrinsic asthma.\textsuperscript{203}

\begin{itemize}
  \item \textsuperscript{191} Id. (quoting 1 Larson, supra note 56, at § 7 (1990)).
  \item \textsuperscript{192} Sewell, 40 Ky. L. Summ. 8, at 4.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Id.
  \item \textsuperscript{195} Id.
  \item \textsuperscript{196} Id.
  \item \textsuperscript{197} Id.
  \item \textsuperscript{198} Id.
  \item \textsuperscript{199} Is Your Office Making You Sick?, Executive Female, May-June 1990, at 32; Faye Rice, Do You Work in a Sick Building?, Fortune, July 2, 1990, at 86.
  \item \textsuperscript{200} 833 S.W.2d 799 (Ky. 1992).
  \item \textsuperscript{201} Id. at 800.
  \item \textsuperscript{202} Id.
  \item \textsuperscript{203} Id.
\end{itemize}
Testimony was presented indicating that new buildings have a greater accumulation of allergens and that these allergens subside with the passage of time.\textsuperscript{204} A specialist testified that the employee's exposure to allergens in the new gymnasium aggravated her pre-existing pulmonary and allergic problems.\textsuperscript{205} However, there was no conclusive proof presented indicating that the allergens were any different, either in make-up or quantity, than the allergens the claimant would encounter in the general environment.\textsuperscript{206}

The Kentucky Supreme Court had previously held that allergic reactions are compensable.\textsuperscript{207} In the \textit{Princess} case, the evidence indicated that the claimant encountered an allergen in the work place to a far greater degree than she would have encountered it in any other employment generally or outside that employment.\textsuperscript{208} The court distinguished \textit{Princess} because the employee in \textit{Champion} had not presented any evidence that she contacted an unusual allergen in the work place or that an allergen was present in unusually higher amounts in the work place than in the general environment.\textsuperscript{209} Furthermore, in \textit{Champion}, there was no showing that the claimant's work caused a sensitization to a particular allergen resulting in a permanently harmful change to her physical condition.\textsuperscript{210}

The court reiterated that an occupational disease, to be compensable, must result from an exposure occasioned by the nature of the employment and be related to a risk connected with that employment.\textsuperscript{211} The gym in \textit{Champion} may have contained some of the offending allergens, but there was no showing that the claimant's exposure to those allergens was a recognizable risk of the teaching profession.\textsuperscript{212} A finding that the employee could not function in the work environment, in and of itself, does not establish a causal connection between the work and the employ-

\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 801.
\textsuperscript{207} Princess Mfg. Co. v. Jarrell, 465 S.W.2d 45, 47 (Ky. 1971).
\textsuperscript{208} Id.
\textsuperscript{209} Champion, 833 S.W.2d at 802.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 803.
\textsuperscript{212} Id.
ee's disability. While the employee need not identify the offending substance which causes the allergic reaction, the employee must show that the irritant exists at work to a greater degree than in any other place in order to establish the necessary causal connection.

M. Suicide

In *Advance Aluminum Co. v. Leslie*, the employee suffered a back injury and, two years following the injury, committed suicide. The ALJ, ruling after the suicide, found that the employee had been totally and permanently disabled by the back injury. The employee's benefits were awarded to his widow, pursuant to statute.

The court rejected the argument that the employee's suicide barred any recovery. As the court correctly noted, K.R.S. section 342.610 provides that there can be no recovery if the employee intentionally injures or kills himself. However, as the court stated, this statute refers to a disability which results from the intentional act or suicide. In the case at bar, the employee's suicide was not the cause of his disability. His disability was caused by a work injury separate and apart from the suicide. Therefore, K.R.S. section 342.610 did not apply.

N. Disability Policy Offset

The employee in *Eastern Coal Corp. v. Mullins* received his full salary for three months following his injury and then received $892.23 per month under the pension/retirement plan provided by the employer at no cost to its employees. The terms of the plan provided that there would be an offset against plan benefits for benefits received from social security and/or workers' com-

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213. *Id.*
214. *Id.*
216. *Id.* at 3.
217. *Id.* (citing KY. REV. STAT. ANN. § 342.730(3) (Baldwin 1993)).
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
pensation. Under the plan, the employee received three months of full salary and the sum of $225.00 per week for the next year, and $140.00 per week thereafter for up to four years. In his original order, the ALJ allowed an offset credit in workers' compensation benefits to the employer for the disability plan benefits paid to the employee.

On reconsideration, the ALJ reversed himself, finding that the plan provided for offset to be taken against plan benefits, not against workers' compensation benefits. Therefore, the employer was not granted any offset against workers' compensation benefits for the monthly benefits paid pursuant to the plan. The Board and court of appeals agreed.

There was some discussion in this case regarding offset plans in general and relevant case law, notably South Central Bell Telephone v. George, Beth-Elkhorn Corp. v. Lucas, and Copher v. American Standard Co. In citing Beth-Elkhorn and George, the court indicated that two key factors allowing entitlement to credit are: "(1) the plan is fully funded and paid for by the employer and (2) the disability pension payments are made by the employer by reason of the [employee's] injury and resulting disability which arise from his employment as opposed to some unrelated reason." In his arguments before the Board and the court of appeals, the employee argued that the plan was not fully funded by the employer since the employee had to work for ten years to be vested in the plan. The employee also argued that the pension payments were made for reasons unrelated to employment since there was a provision for offset against social security benefits, benefits which can be awarded for numerous non-work-related reasons. While the court did not rely on these arguments in its decision, it cited them and may have been

225. Id. at 28.
226. Id.
227. Id.
228. Id. at 29.
229. Id.
230. Id.
234. Mullins, 845 S.W.2d at 29.
235. Id. at 30.
236. Id.
persuaded by them. Therefore, any such pension plans should be carefully reviewed to determine if they meet the requirements as set forth above.

O. Exclusive Remedy

Is an employer insulated from a civil rights suit by the workers' compensation exclusive remedy provisions? According to the supreme court in *Meyers v. Chapman Printing Co.*, the employer is not.

In *Meyers*, the claimant was discharged from her position as a sales representative and filed suit alleging sexual harassment during employment and a gender-based discharge. At the trial level, she was awarded $100,000.00 for her sexual harassment claim, based in part on an alleged panic disorder.

On appeal, the employer asserted that it was protected by the exclusive remedy language of K.R.S. section 342.690(1) which states that an employer's liability under K.R.S. 342 is exclusive and in place of all other liability of the employer to the employee. While the court recognized that a work-related psychological injury resulting in disability is compensable, it held that the employee's claim was for emotional distress caused by sexual harassment, not work-related disability.

Furthermore, the court held that the General Assembly was well aware of the existence of the workers' compensation statute when it enacted the Civil Rights Act. The Civil Rights Act is a specific act and the Workers' Compensation Act is a general one. Where a general statute and a specific statute deal with the same subject matter, the specific statute controls. Therefore, the employee is not estopped from recovering for her injuries under the Civil Rights Act. However, she might be

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237. *Id.*
238. 840 S.W.2d 814 (Ky. 1992).
239. *Id.* at 816.
240. *Id.*
241. *Id.* at 817.
242. *Id.*
243. *Id.* at 819.
244. *Id.*
245. *Id.* (citing 2A Norman J. Singer, Statutes and Statutory Construction § 51.05 (5th ed. 1992)).
246. *Meyers*, 840 S.W.2d at 819.
precluded from recovering under both.\textsuperscript{247} In essence, the court is telling such employees to choose their remedies.

\textbf{P. Attorney Fees}

In cases which are significant for the Plaintiff's Bar, the courts clarified the controlling date for determination of what attorney fees can be charged. In \textit{Hamilton v. Desparado Fuels, Inc.},\textsuperscript{248} the supreme court affirmed the ruling of the court of appeals which held that the amount of attorney fee chargeable for initial litigation of a claim is fixed at the time of the injury, not at the time the contract is executed.\textsuperscript{249} However, on reopening, the date the agreement for representation was signed fixes the amount of attorney fees which are chargeable.\textsuperscript{250}

\textbf{IV. CONCLUSION}

The area of workers' compensation law has experienced significant changes in the past year and a half. The courts have resolved old questions and confronted new topics. Various regulations have been enacted to prescribe the procedure for disputing a medical expense and for choosing a physician.

The court adopted a three-prong test for employee fraud, determined when TTD benefits could be suspended, and discussed the relationship between TTD benefits and vocational rehabilitation. Notice was held not to be a concern unless the lack of it was viewed as prejudicial. Strict compliance with appellate filing deadlines was stressed. The court of appeals held the neck to be part of the back and reiterated the standard of proof for establishing Special Fund liability.

Res judicata of settlement terms was held not applicable in litigation of a second injury or in reopening a claim. Consistency was obtained in terminating death benefits to remarried widows. RIB were held not to serve an income replacement function. The court reiterated that non-work-related factors are to be considered when determining an employee's level of disability. The court of appeals addressed the "positional risk" doctrine in detail,

\textsuperscript{247} Id.
\textsuperscript{248} 868 S.W.2d 95 (Ky. 1993).
\textsuperscript{249} Id. at 97.
\textsuperscript{250} Martin v. Louisville Free Public Library, 854 S.W.2d 790 (Ky. Ct. App. 1993).
and the supreme court confronted the phenomena of "new building syndrome." Suicide was found to bar recovery only if it was the cause of the disability.

Two issues which should be very important to practitioners were also addressed. These issues were the exclusivity of a workers' compensation action and attorneys' fees.

The overall tenor and result of both the regulations and the case law have been to clarify and streamline the procedural aspects of a workers' compensation claim. The decisions have also made the process more equitable to all of the parties and alleviated some inconsistencies and questions which have lingered up to this point.
A SUMMARY OF KENTUCKY EMPLOYMENT LAW DECISIONS

by Michael W. Hawkins*
and Corey M. MacGillivray**

I. INTRODUCTION

This article reviews important employment law decisions which were handed down during the survey period. This article encompasses selected employment law decisions and statutory changes that occurred during the 1990s.

II. EMPLOYMENT DISCRIMINATION

A. Sex and Race Discrimination

In Kentucky Center for the Arts v. Handley, the court of appeals clarified the role of objective and subjective factors in framing an employment discrimination case. The plaintiff, a black female, alleged unlawful sex and race discrimination when she was denied a promotion. The plaintiff occupied the position of ticket agent and sought a promotion to the position of ticket assistant manager, a position that she had actually held on an interim basis while another employee was on maternity leave. The employer awarded the position to a white male.

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1. This article summarizes Kentucky employment law cases that were decided between January 1, 1990 and July 1, 1993.
3. Id. at 699. The plaintiff brought suit under Louisville Ordinance No. 116, Series 1968, as amended by Ordinance No. 139, Series 1975. The court applied federal case law since the ordinance is similar to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2000(e)-17 (1988).
5. Id.
Citing federal case law, the court analyzed the facts under a three-step inquiry. If the plaintiff establishes a *prima facie* case, then the employer must, under the second step, articulate a "legitimate nondiscriminatory" reason for its actions. Once the employer has provided a reason for its decision, then the plaintiff must demonstrate that the reason given by the defendant is merely a pretext for its unlawful discrimination.

In this case, the defendant claimed that the plaintiff failed to establish a *prima facie* case because she did not prove that she was "as qualified" as the person to whom the defendant awarded the ticket assistant manager position. Citing the United States Supreme Court's decision in *Patterson v. McLean Credit Union,* the court ruled that it was not the plaintiff's "burden to persuade the Commission that she was as qualified as the applicant who filled the position." Instead, the first stage of the analysis should address objective factors, and the subjective factors should be reserved for the third stage. Because the plaintiff possessed a bachelor of science degree in theatrical arts, worked for the defendant as a ticket agent, and temporarily held the position which she sought, the court ruled that she was objectively qualified and that she satisfied her burden for the first step of the analysis.

Claiming that the plaintiff lacked self-confidence, reliability, and flexibility in her work schedule, the court ruled that the defendant satisfied its burden in the second step by articulating this legitimate nondiscriminatory reason. Entering the third

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6. *Id.*
7. *Id.* To establish a *prima facie* case, the plaintiff must show that: "(1) she is a member of a protected class, (2) she is qualified for and applied for an available position, (3) she did not receive the job, and (4) the position remained open and the employer sought other applicants." *Id.* (citing McDonnell-Douglas Corporation v. Green, 411 U.S. 702 (1981)).
8. *Id.* (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981)).
9. *Id.* (citing *Burdine,* 450 U.S. at 256).
10. *Id.*
13. *Id.* at 699-700 (citing Lynn v. Regents of the University of California, 656 F.2d 1337 (9th Cir. 1981), *cert. denied,* 459 U.S. 823 (1982)).
14. *Id.*
15. *Id.* at 700.
step, and the field of subjective factors, the court held that the plaintiff failed to prove that the reasons cited by the defendant were pretextual. Instead, the plaintiff lacked any evidence to substantiate "discriminatory intent" by the defendant when it failed to promote her.

B. Sexual Harassment

In Meyers v. Chapman Printing Co., the Supreme Court of Kentucky addressed four questions related to sexual harassment and discrimination. The first question the court answered was whether a plaintiff's claim for emotional damages is preempted under the exclusivity of Kentucky workers' compensation law. A claim of sexual discrimination allows an award of "actual damages," and one of the listed purposes behind the Kentucky statute includes "protect[ing] ... personal dignity and freedom from humiliation."

The court resolved the pre-emption issue by holding that the "workers' compensation statute preempts only common law tort claims and does not pre-empt a statutory civil rights claim." Because the Kentucky Civil Rights Act is a specific statute, and it allows a party to recover for actual injuries, including emotional distress and humiliation, a plaintiff's claim for emotional injuries in a sexual harassment case is not pre-empted.

The second question the supreme court addressed was whether a plaintiff is entitled to a jury trial under the Kentucky Civil Rights Act. The defendant claimed that, in the absence of a provision in the Kentucky Civil Rights Act allowing a jury trial,
the plaintiff was not entitled to a jury trial. The court held that in an action for damages, the Kentucky Constitution preserves “the ancient mode of trial by jury.” Because the Kentucky Civil Rights Act allows a plaintiff to “recover the actual damages sustained by him,” a plaintiff is entitled to a jury trial when bringing suit under the Kentucky Civil Rights Act; a separate provision in the Act allowing for a jury trial would be mere “surplusage.”

The third issue, whether the plaintiff’s evidence was sufficient to sustain a cause of action for sexual harassment, was an issue of first impression in Kentucky. Citing Meritor Savings Bank v. Vinson as the appropriate framework for a sexual harassment case, the supreme court ruled that a plaintiff survives a motion for a directed verdict if the employer’s conduct was “sufficiently severe or persuasive to alter the conditions of employment and create an abusive working environment.”

The fourth issue the court resolved was whether jury instructions in a sex-discrimination case are proper where a “but for” causation instruction is given, which may be interpreted by the jury as meaning “solely because of.” Holding that Kentucky utilizes a “bare bones” method for jury instructions, the “but for” instruction is proper because it does not mean that the jury must find sex discrimination was the only “motive for the employee’s discharge, but only that it was an essential ingredient.”

C. Retaliation

In Mountain Clay, Inc. v. Commission on Human Rights, a case of first impression in Kentucky, the plaintiff filed a charge with the Kentucky Commission on Human Rights charging her employer with sex discrimination in violation of Kentucky Re-

27. Id.
28. Id. (citing Ky. Const. § 7).
29. Id. (quoting KY. REV. STAT. ANN. § 344.450 (Baldwin 1993)).
30. Id.
31. Id. at 820.
34. Id. at 823.
35. Id. at 824.
37. Id. at 396.
vised Statutes (K.R.S.) section 344.040. The plaintiff and eight male employees were terminated by Mountain Clay for bringing beer onto the work site. Later, the male employees were reinstated, but the plaintiff was not. Four months after she filed the sex discrimination charge, Mountain Clay filed suit against the plaintiff to enjoin the Commission from holding a scheduled hearing and to require the plaintiff to post bond to cover Mountain Clay's costs associated with defending the lawsuit. The plaintiff, in response to Mountain Clay's motion, filed a second complaint, alleging retaliation, against Mountain Clay.

In the absence of guidance from Kentucky case law on the issue of retaliation, the court cited federal case law. Sustaining the Commission's findings that the real purpose for Mountain Clay's lawsuit was to expose the plaintiff to "fears of extreme financial hardship and to coerce her to drop or forego her claims of sex discrimination in retaliation against her for having filed her complaint," the court affirmed an award of $1,000 for the plaintiff's emotional injuries.

40. Id.
41. Id.
42. Id. Kentucky Revised Statutes § 344.280 states that it is unlawful "[t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter." Ky. Rev. Stat. Ann. § 344.280 (Baldwin 1993).

[In order to prove a *prima facie* case of retaliation under Title VII of the Civil Rights Act of 1964, the employee must establish that:

(1) he was engaged in opposition to practices made unlawful by Title VII or was a participant in a Title VII proceeding,
(2) his activity was protected,
(3) he was subjected to adverse treatment by the employer or labor union, and
(4) there was a causal connection between his opposition or participation and the retaliation.]

44. Id. at 397.
45. Id. at 398.
III. SMOKERS' RIGHTS

During this survey period, the Kentucky Civil Rights Act\textsuperscript{46} was amended to provide protection for employees who smoke. Under the Kentucky Civil Rights Act, an employer is prohibited from discriminating against a person because he or she is a smoker, so long as the person complies with the employer's workplace policy on smoking.\textsuperscript{47}

IV. WHISTLEBLOWER PROTECTION ACT

In \textit{Boykins v. Housing Authority of Louisville},\textsuperscript{48} the Supreme Court of Kentucky declined to apply the Whistleblower Protection Act\textsuperscript{49} to protect an at-will employee from being discharged

\textsuperscript{45} Id. at 398.
\textsuperscript{46} Ky. REV. STAT. ANN. §§ 344.010-990 (Baldwin 1993).
\textsuperscript{47} As amended, K.R.S. § 344.040 now reads:

It is an unlawful practice for an employer:

1. To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual’s disability, race, color, religion, national origin, sex, age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, so long as the person complies with any workplace policy concerning smoking;

2. To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual’s disability, race, color, religion, national origin, sex, or age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; or

3. To require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment, as long as the person complies with any workplace policy concerning smoking.

\textsuperscript{48} 842 S.W.2d 527 (Ky. 1992).
\textsuperscript{49} Ky. REV. STAT. ANN. § 61.102 (Baldwin 1993). The relevant portion of K.R.S. § 61.102 provides:

No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the attorney general, the auditor of public accounts, the general assembly of the Commonwealth of Kentucky or any of its members or employees, the legislative research commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate
for filing a negligence suit against her employer. The plaintiff, a secretary for the Housing Authority, alleged that her infant son was injured in an apartment owned and operated by the Housing Authority. Four months later, the plaintiff was terminated.

The plaintiff argued that K.R.S. section 61.102 should apply in her case, because her lawsuit against the Housing Authority was "a report of information regarding mismanagement and endangerment of public health and safety" by the Housing Authority. Ruling that the statute was "designed to protect employees from reprisal for the disclosure of violations of the law," the court held that a simple negligence action does not fall within the scope of the statute's protection.

V. DISCHARGE AGAINST PUBLIC POLICY

The Boykins case also provided the Supreme Court of Kentucky with the opportunity once again to broaden the public policy exception to the at-will employment relationship, but once again the court bowed to the strength of the terminable-at-will doctrine's foothold. The plaintiff, an at-will employee who was terminated for bringing a simple negligence suit against her employer, argued that the "open courts" provision in Section 14 of the Kentucky Constitution creates an exception to the ter-

body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, or endangerment of public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

KY. REV. STAT. ANN. § 61.102(1) (Baldwin 1993).

51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
57. Section 14 of the Kentucky Constitution provides that: "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.
minable-at-will doctrine.58 Several years earlier, in Firestone Textile Co. v. Meadows,59 the Kentucky Supreme Court held that an employee has an action for wrongful discharge if the discharge is in violation of a "fundamental and well-defined public policy as evidenced by existing law.... The public policy must be evidenced by a constitutional or statutory provision."60

Applying this framework to the plaintiff's case, the court held that the plaintiff was not unlawfully discharged in violation of public policy.61 Instead, "Section 14 has nothing to do with employment rights.... There is no employment-related nexus between the constitutional policy stated in Section 14 and Boykins' discharge. When Boykins filed suit against [the defendant] ... she found the court doors open to her."62

VI. EMPLOYMENT CONTRACTS

Lewis v. Bledsoe Surface Mining Co.63 involved the issue of damages in an action brought against an employer by an employee who was wrongfully discharged for filing a workers' compensation claim.64 In determining damages, the jury was required to find "the amount [the employee] would have earned from [the employer] but for the wrongful discharge, the amount he would have earned from other employment, and whether he exercised reasonable diligence to secure other employment during the relevant period."65 The employee presented little evidence about his attempts to gain other employment.66 The trial court denied the employer's motion for a directed verdict even though the plaintiff employee applied at less than one company per week from the time he was discharged until trial.67 The court of appeals reversed

58. Boykins v. Housing Auth. of Louisville, 842 S.W.2d 527, 529 (Ky. 1992).
59. 666 S.W.2d 730 (Ky. 1983).
60. Boykins, 842 S.W.2d at 731 (citing Firestone Textile Co. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983) (quoting Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983))).
61. Id. at 530.
62. Id.
63. 798 S.W.2d 459 (Ky. 1990).
64. Id. at 460.
65. Id.
66. Id. at 462.
67. Id.
the trial court's decision on the motion. The Supreme Court of Kentucky held that the plaintiff introduced sufficient evidence of an attempt to seek other employment to support the jury's verdict of damages.

The supreme court stated that the appropriate standard of review for reversing a verdict is whether it is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" Ruling that the trial court did not err in denying the employer's motion for directed verdict, the supreme court reversed the court of appeals and reinstated the judgment of the trial court, implying that a wrongfully discharged employee does not have to orchestrate an intensive job hunt for other employment. This is a dangerous message for employers.

VII. CONCLUSION

This survey demonstrates the continuing evolution in the area of employment law in Kentucky. With the cases and statutes discussed in this survey, along with new federal legislation, employers and their counsel must stay abreast of the changes affecting the workplace.

68. Id. at 460.
69. Id. at 461.
70. Id. at 461-62 (quoting NCAA v. Hornung, 754 S.W.2d 855, 860 (Ky. 1988)).
71. Id.
PROBATE LAW

by Robert J. Calvert*

I. INTRODUCTION

This article traces recent, significant probate developments\(^1\) in both the case law\(^2\) of Kentucky and in the legislative enactments of the Kentucky General Assembly.\(^3\) The purpose of this survey is to make the reader aware of the recent case law and legislative enactments in Kentucky and to speculate upon the ramifications, if any, and influences that such changes will have prospectively in the area of probate law.

II. THE CASE LAW

A. Kentucky Supreme Court Decisions

The Kentucky Supreme Court has handed down three significant decisions in the area of probate law since 1990. The first of these was *Harris v. Rock*.\(^4\) In *Harris*, the court faced the question of whether deposits by a husband into accounts jointly held with his children can defeat his surviving spouse's right under Kentucky Revised Statutes (K.R.S.) section 392.020 to receive one-half of the surplus personalty upon the husband's death.\(^5\)

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1. Other probate cases decided within this survey's time period but not discussed include: Ernst v. Shaw, 783 S.W.2d 400 (Ky. Ct. App. 1990); Burke v. Burke, 801 S.W.2d 691 (Ky. Ct. App. 1990); Knott v. Garriott, 784 S.W.2d 603 (Ky. Ct. App. 1990); Wood v. Wingfield, 816 S.W.2d 899 (Ky. 1991); Duncan v. Wold, 846 S.W.2d 720 (Ky. Ct. App. 1992); West v. Goldstein, 830 S.W.2d 379 (Ky. 1992); and Ratliff v. Higgins, 851 S.W.2d 455 (Ky. 1993).

2. This survey updates cases decided from January 1990 to August 1993.


4. 799 S.W.2d 10 (Ky. 1990).

5. *Id.* at 11.
In the *Harris* case, Rosa and Amos Rock were married and each of them had children by previous marriages. During the course of their marriage, Mr. Rock acquired numerous certificates of deposit, each account bearing his name and the name of his wife or respective child. At the time of his death, there were approximately $20,000 in joint accounts with each of his seven children and $20,000 in joint accounts with his wife. Following his death, Mrs. Rock filed this action to recover her dower interest in one-half of the personality of Mr. Rock, including the money in the various joint accounts, pursuant to K.R.S. section 392.020.

In a five-to-two decision, the Kentucky Supreme Court held the deposit of money by a decedent into joint accounts between the decedent and his children was subject to the dower interest of the widow. The surviving joint tenants argued that K.R.S. section 391.315 impliedly repealed the provisions of K.R.S. section 392.020. Kentucky Revised Statutes section 391.315 states: “Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created ...”

The court, however, found no conflict between K.R.S. section 392.020 and K.R.S. section 391.315, and instead relied on K.R.S.
section 392.020 as the basis of its decision.\footnote{17} Kentucky Revised Statutes section 392.020 gives the surviving spouse a one-half statutory interest in the decedent's surplus real and personal property.\footnote{18} In rejecting the application of K.R.S. section 391.315, the court stated that, when resolving a dispute between a decedent's estate and the surviving party to a joint account, there is a statutory limitation that the funds do not become the property of the surviving party if there is clear and convincing evidence of a different intention at the time the account was created.\footnote{19}

However, there is also an implied limitation in the law that the survivor cannot become the owner of the funds in the account upon the death of the other party if the party who deposited the funds is not legally entitled to dispose of them in such a manner.\footnote{20} Thus, the court held that funds on deposit in the joint accounts per K.R.S. section 391.315(1) do not belong to the surviving joint tenants if: (1) there is clear and convincing evidence of an intention to divest the widow of her statutory share or (2) the depositor was not legally entitled to make such a disposition of the funds.\footnote{21} The court found that such a disposition "creates a presumption of fraud upon the surviving spouse."\footnote{22}

In \textit{Harris}, the presumption arose out of a transfer of seven-eighths of the personal estate into a joint account and, in the opinion of the court, this "presumption of fraud" was not rebutted.\footnote{23} In examining the prior case law, the court emphasized the intent of the decedent in creating joint tenancy by stating: "[T]he widow's right to dower cannot be defeated by a gift by her spouse of all, or more than one-half, of his property to another with the intent to defeat the claims to dower."\footnote{24}

In 1992, the Kentucky Supreme Court again addressed the dower/curtesy problem. In \textit{Hannah v. Hannah},\footnote{25} the court was asked to decide if a widow who accepts the provisions of a will can also claim a right to her dower share.\footnote{26} In that case, Mrs.
Hannah brought an action against her deceased husband’s brother to recover $50,000 that her husband had transferred to a joint bank account in his and his brother’s names. The transfer occurred after the marriage. The widow, who was the sole beneficiary under her husband’s will, claimed the transfer was an oral trust for her benefit, but elected not to take a widow’s share against the will. She maintained that she was entitled to both the benefits under the will and her dower rights in the $50,000 that her husband gave away and thus was not part of his estate.

Kentucky Revised Statutes section 392.080(2) provides that a spouse may receive his or her share by will and through the dower or curtesy interest only if such an intention of the testator is ”plainly expressed in the will or necessarily inferable from the will.” If the widow is not satisfied with the provisions under the will, the widow must renounce it; otherwise, the widow is estopped from receiving her dower interest. The court reasoned that the plain language of the statute made it clear that a widow cannot take both her interest under the will and her statutory interest. Since the court found that the surviving spouse, after taking her share under the will, had no dower interest, it reasoned that she had no standing even to claim a fraudulent transfer.

In 1992, the high court of Kentucky also addressed a procedural issue relating to the administration of estates. Richardson v. Dodson involved the issue of whether the timely filing of a complaint by the decedent’s son in his individual capacity was sufficient under Civil Rule 15.03 to permit the subsequent amendment of the complaint, naming himself as the personal represen-

27. Id.
28. Id.
29. Id.
31. Id.
32. Hannah v. Hannah, 824 S.W.2d 866, 868 (Ky. 1992). A surviving spouse is protected from total disinherition by K.R.S. § 392.080. ”The purpose of the dower statute is to insure that the surviving spouse will not be left disinherited and destitute. It was not meant to utterly destroy the testator’s ability to give and devise his property as he or she desires, so long as the spouse was provided for.” Id.
33. Id.
34. Id.
35. 832 S.W.2d 888 (Ky. 1992).
tative, to relate back to the original filing of the complaint.\textsuperscript{36} In the \textit{Richardson} case, the decedent's son sued for the wrongful death of his mother.\textsuperscript{37} In his complaint, he alleged he was the natural son of the decedent.\textsuperscript{38} Thereafter, he was appointed administrator of the estate.\textsuperscript{39} Prior to the filing of any motion or responsive pleading, he filed an amended complaint, alleging his status as administrator of the decedent's estate.\textsuperscript{40} By this time, however, the "applicable statute of limitations had run."\textsuperscript{41}

The trial court sustained appellees' motion to dismiss "on grounds that the claim was time-barred."\textsuperscript{42} The appellate court held that, based on K.R.S. section 411.130(1), "which requires prosecution of wrongful death cases by the decedent's personal representative," and K.R.S. section 413.140(1)(e), "which allows a period of one year for the bringing of such actions, the amended complaint was not timely and did not relate back to the original complaint."\textsuperscript{43}

The \textit{Richardson} court held that the timely filing by decedent's son in his individual capacity was sufficient to toll the statute of limitations and permit relation back of the subsequent amendment naming him as plaintiff in his capacity as personal representative, although his appointment as personal representative occurred after expiration of the statutory period.\textsuperscript{44}

The court based its decision on the literal meaning of Civil Rule 15.03(1) and the court's earlier decision in \textit{Modern Bakery},

\begin{quote}
36. \textit{Id.} at 889. K.R.S. § 411.130(1) states:

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.

\textit{KY. REV. STAT. ANN.} § 411.130(1) (Michie/Bobbs-Merrill 1984). \textit{See Wheeler v. Hartford Accident & Indem. Co.}, 560 S.W.2d 816 (Ky. 1978), holding that all actions for wrongful death must be maintained by the personal representative of the deceased, although if the personal representative refuses to bring the action, the beneficiary may do so in his or her own name. \textit{Id.} at 819.

37. \textit{Richardson}, 832 S.W.2d at 889.

38. \textit{Id.}

39. \textit{Id.}

40. \textit{Id.}

41. \textit{Id.}

42. \textit{Id.}

43. \textit{Id.}

44. \textit{Id.}
\end{quote}
Inc. v. Brashear. Civil Rule 15.03(1) states: "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." In Modern Bakery, the court interpreted the relation-back amendment rule and developed a test for its application. The test provides:

As long as the real party in interest, by amended complaint, is substituted as a plaintiff after the statute of limitations has run on the original cause of action, the amendment of the complaint to substitute that party relates back, and the action by the new plaintiff is not barred.

The court concluded that the combination of Civil Rule 15.03(1) and the test set forth in Modern Bakery could lead to no other result than holding that the amendment by the son in his capacity as personal representative related back to the original filing of the complaint. In rendering its decision in Richardson, the court took into consideration that the purpose of the statute of limitation is served "when the notice of litigation is given within the period allowed," and that the plaintiff in Richardson was also a person entitled to be appointed administrator. The court stated that it did not have to decide a situation where the plaintiff was not a person eligible to be appointed.

B. Kentucky Court of Appeals Decisions

Not only did the Supreme Court of Kentucky further the interpretation of state probate law, but the Kentucky Court of Appeals rendered two noteworthy decisions as well.

In 1991, in James v. Webb, the Court of Appeals of Kentucky held that a safe deposit box was not an "account" or "other like

45. 405 S.W.2d 742 (Ky. 1966).
46. Richardson v. Dodson, 832 S.W.2d 888, 889 (Ky. 1992) (quoting Ky. R. Civ. P. 15.03(1)).
47. Id. (quoting Modern Bakery, 405 S.W.2d at 743).
48. Id. at 889-90.
49. Id. at 890 (citing Nolph v. Scott, 725 S.W.2d 860 (Ky. 1987)).
50. Id. at 889.
51. Id.
arrangement” as defined in K.R.S. section 391.300(1),\textsuperscript{53} which entitles the survivor to sums remaining on deposit at the death of a party to a joint account pursuant to K.R.S. section 391.315(1).\textsuperscript{54} Also, the safe deposit lease agreement naming the husband and wife as tenants in common did not create an ownership interest in the contents of the box so as to transfer title of bearer bonds found in the box to the wife upon his death.\textsuperscript{55} Thus, joint interest was created in the box, but not its contents.\textsuperscript{56}

In the Webb case, the wife, as administratrix of her husband’s estate, appealed from judgment of the trial court ruling that bearer bonds found in a safe deposit box shared by husband and wife were assets of husband’s estate.\textsuperscript{57}

The court acknowledged K.R.S. section 391.315(1), which states that on the death of a party to a joint account, any sums left in the account belong to the surviving party, not the decedent’s estate, “unless there is clear and convincing evidence of a different intention at the time the account\textsuperscript{56} is created.”\textsuperscript{59} However, the court asserted that a safe deposit box and those items within the box, including the bearer bonds, “create a situation [more] analogous to a bailment, rather than a bank account,” thus reasoning that K.R.S. sections 391.300 and 391.315 were not applicable.\textsuperscript{60}

The wife next argued that the “language of the lease agreement created an ownership interest in the contents of the box.”\textsuperscript{61} Since there was no similar case on point, the court was forced to look outside the Commonwealth for guidance. Having done so, the court found that the majority of states hold that “absent specific language creating a joint tenancy with right of survivorship in

\textsuperscript{55} Webb, 827 S.W.2d at 704.
\textsuperscript{56} Id. at 706.
\textsuperscript{57} Id. at 703.
\textsuperscript{58} "Account’ is defined as a ‘contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangements.’' Id. at 704 (quoting Ky. Rev. Stat. Ann. § 391.300(1) (Michie/Bobbs-Merrill 1984)).
\textsuperscript{61} Id.
the contents of the box, the lease agreements govern access to the box and not ownership of the contents.”

Thus, the court adopted the rule that the language of the typical lease contract for the rental of a safe deposit box, as in Webb, “was meant to govern access to the box and protect the bank from liability for alleged wrongful access, but not to enunciate any rights in the contents.”

In 1992, the Kentucky Court of Appeals, in Vega v. Kosair Charities Committee, Inc., addressed the issue of whether the phrase “issue of the body,” when used in a testamentary instrument, included adopted children. In Vega, the guardian of the estate of Brian Vega commenced this litigation by filing a complaint in which he alleged that Brian was the “issue of the body” of his adopted mother.

The court held that the use of this term in a will showed an intent to exclude, not include, adopted children. The court noted K.R.S. section 199.520(2), which states that an adopted child “shall be deemed the child of the petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting the child the same as if born of their bodies.”

However, the court opined that the policy of permitting persons to pass on their property as they see fit “takes precedence over the policy expressed in K.R.S. section 199.520(2).”

62. Id. at 705.
63. Id. at 706.
64. 832 S.W.2d 895 (Ky. Ct. App. 1992).
65. Id. at 897. Also at issue in Vega, but not discussed in this survey, were the issues of whether the district court lacked jurisdiction to decide the contested probate matter or matters provided by statute to be commenced in circuit court, and whether the district court ruling was res judicata on that issue. The court held that the district court did lack such jurisdiction and, therefore, its ruling was not res judicata.
66. Id. at 895-96.
67. Id. at 897 (citing Breckinridge v. Skillman’s Trustee, 330 S.W.2d 726 (Ky. 1959)) (adopted children are presumed to be within the class designated in a will as “children,” “heirs,” or “heirs at law,” unless a contrary intent is shown).
68. KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).
69. Vega, 832 S.W.2d at 897. See also KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).
70. Vega, 832 S.W.2d at 897 (citing Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340, 344 (Ky. Ct. App. 1967)) (individual adopted by a life beneficiary as his child was not an heir entitled to take remainder of trust under will providing that upon death of last surviving beneficiary, remainder should be distributed to “my then surviving heirs” according to the laws of descent and distribution).
III. STATUTORY AMENDMENTS AND ENACTMENTS

The 1992 Kentucky General Assembly did very little in the way of statutory amendments regarding probate law. There were only three relevant changes enacted by the Kentucky legislature. K.R.S. section 391.030, providing for the descent of personal property of an intestate decedent and a spousal exemption for the surviving spouse and children, was amended to read as follows: "The exemption provided in this section applies where the husband or wife dies testate." 72

Prior to this change, the spousal exemption applied only when a decedent died (1) intestate; (2) testate, but will was renounced by the surviving spouse; or (3) testate, but with administration dispensed. 73 Now the exemption, where applicable, is generally available in cases of testacy or intestacy.

Perhaps the most significant change in Kentucky occurring in either the case law or statutory enactment was the addition of K.R.S. section 395.617, 74 which allows the filing of a proposed settlement by the fiduciary of an estate. Prior to this enactment, a fiduciary could only file a settlement which met the requirements of K.R.S. section 395.610. 75 Such settlements are accountings, after the fact, containing all receipts and disbursements made during the administration of the estate accompanied by receipts and vouchers for all disbursements made. Since approval of such settlements occurred after expiration of the period of time for the filing of exceptions, the risks to the fiduciary were significant. A proposed settlement will eliminate the risk of making disbursements later disapproved by the court, and should prove to be useful where disbursements are likely to be challenged by an interested party or the court.

Additionally, the Kentucky legislature amended a related statute, K.R.S. section 395.620. Paragraph two (2) was added to read: "A hearing on a settlement filed in conformity with an approved proposed settlement made under K.R.S. 395.617 shall not be necessary." 76

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IV. CONCLUSION

The Kentucky Supreme Court, in its three significant decisions in the area of probate law since 1990, has addressed and clarified such issues as the effect of dower on joint and survivorship accounts, dower as it relates to a spouse's right to elect against the will, and the relation back of the filing status of an administrator in a wrongful death suit. Likewise, the appellate court made notable decisions in the areas of safe deposit boxes and adopted children as these issues relate to testamentary language and intent.

While the Kentucky legislature did little in the way of statutory changes, the revision of K.R.S. section 395.617, allowing for a proposed settlement, will aid fiduciaries in the administration of their respective estates.
COMMON SENSE IS NO LONGER A STRANGER IN THE HOUSE OF KENTUCKY INSURANCE LAW

by James R. Kruer* and David J. Goetz **

I. INTRODUCTION

The Kentucky Supreme Court, in what could arguably be described as the most important, if not the most dramatic, change in Kentucky insurance law during 1993, overturned a prior decision of the court of appeals dealing with settlement in underinsured motorist cases.1 The court’s decision in Coots v. Allstate Insurance Co.2 represents a full-circle change from the previous state of the law which had been articulated in Kentucky Central Insurance Co. v. Kempf,3 In Kempf, the Kentucky Court of Appeals had held that a tort victim who settles with a tortfeasor before obtaining a judgment has abrogated his right to underinsured motorist benefits.4 Such a position is contrary to the usual goal of encouraging settlements, and the Kentucky Supreme Court’s decision to overrule Kempf makes sense from a practitioner’s point of view. This article examines this important holding in Coots, after first reviewing several other noteworthy Kentucky insurance law cases which were recently decided.

II. REPARATION BENEFITS

In State Farm Mutual Automobile Insurance Co. v. Harris,5 three Tennessee residents were travelling in the Commonwealth

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2. Id.
4. Kempf, 813 S.W.2d at 831.
when an automobile crossed the center line, striking their vehicle. Another automobile, driven by a non-resident uninsured motorist, then struck the Harris's car from behind. In two separate suits, the Harrises obtained judgments against the other drivers for their injuries. The insurer of the car that crossed the center line paid its policy limits.

The Harrises then sought to receive benefits through the Kentucky Assigned Claims Bureau. The trial court entered summary judgment against the Assigned Claims Bureau, and State Farm Mutual Automobile Insurance was assigned the claim. The insurer appealed the trial court's judgment, arguing that the Harrises were not entitled to basic reparation benefits from the Assigned Claims Bureau, or in the alternative, the amount received should be reduced by any payment received by the Harrises for their injuries from their own automobile insurance, which was carried through Tennessee Farmers Mutual Insurance Company.

The court of appeals noted that Kentucky Revised Statutes (K.R.S.) section 304.39-030 provides that every person injured through the use or maintenance of an automobile in the Commonwealth of Kentucky is entitled to basic reparation benefits under the Motor Vehicle Reparations Act, unless he or she has rejected the limitation on his rights to recover his damages in tort. These benefits provide reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of an automobile. The court stated that under K.R.S. section 304.39-040(1), these benefits are to be paid regardless of fault. In addition, they are not restricted to those qualifying as basic reparation insureds.

6. Id. at 50.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id. at 50-51.
rejected in writing their tort rights, pursuant to K.R.S. section 304.39-060(4).\textsuperscript{17} In addition, they were not deemed to have rejected these rights by maintaining security equivalent to that provided by K.R.S. section 304.39-110.\textsuperscript{18} The court stated that under K.R.S. section 304.39-110(1)(c), the requirement of security for payment of tort liabilities is fulfilled by providing the basic reparation benefits as defined by K.R.S. section 304.39-020(2).\textsuperscript{19} Because Tennessee is not a no-fault insurance state, Tennessee Farmers is not licensed to do business in Kentucky, and Tennessee Farmers policies do not provide basic reparation benefits, the court held that the Harrises had not rejected the limitation on their tort rights.\textsuperscript{20}

The court then stated that under K.R.S. section 304.39-160(1)(b), persons entitled to benefits may receive them through the Kentucky Assigned Claims Bureau if basic reparation benefits applicable to the injury cannot be identified.\textsuperscript{21} Because the Harrises were injured by an uninsured non-resident and they did not have basic reparation coverage, the court found that no basic reparation insurance benefits could be identified.\textsuperscript{22} The court affirmed the trial court's judgment that the Harrises were entitled to these benefits through the Assigned Claims Bureau.\textsuperscript{23}

The court dismissed State Farm's second argument that the amount received by the Harrises should be reduced by the amount received under their policy with Tennessee Farmers.\textsuperscript{24} Because Tennessee Farmers was not licensed to do business in the state of Kentucky, the court held that State Farm had no right of subrogation to any amount paid to the Harrises by this insurer.\textsuperscript{25}

\section*{III. NOTICE OF CANCELLATION}

Another important insurance law issue was decided by the court of appeals in 1993. In the case of \textit{Kentucky Farm Bureau...}
Insurance Co. v. Gearhart, the court of appeals examined the adequacy of a cancellation notice issued by an automobile insurer. The insured had an automobile insurance policy with the insurer and requested the cancellation of coverage as to his current vehicle and the addition of coverage on a new vehicle. Shortly thereafter, he received cancellation notices from the insurer, which included the policy number and make of his previously insured vehicle. Several months later, the new vehicle was involved in an accident and the insurer refused to pay or defend the subsequent action, claiming that the policy had been cancelled. The court of appeals held that a cancellation notice of a policy must include:

proper designation of the vehicle covered ... to alert the ordinary and reasonable person that coverage is about to expire, unlike the mere indication of a policy number, which the vast majority of people simply do not know. As a result, the legislature must have intended to require proper designation of the covered vehicle for cancellation to be effective.

The court, by way of offering some degree of protection to insureds threatened with the cancellation of their automobile coverage, held that where a proper designation of the vehicle is missing from a cancellation notice, the notice is inadequate as a matter of law, and this is not an issue to be submitted to a jury for a factual determination.

IV. RESIDENCY

In a fact-specific case of first impression, Perry v. Motorists Mutual Insurance Co., the Supreme Court of Kentucky held that for purposes of underinsured motorist coverage, the issue of residency was a question of fact and not a question of law. In Perry, the insured's daughter lived with her boyfriend for three to four weeks before their marriage and was killed in a traffic

27. Id.
28. Id. at 908.
29. Id.
30. Id. at 909.
31. Id.
32. Id.
33. 860 S.W.2d 762 (Ky. 1993).
34. Id. at 765.
accident approximately twelve hours after they were married. The father, as administrator of the estate, sought underinsured motorist benefits from his automobile insurer, Motorists Mutual. The carrier denied the claim, asserting that the daughter was not a “resident” of the father’s household and, therefore, was not entitled to coverage. The term “resident” was not defined in the policy.

The jury at the circuit court trial found that the daughter was a resident of her father’s household and that Motorist Mutual’s insurance coverage would apply. The court of appeals reversed, stating that where underlying facts are not in dispute, the question of residency is a matter of law for the court. The Kentucky Supreme Court granted discretionary review.

Several Kentucky cases have examined what constitutes legal residency. The supreme court in Perry held that in a case involving the denial of insurance coverage on the basis of residency, the intent of the decedent should be “primary in determining her residence” and “[w]here different inferences may be drawn from undisputed facts, intent is a question of fact and not of law.” The court stated that an individual can have more than one place of residence by maintaining a permanent place of residence while temporarily living elsewhere. Because there were several possible inferences as to the intent of the daughter, the court held that her residency was a question of fact for the jury. In addition, the insurance policy did not define the term “resident,” and ambiguous terms in contracts of insurance “must be construed in a manner as to favor coverage rather than restrict it.” The supreme court reversed the judgment of the court of

35. Id. at 764.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. See Ellison v. Smoots, Adm’r., 151 S.W.2d 1017 (Ky. 1941) (legal residency is based on fact and intention); Old Reliable Ins. Co. v. Brown, 558 S.W.2d 190 (Ky. Ct. App. 1977) (defining residence as a “factual place of abode or living in a particular locality”).
44. Id. at 765.
45. Id.
46. Id.
appeals and reinstated the verdict of the jury and the circuit court.47

V. SETTLEMENT IN UNDERINSURED MOTORIST CASES

This article now turns to the recent decision which presents the greatest change in Kentucky insurance law, Coots v. Allstate Insurance Co.,48 and examines the issues which arise when an insured wishes to settle with an underinsured tortfeasor's carrier prior to obtaining a judgment. Coots involved two cases, consolidated on appeal, in which the trial courts precluded the insureds from receiving underinsured motorist benefits after they had settled with tortfeasors in exchange for full releases.49 The injured policyholders had sought to recover from the insurers the balance of their damages, up to their underinsured motorist coverage limits.50 In both instances, the trial courts denied the policyholders' claims on the basis of the Kentucky Court of Appeals opinion in Kentucky Central Insurance Co. v. Kempf,51 and awarded summary judgment to the insurers.52

In Kempf, an insurance policyholder's son was at fault in an automobile accident which injured a third party, Jesse Marie Holcomb.53 Holcomb reached settlement with the Kempfs and their automobile insurer and released the Kempfs from any liabilities arising from the accident, but reserved her claim against her own automobile insurer, Kentucky Central Insurance Co., for underinsured motorists benefits.54 Kentucky Central paid its underinsured motorist policy limits to Holcomb, and then filed an action against Kempf seeking subrogation.55

The circuit court granted the Kempf's motion to dismiss, which asserted that Holcomb was required to obtain a judgment before she could receive underinsured motorists benefits and Kentucky

47. Id.
48. 853 S.W.2d 895 (Ky. 1993).
49. Id. at 896-97.
50. Id.
52. Coots, 853 S.W.2d at 896.
53. Kempf, 813 S.W.2d at 830.
54. Id.
55. Id. at 831.
Central had made a payment it was not obligated to make. The court of appeals affirmed, holding that K.R.S. section 304.39-320 "requires that an insured must obtain a judgment before claiming underinsurance benefits from its insurer." The court reasoned that because Kentucky is not a direct action jurisdiction and the statute's language is plain and not ambiguous, an injured party must enforce a judgment against the defendant's indemnitor before claiming underinsurance benefits from his own insurer. The court also stated that this requirement removes confusion because insurers will know that they need not be concerned about bad faith or unfair claims settlement charges by requiring their insureds to get a judgment, and that insureds will be aware that by settling claims against the other party, they will waive their right to underinsured motorist benefits.

The Kentucky Supreme Court's holding in *Coots* turned on its interpretation of the word "judgment" as used in the underinsured motorist statute. In overruling the literal interpretation of "judgment" in *Kempf*, the court borrowed one of the more memorable lines in Kentucky case law history from Justice Palmore, who stated in *Cantrell v. Kentucky Unemployment Insurance Commission*, "[W]e do not believe the circumstances of this case require any fol do rol about strict or liberal construction in order to arrive at the correct solution. When all else is said and done, common sense must not be a stranger in the house of the law."
The court outlined the policies and purposes of the Motor Vehicle Reparations Act as stated in K.R.S. section 304.39-010, which include the encouragement of "prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation" and the reduction of "the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system." The court overruled *Kempf* because the purposes of the Motor Vehicle Reparations Act, the duty to negotiate for payment of underinsured motorist coverage under the Unfair Claims Settlement Practices Act, and the protection against unlawful acts and deceptive practices under the Consumer Protection Act would be undermined by a strict interpretation of the term "judgment" in K.R.S. section 304.39-320. The court held that underinsured motorist coverage is not abrogated when an injured policyholder attempts to settle with the tortfeasor and his carrier for the policy limits in his liability coverage, so long as he notifies his carrier of his intent to do so, advises the carrier of the proposed settlement, and provides an opportunity for the carrier to protect its rights to subrogation. In order to protect its subrogation rights, the insurer could substitute its own payment to its insured equal to the tentative settlement benefits before the release of the tortfeasor. This approach makes "common sense" because it upholds the purposes of the Motor Vehicle Reparations Act and provides incentives to the parties to make prompt settlement.

VI. CONCLUSION

If the relative importance of a calendar year, in the context of a field of law, was measured by the volume of case law published,
then 1993 would not be seen as a very noteworthy year for insurance law. However, it is clear that 1993 will stand as a year in which the courts exercised their common sense when reviewing insurance law cases. Carriers assigned claims by the Kentucky Assigned Claims Bureau must pay basic reparation benefits to parties injured in the Commonwealth without subrogation against a non-licensed, out of state insurer; an insurer must provide adequate notice to its insured when cancelling a policy; the issue of residency for underinsured motorist coverage is a question of fact; and, practitioners representing tort victims may once again work toward settling cases with the tortfeasor without relinquishing their clients' rights to receive underinsured motorist benefits. As always, many questions remain open, but 1993 was definitely a step in the right direction.
SURVEY OF KENTUCKY FAMILY LAW DECISIONS
RENDERED IN 1993

by Lowell F. Schechter*

I. INTRODUCTION

While property division and spousal support were the family law issues most frequently litigated in the Kentucky appellate courts earlier in the 1990s,1 child support and custody issues predominated in 1993.2 In fact, the most significant Kentucky Supreme Court family law decision of the year was its decision concerning child custody in Squires v. Squires,3 where a majority, composed of six justices, upheld a trial court award of joint custody and issued an opinion which strongly supported the concept of joint custody. While the court stopped short of mandating that trial courts “consider joint custody first,”4 the majority expressed its belief that a trial court should not deny joint custody simply on the basis of present antagonism between the parents, but should instead base its decision on the “likelihood of future cooperation between the parents.”5

Other significant substantive decisions included Dotson v. Dotson,6 where the supreme court concluded that a trial court had erred in awarding a non-working husband with meager job skills only 15% of the marital property and in denying him any maintenance. Also significant was Commonwealth v. Welch,7 where the supreme court held that a mother could not be convicted of criminal abuse for the use of illegal drugs during pregnancy.8

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2. See infra text accompanying notes 107-222.
3. 854 S.W.2d 765 (Ky. 1993).
4. Id. at 769.
5. Id.
6. 864 S.W.2d 900 (Ky. 1993).
7. 864 S.W.2d 280 (Ky. 1993).
8. As Welch is primarily a criminal law case, it is not dealt with in detail in this family law survey.
The supreme court also dealt with a number of procedural issues. In *Goldman v. Eichenholz*, the court held that mandamus cannot be used to attack a final court judgment dissolving a marriage. Additionally, in *Pettit v. Raikes*, the court held that prohibition cannot be used in an intrastate custody case to challenge a venue decision.

The court of appeals rendered two decisions in 1993 which are currently being reviewed by the Kentucky Supreme Court. In *Greathouse v. Shreve*, the court of appeals affirmed an award of custody of a nine year old boy to his maternal grandmother instead of his natural father, holding that where a parent has surrendered the care and custody of his child to a grandparent and has then acquiesced in such custody for an extended period of time, the trial court does not have to determine that the parent is "unfit" before awarding custody to the grandparent. The trial court instead can apply the "best interests of the child" standard, which is normally reserved for custody disputes between two parents. The court of appeals also held, however, that where custody is awarded to the grandparent, the grandparent's income should be taken into account in deciding the amount of child support the non-custodial parent is obligated to pay.

In *Hill v. Courtney*, a divided court of appeals held that a county attorney is not required to represent a custodial parent who is seeking to modify a child support award, unless that parent is either indigent or receiving Aid to Families with Dependent Children (AFDC) benefits.

Two additional court of appeals decisions provided further guidance on the proper application of the 1990 Kentucky child support guideline legislation. In *Wiegand v. Wiegand*, the court

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9. 851 S.W.2d 463 (Ky. 1993).
10. 858 S.W.2d 171 (Ky. 1993).
11. These cases are noted here because they raise important issues currently before the supreme court; these cases are not discussed in detail below, however, because the court of appeals opinions have been ordered not to be published.
13. Id. at *2.
14. Id.
15. Id.
17. Id. at *3.
of appeals held that where a custodial parent, seeking an increase in child support payments from the non-custodial parent, established that the non-custodial parent’s support obligation under the guidelines was at least 15% greater than the non-custodial parent was currently obligated to pay, the trial court could not refuse to apply the guidelines and to modify support simply on the grounds that there had been no material change of circumstances since the initial award. Instead the trial court must apply the guidelines and provide specific reasons for any deviation from the amount of support determined by the guidelines.

In Downey v. Rogers, the court of appeals held that a non-custodial parent, who was seeking a decrease in his support obligation to the custodial parent but could not establish that his support obligation under the guidelines was at least 15% less than he was currently obligated to pay, could not overcome the resulting presumption against modification by arguing that a large increase in his consumer debt, brought about by voluntary purchases, was a material change in circumstances.

Three other court of appeals decisions addressed jurisdictional issues raised by interstate child custody and support disputes. In Dillard v. Dillard, where the custodial parent and child had moved out of Kentucky after the divorce, the court of appeals found that the Kentucky court retained jurisdiction for the purpose of modifying custody. In Cann v. Howard, where the custodial parent and child had moved to Kentucky after an Ohio divorce, the court of appeals held that the Kentucky court did not acquire jurisdiction to modify child support and visitation. In Karahalios v. Karahalios, where a parent remaining in Tennessee had filed for divorce prior to the filing by the parent who had moved with the child to Kentucky, the court of appeals held...

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20. Id. at 337.
21. Id.
22. 847 S.W.2d 63 (Ky. Ct. App. 1993).
23. Id.
that the Kentucky court had jurisdiction to decide custody. The court of appeals, however, vacated the lower court's order awarding custody because the lower court had failed to fulfill its statutory obligation to communicate with the Tennessee court before proceeding with its hearing.\footnote{Id. at 461.}

\section*{II. THE DIVORCE PROCESS}

In \textit{Goldman v. Eichenholz},\footnote{851 S.W.2d 463 (Ky. 1993).} the Kentucky Supreme Court held that a party to a marriage could not use mandamus to challenge the trial court's action in dissolving that marriage.\footnote{Id. at 465.} The husband, Barry Bernson's, first petition for divorce had been dismissed by agreement of the parties after extensive individual and joint marriage counseling.\footnote{Id. at 464.} There was further joint counseling, but Barry nevertheless decided to refile his petition for divorce.\footnote{Id.}

The wife, Honi Goldman, denied that the marriage was irretrievably broken and requested a reconciliation conference under Kentucky Revised Statutes (K.R.S.) section 403.170(2)(b).\footnote{Id. Kentucky Revised Statutes § 403.170(2)(b) provides in part: "The Court, at the request of either party shall, or on its own motion may, order a conciliation conference ...." \textnormal{KY. REV. STAT. ANN. § 403.170(2)(b) (Baldwin 1990).}} The trial court rejected Honi Goldman's request for a reconciliation conference on the grounds that it was "superfluous in light of the extensive counseling which had already occurred."\footnote{Goldman v. Eichenholz, 851 S.W.2d 463, 464 (Ky. 1993).} The court granted Barry Bernson's petition for divorce, deciding that the marriage was irretrievably broken.\footnote{Id.}

Precluded from directly appealing the trial court's decision by K.R.S. section 22A.020(3), which provides that "there shall be no review by appeal or by writ of certiorari from that portion of a final judgment, order, or decree of a circuit court dissolving a marriage,"\footnote{Id. Kentucky Revised Statutes § 22A.020(3)'s elimination of appeals of court decisions dissolving marriages is authorized by Section 115 of the Constitution of Kentucky, which provides that "the General Assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage." \textnormal{KY. CONST. § 115.}} Honi Goldman sought to challenge the decision by bringing a mandamus action to set aside the divorce decree and
to require a reconciliation conference before the trial court could decide that the marriage was irretrievably broken.\textsuperscript{36}

Writing for a unanimous supreme court, Justice Lambert rebuffed this challenge and held that where the legislature, acting within its power, had extinguished a right to appeal, the court would not allow this legislative decision to be circumvented by issuance of a writ of mandamus.\textsuperscript{37}

In \textit{Karahalios v. Karahalios},\textsuperscript{38} the court of appeals rejected Michael Karahalios' attempt to set aside a divorce granted to Sheila Karahalios by the Wayne County Circuit Court. Michael and Sheila had been married in Tennessee and had remained domiciled there until September, 1990, when Sheila separated from Michael and moved to Kentucky.\textsuperscript{40} Michael filed for divorce in Tennessee on February 26, 1991, asking for custody of the couple's one child, Kristina.\textsuperscript{41} Sheila filed for divorce in Kentucky on March 13, 1991, also asking for custody of Kristina.\textsuperscript{42} The Wayne County Circuit Court entered an order dissolving the marriage and awarding Sheila custody of Kristina on June 26, 1991.\textsuperscript{43}

Michael filed a motion to have the Wayne Circuit Court's order set aside, arguing that Sheila had been guilty of fraudulent conduct, including: misrepresenting the date on which she moved to Kentucky in order to satisfy the 180-day minimum residence requirement; misstating Michael's last known address to the court to prevent his being notified of the Kentucky divorce action; and failing to give the warning order attorney the addresses of Michael's place of business and of his Tennessee lawyer, once again to prevent Michael's gaining notice of the divorce action.\textsuperscript{44}

The trial court found that Sheila had been resident in Kentucky for the requisite days and had given the court Michael's correct

\begin{itemize}
\item \textsuperscript{36} Goldman, 851 S.W.2d at 464-65.
\item \textsuperscript{37} Id. at 465 (citing Merrick v. Smith, 347 S.W.2d 537 (Ky. 1961)). Justice Lambert also found that appellant had failed to make the requisite showing of irreparable harm or great injustice. \textit{Id.}
\item \textsuperscript{38} 848 S.W.2d 457 (Ky. Ct. App. 1993).
\item \textsuperscript{39} \textit{Id.} at 460.
\item \textsuperscript{40} \textit{Id.} at 458.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 458-59.
\item \textsuperscript{44} \textit{Id.} at 459.
\end{itemize}
last known address.\textsuperscript{46} The court of appeals held that there was sufficient evidence to support both of these findings.\textsuperscript{46} The court of appeals also held that Sheila was under no obligation to supply the warning attorney with additional addresses, given that Civil Rule 4.06 only required providing the last known address of the defendant.\textsuperscript{47} The Kentucky Supreme Court, in Unknown Person ex rel. Englert v. Whittington,\textsuperscript{48} had rejected the idea of imposing additional requirements not contained in the rule itself.\textsuperscript{49}

\section*{III. PROPERTY DIVISION}

\subsection*{A. Characterization of Property}

In 1993, the court of appeals considered two cases of first impression regarding the proper characterization of property as marital or non-marital, holding that a police officer's pension could be considered marital property for the purpose of using it as a set-off in dividing marital property in Glidewell v. Glidewell,\textsuperscript{50} but that a railroad worker's disability benefit payments could not be classified as marital property in Elkins v. Elkins.\textsuperscript{51} Glidewell also raised the issue of the proper characterization and treatment of non-vested pension benefits, an issue raised on a number of occasions in the Kentucky courts, but never definitively resolved.\textsuperscript{52}

In Glidewell v. Glidewell,\textsuperscript{53} at the time of their 1991 divorce, Danny and Carol Glidewell had been married for almost fifteen years, with one child born of the marriage.\textsuperscript{54} Danny had been employed by the Louisville Police Department for the past thirty-three months and had a non-vested retirement account valued at

\begin{itemize}
\item \textsuperscript{45} Id. at 459.
\item \textsuperscript{46} Id. at 459-60.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} 737 S.W.2d 676 (Ky. 1987), \textit{cert. denied}, Whittington v. Cunnagin, 485 U.S. 979 (1988).
\item \textsuperscript{49} Karahalios, 848 S.W.2d at 459.
\item \textsuperscript{50} 859 S.W.2d 675 (Ky. Ct. App. 1993).
\item \textsuperscript{51} 854 S.W.2d 787 (Ky. Ct. App. 1993).
\item \textsuperscript{52} Glidewell, 859 S.W.2d at 678. The issue was last raised in the court of appeals in 1992 in Fry v. Kersey, 833 S.W.2d 392 (Ky. Ct. App. 1992). For further discussion, see Schechter, \textit{supra} note 1, at 663.
\item \textsuperscript{53} 859 S.W.2d 675 (Ky. Ct. App. 1993).
\item \textsuperscript{54} Id. at 676.
\end{itemize}
The trial court classified this pension fund as marital property, and while the trial court did not directly award Carol a share in Danny's pension account, it did use the pension fund as a set-off against other marital property awarded to Carol in making an equal division of the approximately $45,000 in marital property.\(^{56}\)

On appeal, Danny first contended that the trial court was precluded from classifying the pension as marital property and using it as a set-off against marital funds awarded to his wife by K.R.S. section 427.120, which provides that: "No part of any police or firefighter's pension fund ... shall, before or after its order for distribution to any person entitled thereto, be seized or levied upon by any writ or decree for the payment of any debt, claim or judgment against the beneficiary of the fund."\(^{57}\)

The court of appeals, however, unanimously concluded that K.R.S. section 427.120 did not bar the classification of a police or fire officer's pension as marital property and use as a set off, giving three reasons for its decision.\(^{58}\) First, the court looked to the construction of similar statutes in other jurisdictions and found that courts in sister states had held that their statutes did not bar classification of pensions as marital property, reasoning that the legislative purpose behind immunizing pensions from third party attack was to protect not only the officer, but the officer's family as well.\(^{59}\) Second, the court found that the Kentucky Attorney General had issued an opinion that Police and Firefighter's Retirement Fund benefits might be attached to satisfy a child support order, reasoning that these benefits were intended to protect not only the officer, but the officer's family as well, and the court believed the same reasoning should be extended to a spouse's right to share in that portion of the pension accumulated during the marriage.\(^{60}\) Finally, the court found that the Kentucky legislature had expressly and unequivocally exempted teachers' pensions from consideration as marital property in K.R.S. section 161.700(2)\(^{61}\) and concluded that had the Kentucky

\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id. at 677 (citing KY. REV. STAT. ANN. § 427.120 (Baldwin 1991)).
\(^{58}\) Id. at 677-78.
\(^{59}\) Id.
\(^{60}\) Id. at 678.
\(^{61}\) Kentucky Revised Statutes § 161.700(2) provides:
legislature intended to exempt police and firefighters' pensions from consideration as marital property, the legislature would have used similar language. 82

Danny also objected to the trial court's valuation of the pension, arguing that since the pension had not yet vested it had a dollar value of zero on the date of the decree. 63 The court of appeals noted that its prior decisions concerning the treatment of non-vested pensions were not necessarily consistent. 64 In 1979, in Ratcliff v. Ratcliff, 65 the court held that a non-vested pension could not be divided as marital property, but could be considered as an economic circumstance to be taken into account in dividing other marital property under K.R.S. section 403.190. 66 However, in 1986, in Poe v. Poe, 67 the court held that a non-vested pension could be considered marital property, but because its value was speculative, division of the pension must be deferred until the pension had vested. 68 The court of appeals in Glidewell decided to follow the Poe approach of considering the non-vested pension marital property, but deferring its division until it is vested, explaining:

We feel this solution more equitable for both parties in that the non-pensioner spouse will receive exactly that portion of the pension to which she is entitled (instead of perhaps receiving an inadequate amount of marital property), while the pensioner spouse will not be unjustly penalized by the unequal distribution of marital property in the event the pension does not vest. 69

The court of appeals, therefore, found that the trial court had erred in awarding Carol a share of Danny's pension before it had vested. 70

Retirement allowance, disability allowance, accumulated contributions, or any other benefit under the retirement system shall not be classified as marital property pursuant to KRS § 403.190(1). Retirement allowance, disability allowance, accumulated contributions, or any other benefit under the retirement system shall not be considered as an economic circumstance during the division of marital property in an action for dissolution of marriage pursuant to KRS § 403.190(1)(d).

KY. REV. STAT. ANN. § 161.700(2) (Baldwin 1990).

62. Glidewell, 859 S.W.2d at 678.
63. Id.
64. Id.
66. Id.
67. 711 S.W.2d 849 (Ky. Ct. App. 1986).
68. Id. at 856.
69. Glidewell, 859 S.W.2d at 679.
70. Id. The court of appeals calculated that the pension should have vested by the
In Elkins v. Elkins, James Elkins claimed that the trial court had erred in classifying as marital property that property which he claimed was the proceeds of two lump sum Railroad Retirement disability benefits awards. The court of appeals noted that in Hisquierdo v. Hisquierdo, the United States Supreme Court had held that federal law prohibited state courts from considering the prospective right to such federal benefits when dividing the marital estate. The court of appeals held that Railroad Retirement disability payments retain their status as non-marital property even after they have been received, so long as the payments can be traced into identifiable assets.

B. Equitable Distribution of Property

Dotson v. 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, wherein the couple spent most of their fifteen years of marriage not working, but living off the income from Bonita's businesses. 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 almost $200,000 in marital property, which was only 15% of the marital estate.

The court of appeals reversed, holding that the trial court had erred in two ways in applying K.R.S. section 403.190(1). The trial court had placed too much emphasis on the financial contri-
bution of each party and had not given enough weight to non-financial contributions to the marriage. More importantly, the trial court had failed to take into account the other factors required by the statute: the value of the property set aside to each spouse, the duration of the marriage, and the economic circumstances of each spouse.

The Kentucky Supreme Court, with Justices Wintersheimer and Reynolds dissenting, agreed that the trial court had erred. Justice Spain, writing for the court, placed great weight on the fact that the marital estate was not generated by the active efforts of either Bonita or David, both of whom were voluntarily unemployed during most of the marriage. The marital estate was instead accumulated from the unearned income from Bonita's premarital investments. The court stated: "Under such circumstances the question of respective contributions by the spouses is simply inapplicable."

IV. MAINTENANCE

A. Maintenance Awards

Dotson v. Dotson also involved the question of whether the husband was entitled to a maintenance award under K.R.S. section 403.200(1). The trial court had denied maintenance to David Dotson on the basis that he was only forty years old, had no apparent health problems, and had not proved that he was unable to support himself through appropriate employment.

80. Id.
81. Id. These factors militated for a much more balanced division of assets, given that Bonita had far more separate property than David, they had been married a long time, and 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).
82. Dotson, 864 S.W.2d at 902-03.
83. Id. at 902.
84. Id.
85. Id.
86. 864 S.W.2d 900 (Ky. 1993).
87. Kentucky Revised Statutes § 403.200(1) provides that a court may grant maintenance to a spouse only if that spouse lacks sufficient property to provide for his or her reasonable needs and is unable to support him or herself through appropriate employment. KY. REV. STAT. ANN. § 403.200(1) (Baldwin 1990).
88. Id. at 901. The trial court added that David, content to live off Bonita's income, had enjoyed a marital sinecure for the past thirteen or fourteen years, and must now look to earn his own living. Dotson v. Dotson, No. 91-CA-2745-MR, 1992 WL 354892, at *1-*2 (Ky. Ct. App. Dec 4, 1992).
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. 89

The supreme court endorsed the courts of appeals’ reasoning. The court first agreed with the legal standard applied by the court of appeals, stating that, “the maintenance provisions of the dissolution statute are designed to provide income to a spouse commensurate with his or her needs at a standard of living comparable to that enjoyed during the marriage.” 90 Second, the court affirmed the court of appeals’ assessment of the evidentiary record, that David’s limited education, work history, and job skills made it unlikely that he could earn enough to meet this standard. 91 The supreme court added that in assessing David’s chances of finding any employment, “the court can certainly take judicial notice of our area’s present high unemployment rate and economic recession.” 92

In contrast to Dotson, in Robbins v. Robbins, 93 a case involving a seventeen-year marriage which had produced two children, it was the wife, Modesta Robbins, who had the eighth-grade education and limited work history, while the husband, Larry, had shown himself capable of earning $30,000 per year. 94 The trial court, finding that even if Modesta could obtain employment she would be limited to a minimum wage job, awarded her $500 per month permanent maintenance. 95

The court of appeals rejected the husband’s appeal, holding that given the length of the marriage, the standard of living the

89. Dotson, No. 91-CA-2745-MR, 1992 WL 354892, at *3. 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 workplace: 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.

Id. at *4–*5.
90. Dotson, 864 S.W.2d at 902.
91. Id.
92. Id.
93. 849 S.W.2d 571 (Ky. Ct. App. 1993).
94. Id.
95. Id.
parties enjoyed during the marriage, the small amount of marital property to be distributed, and the wife's limited earning capacity, it could perceive no abuse of discretion in the trial court's decision to award the wife $500 per month as permanent maintenance.96

B. Enforcement of Maintenance Awards

In Blakeman v. Schneider,97 when James and Della Blakeman were divorced, the Jefferson County Circuit Court awarded Della approximately half of the $1,259,692 marital estate and $1,500 per month maintenance for twenty-four months.98 In December 1989, James was held in contempt by the trial court for what the court found was a deliberate plan to avoid paying the required maintenance to Della, as well as debts to business creditors.99 The court, however, was unable to enforce its contempt order because James was in New Zealand.100

In February 1993, in a hearing with James present before the court, the Jefferson County Circuit Court found that James owed Della $200,000 and that he was capable of paying this amount and ordered that he be jailed until he paid this amount.101 James appealed this order first to the court of appeals and then to the Kentucky Supreme Court, arguing that the evidence demonstrated that he did not have the financial ability to pay.102 The Kentucky Supreme Court held that the inability of a contemnor to pay the amount necessary to purge his contempt is a matter of fact and the trial court's finding of fact should not be set aside unless clearly erroneous.103 The supreme court found that in this case the record contained substantial evidence supporting the trial court's determination that James Blakeman had

96. Id. at 572. It should be noted that because of serious deficiencies in appellant's brief, including appellant's failure to make references to the specific places in the videotaped record of the six hearings conducted by the trial court and domestic relations commissioner which would provide support for the factual statements made in the brief, the court of appeals limited its review to the content of the parties' briefs. Id. at 571-72.
97. 864 S.W.2d 903 (Ky. 1993).
98. Id. at 905.
99. Id.
100. Id.
101. Id.
102. Id. at 904.
103. Id.
the capacity to pay. The supreme court also found that the trial court's contempt order was civil rather than criminal in nature, because its purpose was to compel James to pay rather than to punish him for any past failure to pay. The court held that given that James had the ability to purge his contempt and free himself from his imprisonment by tendering an amount of money which he had the ability to pay, the trial court and the appellate court were correct in denying him relief.

V. JURISDICTION OVER CHILD CUSTODY, SUPPORT, AND VISITATION ISSUES

For purposes of analysis, the four cases falling in this category can be further sorted into three separate patterns of movement: in Pettit v. Raikes, the custodial parent and children moved from one location to another within Kentucky; in Dillard v. Dillard, the custodial parent and child moved from a location within Kentucky to a sister state; and in Cann v. Howard and Karahalios v. Karahalios, the custodial parent and child moved from a sister state to Kentucky.

In Pettit v. Raikes, Tina Pettit and Johnnie Hawkins were divorced by the Hart County Circuit Court in 1986, with Tina being awarded custody of the parties' three children. Tina and the children moved to Jefferson County, where, in 1992, she brought an action seeking an increase in child support. Johnnie Hawkins then filed an action in the Hart Circuit Court, seeking to modify the 1986 custody award. Tina claimed that Johnnie had sought to modify custody in retaliation for her seeking increased support for the children. She moved to dismiss the custody case, but the Hart Circuit Court, noting that the father

104. Id. at 906.
105. Id.
106. Id. at 906-07.
107. 858 S.W.2d 171 (Ky. 1993).
110. 851 S.W.2d 463 (Ky. 1993).
111. 858 S.W.2d 171 (Ky. 1993).
112. Id.
113. Id.
114. Id.
115. Id.
and other members of both families still lived in that county and also finding no compelling reason to decline the case in favor of another venue in Kentucky, denied Tina’s motion to dismiss.\textsuperscript{116} 

Tina then sought a writ of prohibition from the court of appeals, seeking to prevent the Hart Circuit Court from conducting the modification hearing.\textsuperscript{117} The court of appeals, however, denied the writ of prohibition and the Kentucky Supreme Court affirmed this denial.\textsuperscript{118} 

The Kentucky Supreme Court reasoned that Tina could not challenge the Hart Circuit Court’s jurisdiction.\textsuperscript{119} Given that this child custody dispute was wholly intrastate, any circuit court in Kentucky, including the Hart Circuit Court, had jurisdiction over the dispute.\textsuperscript{120} The only issue Tina could raise was that the Hart Circuit Court was not the proper venue.\textsuperscript{121} However, the supreme court had previously ruled, on similar facts, in \textit{Shumaker v. Paxton}\textsuperscript{122} that a dissatisfied party could not raise an interlocutory challenge to a venue determination by writ of prohibition, but could only “proceed by appeal from a final judgment.”\textsuperscript{123} The court found good policy reasons for abiding by this restriction: 

As a practical matter, in view of the frequency of intrastate family relocation during and after the dissolution of marriage, the occurrence of disputes such as this is not unusual. If appellate courts should undertake to decide every venue dispute via a petition for prohibition, they would do little else.\textsuperscript{124} 

In \textit{Dillard v. Dillard},\textsuperscript{125} Claire and Dennis Dillard were divorced in Allen County, Kentucky in 1986, with Claire being awarded custody of the parties’ son Nicholas.\textsuperscript{126} However, after Nicholas was found to have been abused by Claire’s boyfriend, the Allen Circuit Court transferred custody to Dennis.\textsuperscript{127} Shortly thereafter,

\textsuperscript{116} Id. at 172. 
\textsuperscript{117} Id. 
\textsuperscript{118} Id. 
\textsuperscript{119} Id. 
\textsuperscript{120} Id. 
\textsuperscript{121} Id. 
\textsuperscript{122} 613 S.W.2d 130 (Ky. 1981). 
\textsuperscript{123} \textit{Pettit}, 858 S.W.2d at 172. 
\textsuperscript{124} Id. 
\textsuperscript{125} 859 S.W.2d 134 (Ky. Ct. App. 1993). 
\textsuperscript{126} Id. at 135. 
\textsuperscript{127} Id.
Dennis moved out of state with Nicholas, first to South Carolina and then to Tennessee, but the Kentucky court continued to exercise jurisdiction.\textsuperscript{128} In 1992, Claire moved to modify the 1987 custody order transferring custody to Dennis.\textsuperscript{129} The Allen Circuit Court determined that Nicholas was seriously endangered by the domestic violence and abusive atmosphere in Dennis' home, that Claire and her new husband could offer Nicholas a better, more stable home, and that any harm likely to be caused by the change in custody would be outweighed by the advantages it would bring, and therefore awarded Claire custody.\textsuperscript{130} On appeal, Dennis did not attack the Allen Circuit Court's findings, but did challenge the Allen Circuit Court's jurisdiction to hear the case.\textsuperscript{131}

The court of appeals held that the trial court had jurisdiction to modify custody.\textsuperscript{132} The trial court had relied on K.R.S. section 403.420(1)(b), which states that a court has jurisdiction to make a child custody determination if it is in the best interest of the child that the court assume jurisdiction because the child and at least one contestant have a significant connection with the state and there is substantial evidence within the state concerning the child's care and welfare.\textsuperscript{133} Judge McDonald, writing for the majority, found while Dennis had alleged that Claire no longer lived in Kentucky, there was no evidence to this effect.\textsuperscript{134} As to Nicholas, the facts that he was born in Kentucky and lived there for his first four years, that many of his relatives still lived in Kentucky, that he frequently visited these relatives in Kentucky, and that the Kentucky court had continued to be involved in custody and visitation matters, supported the trial court's finding that Nicholas retained a significant connection with Kentucky.\textsuperscript{135} Judge McDonald concluded that given the child and one parent had significant contacts with Kentucky, the mere fact that the child and the other parent lived in another state did not, as a

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 135-36.

\textsuperscript{131} Id. at 136.

\textsuperscript{132} Id. at 137.


\textsuperscript{134} Dillard, 859 S.W.2d at 136-37.

\textsuperscript{135} Id. at 137.
matter of law, divest the Kentucky trial court of jurisdiction to modify its custody order.\textsuperscript{136}

Judge Wilhoit, dissenting, did not disagree with the majority’s conclusion that Kentucky had significant contacts with the mother and child, but argued that the purpose of the Uniform Child Custody Jurisdiction Act (UCCJA) was to assure litigation take place in the state with the closest connection to the child and his family, and that, based on the record in this case, South Carolina was the state with the closest connection.\textsuperscript{137}

In \textit{Cann v. Howard},\textsuperscript{138} Tonda Howard and Steven Cann were divorced in Allen County, Ohio in March 1989, with Tonda being given custody of the parties’ son Mark.\textsuperscript{139} The Ohio court continued to assert jurisdiction over the parties, finding Tonda in contempt for interfering with Steven’s visitation rights in August 1989.\textsuperscript{140} Meanwhile, Tonda had already moved to Greenup County, Kentucky, where in April 1990, she filed a motion to modify visitation and child support.\textsuperscript{141} The Greenup Circuit Court denied Steven’s objections to its jurisdiction and modified both the Ohio court’s visitation and child support orders.\textsuperscript{142}

The court of appeals, however, reversed the circuit court, holding that it did not have subject-matter jurisdiction over the visitation order nor personal jurisdiction over Steven in regard to the child support order.\textsuperscript{143} The court of appeals found that subject-matter jurisdiction over visitation was controlled by the Federal Parental Kidnapping Prevention Act,\textsuperscript{144} which barred a Kentucky court from interfering with a sister state’s custody determination unless the sister state’s court no longer had jurisdiction or had declined to exercise its jurisdiction to modify the custody determination.\textsuperscript{145} In the instant case, the Ohio court continued to have jurisdiction because Steven remained domiciled in Ohio and the Ohio court manifested its acceptance of continuing

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} 850 S.W.2d 57 (Ky. Ct. App. 1993).
\textsuperscript{139} Id. at 58.
\textsuperscript{140} Id. at 59.
\textsuperscript{141} Id. at 58-59.
\textsuperscript{142} Id. at 59.
\textsuperscript{143} Id. at 63.
\textsuperscript{145} Cann, 850 S.W.2d at 59.
jurisdiction through its August 1989 contempt order against Tonda. The court of appeals, therefore, instructed the Greenup Circuit Court to adopt one of two alternatives on remand: (1) refuse Tonda's request to modify the Ohio court's decree until Tonda could prove that the Ohio court either no longer had jurisdiction or had declined to exercise it, or (2) request directions from the Ohio court on how to resolve the modification issue.

As to the issue of whether the Greenup Circuit Court had the personal jurisdiction over Steven so as to order him to pay increased child support, there was "no question" that Steven had not been personally served with process in Kentucky and that he did not have sufficient contacts with Kentucky to justify long-arm jurisdiction. The Greenup Circuit Court, nevertheless, decided that when Steven had appeared to defend against the modification of his visitation rights he had waived his defense of lack of personal jurisdiction. The court of appeals, however, strongly disagreed, maintaining that "one ought to be able to defend one's right to visitation with one's children without submitting to in personam jurisdiction."

In Karahalios v. Karahalios, Michael Karahalios, who remained in Tennessee, filed for divorce in Tennessee before Sheila, who had moved to Kentucky with daughter Kristina, filed in Wayne County, Kentucky. The Kentucky court reached a decision first, dissolved the marriage, and awarded custody of Kristina to Sheila. Michael appealed and ultimately succeeded in having the court of appeals overturn the custody order.

The court of appeals rejected Michael's first argument, that the Wayne Circuit Court did have subject matter jurisdiction over the custody issue. Kentucky Revised Statutes section 403.420(1)(a) permitted a Kentucky court to exercise jurisdiction if Kentucky was the child's "home state." "Home state" was

146. Id. at 61.
147. Id. at 61-62.
148. Id. at 62.
149. Id.
150. Id. at 63.
151. 848 S.W.2d 457 (Ky. Ct. App. 1993).
152. Id. at 458.
153. Id. at 458-59.
154. Id. at 461.
155. Id. at 460-61.
156. Id. at 460.
defined as the state where the child had lived with a parent for at least six months preceding the commencement of the action, and the Wayne Circuit Court had made the necessary factual determination that Kristina and her mother had lived in Kentucky for more than six months before the divorce action was filed.\textsuperscript{157}

The court of appeals, however, agreed with Michael's other argument—that the Wayne Circuit Court had failed to fulfill its obligation under K.R.S. section 403.450(3) to communicate with the Tennessee court where an action had been initiated prior to the Kentucky action to determine the most appropriate forum before proceeding to render a judgment on its own.\textsuperscript{158} The circuit court's failure was serious in that it had "resulted in a predicament that the UCCJA was enacted to prevent, namely, jurisdictional competition and lack of cooperation with a court of another state."\textsuperscript{159} Because of this failure, the court of appeals vacated the award of custody and remanded the case, directing the circuit court to communicate with its Tennessee counterpart, and instructing the court to "keep in mind that the best interests of Kristina should be put foremost in any future proceedings, and that she is a child, not a pawn in a game of inter-jurisdictional oneupmanship."\textsuperscript{160}

VI. CHILD CUSTODY

\textit{Squires v. Squires}\textsuperscript{161} involved a very short marriage in which Rosemarie and Paul Squires lived together only four months before separating, yet nevertheless produced a child.\textsuperscript{162} The Domestic Relations Commissioner found that, while both Rosemarie and Paul would be good parents, they were unable to agree or to cooperate with each other to the extent necessary to make a joint custody award feasible and, therefore, awarded sole custody to Rosemarie.\textsuperscript{163} The Hardin Circuit Court reversed and awarded joint custody, stating that it was the court's policy to follow the national trend and award joint custody whenever possible.\textsuperscript{164} The

\textsuperscript{157} Id.
\textsuperscript{158} Id. at 461.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} 854 S.W.2d 765 (Ky. 1993).
\textsuperscript{162} Id. at 767.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
trial judge recognized that the parties had not been cooperating, but still went ahead with an award of joint custody based on his belief that it was in the child's best interests to keep continued contact with both parents, and that the parents would be kept "on their best behavior" by the threat of a modification order giving custody to the other parent. 165

Judge Schroder's majority opinion in the court of appeals strongly endorsed the trial court judge's policy of favoring joint custody, as he argued that joint custody could be beneficial to the child, the parents, and society at large. 166 Judge Huddleston's dissent argued that the parties had not lived together long enough to establish the foundation of mutual trust and cooperation necessary for joint custody, and warned that it was dangerous to award joint custody where it was not certain that the parents could cooperate effectively, because if the parents could not put aside their personal enmity, the child could be victimized by a joint custody arrangement. 167

The Kentucky Supreme Court granted discretionary review and in April 1993, issued a six-to-one decision upholding the award of joint custody in Squires. 166 Justice Lambert's majority opinion, which was strongly supportive of the joint custody alternative, construed K.R.S. section 403.270(4) to mean that a court should award joint custody if the court was reasonably satisfied that for the child the positive aspects outweighed the

165. Id.

Joint custody recognizes that, although one parent may have primary physical possession of the child, both parents share the decision making in major areas concerning the child's upbringing, such as which school to attend, etc, a role traditionally enjoyed by both parents during the marriage. Joint custody is also a natural progression of our no-fault divorce concept (KRS § 403.140(c)), recognizing that both parties may be fit parents but not compatible to be married to each other. A divorce from a spouse is not a divorce from your children, nor should custody decisions be used as a punishment. Joint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's upbringing.

Id. at *2 (citation omitted).

167. Id. at *4. Judge Huddleston also cited a number of authorities on child-custody who had been interviewed in a recent Wall Street Journal article for the proposition that there was no longer "a trend" toward joint custody, given the problems and difficulties that had been revealed in the attempts to implement joint custody on a broad scale.

negative. 169 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. 170

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.” 171 He further stated his belief that joint custody should only be awarded when the parents were 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. 172

_Basham v. Wilkins_ 173 involved a non-marital relationship between Anna Basham and Roy Wilkins which resulted in the birth of a boy, Matthew Wilkins, in December of 1987. 174 Anna filed an action against Roy in Meade District Court to establish paternity and to set child support. 175 An agreed judgment was entered in June 1988, wherein Roy admitted paternity and agreed to pay child support. 176 Roy then petitioned the Meade District Court for visitation, and an agreed order was entered in July 1988, which gave Roy visitation every other weekend and alternative holidays. 177 Throughout these proceedings, however, no formal determination of custody was ever made by the court. 178

In November 1990, Roy filed a petition requesting permanent custody of Matthew, alleging that Anna and her husband were not properly caring for Matthew and that it would be in Matthew’s best interest for Roy to have custody. 179

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169. _Id._ at 770.
170. _Id._ at 769.
171. _Id._ at 771.
172. _Id._ at 772-75. Another point of controversy between the judicial proponents and opponents of joint custody is the proponents’ argument that joint custody is preferable to sole custody, because the court can always modify to sole custody if joint custody does not work, which the opponents counter with the argument that the instability caused by such modifications is detrimental to the best interests of the children involved.
174. _Id._
175. _Id._
176. _Id._
177. _Id._ at 491-92.
178. _Id._
179. _Id._
The Domestic Relations Commissioner, acting on the belief that an initial custody determination in favor of Anna had been implicitly made in the previous paternity action, treated Roy's petition as a request for modification of custody rather than as a request for an initial determination of custody. The Commissioner therefore applied the "proof of serious endangerment" standard required for such modification under K.R.S. section 403.340(2)(c), rather than the "best interest of the child" test utilized in initial determinations under K.R.S. section 403.270. The Commissioner concluded that Roy failed to meet the burden of showing serious endangerment.

The Meade Circuit Court agreed with the Commissioner in applying the serious endangerment standard, but differed from the Commissioner in concluding that the evidence presented concerning Anna's serious manic-depressive mental illness along with her husband's inappropriate physical disciplining of Matthew did establish serious endangerment. The Meade Circuit Court awarded custody to Roy, and Anna appealed.

Judge Schroder, writing for a unanimous court of appeals, first traced the general history of how custody was determined in regard to children born out of wedlock. He concluded that the traditional preference given to the mother of the illegitimate child was no longer viable, and the "best interests of the child" standard applied to all initial custody determinations between parents.

Judge Schroder next examined the history of the instant case and concluded that the Domestic Relations Commission had erred in treating the question before the court as one of modification of custody previously determined in the paternity action. The district court in the paternity action had never made a custody determination in which it considered the best interests of the child. Moreover, the district court did not have the power to

180. Id.
183. Basham, 851 S.W.2d at 492.
184. Id.
185. Id.
186. Id. at 492-93.
187. Id. at 492.
188. Id.
189. Id.
make such a custody determination, as the judicial power to
determine custody was restricted to the circuit court.\textsuperscript{190}

Because the Meade Circuit Court was making an initial deter-
mination of custody, the "best interests of the child" test was
the one to be applied.\textsuperscript{191} Judge Schroder noted that where, as in
this case, the mother had voluntarily assumed custody for a
considerable period of time before the father brought suit, the
length of time spent with the mother and the bonding that had
occurred during this time were significant factors in her favor
under the "best interests of the child" test, but found that in
this case there was other, stronger evidence against her.\textsuperscript{192}
Believing that there was substantial evidence to support the trial
court's finding of fact and ultimate decision to award custody to
the father, the court of appeals upheld the trial court's award,
even though the trial court had applied the incorrect legal stan-
dard.\textsuperscript{193}

VII. MODIFICATION OF SUPPORT UNDER THE CHILD
SUPPORT GUIDELINES

In \textit{Wiegand v. Wiegand},\textsuperscript{194} when Kenneth and Marcie Wiegand
were divorced in 1983, Kenneth "agreed to pay child support of
$125 per month per child until each of the parties' two children
reached eighteen years of age."\textsuperscript{195} Kenneth's "monthly support
obligation was increased to $160 per child in 1989 and to $170
per child in 1990."\textsuperscript{196} In 1992, Marcie petitioned for an increase
in child support from $170 to $334 per month for the one child
still under eighteen, based on child support guidelines enacted
in 1990.\textsuperscript{197}

While the Christian County Circuit Court acknowledged that
the fact that Kenneth's obligation under the child support guide-
lines was at least 15% greater than his current child support
obligation created a rebuttable presumption for modification un-

\textsuperscript{190}. \textit{Id.} at 493 (citing \textit{Cummins v. Cox}, 799 S.W.2d 5 (Ky. 1990) and \textit{Sumner v. Roark},
836 S.W.2d 434 (Ky. Ct. App. 1992)).
\textsuperscript{191}. \textit{Id.}
\textsuperscript{192}. \textit{Id.} at 493-94.
\textsuperscript{193}. \textit{Id.}
\textsuperscript{194}. 862 S.W.2d 336 (Ky. Ct. App. 1993).
\textsuperscript{195}. \textit{Id.}
\textsuperscript{196}. \textit{Id.}
\textsuperscript{197}. \textit{Id. See KY. REV. STAT. ANN. § 402.210-215} (Baldwin 1990).
der K.R.S. section 403.213(2), the trial court concluded that the presumption was rebutted by Kenneth’s evidence showing there had been no significant increase in his income nor any other material change in the economic circumstances of the parties. The trial court evidently believed that its conclusion that there had been no material change in circumstances rendered the child support guidelines inapplicable and that it, therefore, was under no obligation to spell out on the record its reasons for deviating from the guidelines.

The court of appeals emphatically rejected this approach, holding that a circuit court could not set the guidelines aside based on its own conclusion that there had been no material change in circumstances. Kentucky Revised Statutes section 403.211 required circuit courts to apply the guidelines in all K.R.S. section 403.212 modification proceedings, and to provide specific reasons for deviating from the guidelines in any modification proceeding where there was the 15% discrepancy, yet the court refused to order an increase in support.

The court of appeals stressed that the trial court’s approach would promote unjust results and would undermine the statutory guidelines’ basic goal of ensuring adequate child support in all cases. For under the trial court’s approach, a parent who was paying an inadequate amount of support under a pre-guidelines divorce decree would be shielded from any increase, so long as there had been no significant change in the economic circumstances of the parties.

In Downey v. Rogers, when Max Downey and Gayle Downey Rogers were divorced in 1986, they agreed that they would share

198. Kentucky Revised Statutes § 403.213(2) provides:
Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances . . . .
KY. REV. STAT. ANN. § 403.213(2) (Baldwin 1990).
199. Wiegand, 862 S.W.2d at 337.
200. Id.
201. Id.
202. Id.
203. Id.
204. Id.
205. 847 S.W.2d 63 (Ky. Ct. App. 1993).
custody of their three children and that Max would pay Gayle $760 per month for child support.\textsuperscript{206} In 1991, Max petitioned for a decrease in his support obligation, claiming that financial reverses made it impossible for him to pay this amount.\textsuperscript{207} The Adair County Circuit Court applied the child support guidelines and determined that Max's obligation under the K.R.S. section 404.213\textsuperscript{208} guidelines would come to $682.\textsuperscript{209} The difference between the $760 he owed under the agreement and the $682 calculated under the guidelines was less than 15%, creating a rebuttable presumption against any modification.\textsuperscript{210} The Adair Circuit Court nevertheless reduced Max's support payment to $682, and both Max and Gayle appealed.\textsuperscript{211}

Max argued that the trial court had erred in deciding to utilize the child support guidelines.\textsuperscript{212} He pointed out that under the parties' joint custody arrangement, the children spent every other week with each parent.\textsuperscript{213} He argued that where there was not only joint legal custody, but an equal sharing of physical possession of the children and the attendant expenses, it was inappropriate to apply the Family Support Act's guidelines and make one parent pay support to the other.\textsuperscript{214}

The court of appeals admitted that the Family Support Act was predicated on one parent having physical custody most, if not all, of the time, and that it did not really address or even contemplate the equal time sharing arrangement existing in this case.\textsuperscript{215} The court of appeals concluded, however, that while such an equally divided living arrangement might provide sufficient grounds to allow deviation from the guidelines under the Family

\begin{itemize}
\item 206. Id. at 63-64.
\item 207. Id. at 64.
\item 209. Downey v. Rogers, 847 S.W.2d 63, 64 (Ky. Ct. App. 1993). Kentucky Revised Statutes § 403.213(2) provides that for one year from date of July 13, 1990, when the Family Support Act became effective, a difference greater than 25%, rather than 15%, was required to avoid the presumption against modification. The date of the trial court decision is not provided, but it may have been within the one year period, because the court of appeals states that Max "failed to establish a change in support of 25% (or even 15%)." Id. at 65 (citing Ky. Rev. Stat. Ann. § 403.213(2) (Baldwin 1990)).
\item 210. Id. at 64.
\item 211. Id.
\item 212. Id.
\item 213. Id.
\item 214. Id.
\item 215. Id. at 65.
\end{itemize}
Support Act, it did not provide sufficient grounds to justify abandoning the Act.\textsuperscript{216} The trial court had in fact considered the possibility of deviating from the guidelines, given the parties' unusual living situation, but had decided not to do so, and the court of appeals could find no abuse of discretion in this regard.\textsuperscript{217}

Gayle argued that the trial court had erred in reducing Max's support obligation because Max had not shown a material change in circumstance.\textsuperscript{218} The only significant financial change that Max could show was a large increase in his consumer debt, brought about by the construction of a $150,000 house, the purchase of a boat, a motorcycle, and pick-up truck, and the acquisition of a thoroughbred horse.\textsuperscript{219} The court of appeals declared that increased debt from the purchase of consumer durables should not be considered a material change of circumstance allowing a reduction in child support: "It is axiomatic, we believe, that one cannot expect to be relieved from his child support obligation solely because he has taken on too much debt. Support of one's children is a fundamental commitment which takes precedence over debts to one's creditors."\textsuperscript{220}

The court of appeals found that Max failed to meet the mandated 15\% change in support, which created a presumption against modification, and that Max failed to demonstrate a material change of circumstance that would overcome this presumption.\textsuperscript{221} Therefore, the court held that the trial court had erred as a matter of law in modifying the support obligation, and directed it to vacate its order modifying support.\textsuperscript{222}

\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
KENTUCKY CORPORATE LAW DEVELOPMENTS

by William L. Montague and Mary Lee Muehlenkamp*

I. INTRODUCTION

Recent years have brought changes to corporate law in Kentucky, both statutorily and through case law. This article will discuss the statutory changes dealing with reinstatement of a business or nonstock, nonprofit corporation. It will also review case law dealing with fiduciary duties of corporate officers, piercing the corporate veil, and personal jurisdiction over a corporation.

II. STATUTORY DEVELOPMENTS

Recent statutory developments effective April 1, 1992 deal with reinstatement of a corporation. First, under Chapter 271B of the Kentucky Revised Statutes (K.R.S.), the procedure for reinstatement of a business corporation has been broadened to allow application for reinstatement following administrative dissolution or revocation under prior law.1 Similarly, under Chapter

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Reinstatement following administrative dissolution or revocation under prior law — Exception.—(1) A corporation administratively dissolved under KRS 271B.14-210, or revoked under the provisions of KRS 271A.615, which was repealed by 1988 Ky. Acts, ch. 23, sec. 248, may apply to the Secretary of State for reinstatement at any time after the effective date of dissolution or revocation. The application shall:

(a) Recite the name of the corporation and the effective date of its administrative dissolution or revocation;
(b) State that the ground or grounds for dissolution or revocation either did not exist or have been eliminated;
(c) State that the corporation's name satisfies the requirements of KRS 271B.4-010;
(d) Contain a certificate from the Revenue Cabinet reciting that all taxes owed by the corporation have been paid; and

(e) Be accompanied by the reinstatement penalty and the current fee for filing each delinquent annual report provided for in KRS 271B.1-220.

Id.
273, a nonstock, nonprofit corporation revoked under the provisions of K.R.S. section 273.367, which was repealed in 1988, are now permitted to apply to the Secretary of State for reinstatement.

Previously, a dissolved corporation could only apply for reinstatement within two years after dissolution. Effective April 1, 1992, a business corporation or a nonstock, nonprofit corporation is permitted to make application at any time. Any business corporation that was administratively dissolved or revoked, and which has taken the action necessary to wind up and liquidate its business is prohibited from being reinstated.

An additional change in the area of reinstatement now permits a business corporation which was refused reinstatement and which subsequently reincorporated as a second corporation to reinstate the first corporation and merge the second corporation into the first. Similar provisions regarding nonstock, nonprofit corporations were also enacted. Finally, a provision was added to the statute section dealing with appeal from denial of reinstatement to permit such an appeal by a business corporation.
or a nonstock, nonprofit corporation\textsuperscript{11} that has been revoked as well as by those that have been administratively dissolved.

III. CASE LAW

The last several years have seen a case involving fiduciary duties owed by officers of a corporation,\textsuperscript{12} a case regarding piercing the corporate veil under an equity theory or alter ego theory,\textsuperscript{13} and three cases regarding various issues of personal jurisdiction over a corporation.\textsuperscript{14}

A. Fiduciary Duties of Corporate Officers

While \textit{Steelvest, Inc. v. Scansteel Service Center, Inc.}\textsuperscript{15} is widely recognized as defining the standard for obtaining a summary judgment in Kentucky courts, it also dealt with issues important to corporate law, specifically the fiduciary duties of directors and officers of a corporation.

Scanlan was the president and a director of Steel Suppliers, which was acquired by Steelvest in 1984 and continued to be run

\begin{footnotesize}
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\item \textsuperscript{11} Ky. REV. STAT. ANN. § 273.3184 (Michie/Bobbs-Merrill 1992).
\item \textsuperscript{12} Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 (Ky. 1991).
\item \textsuperscript{13} United States v. WRW Corp., 986 F.2d 138 (6th Cir. 1993).

\end{itemize}
\end{footnotesize}
as a separate, unincorporated division of Steelvest.\textsuperscript{16} After the acquisition, Scanlan stayed on with Steel Suppliers as president and general manager, and also became a director of Steelvest.\textsuperscript{17}

During the next eleven months, Scanlan continued in his employment with Steel Suppliers, but was formulating a plan during that period to start his own business which would be in direct competition with Steelvest.\textsuperscript{18} In furtherance of his plan, and without disclosing his activities to any Steelvest representative, Scanlan sought the advice of counsel, contacted potential investors, and sought financing, including financing from two major clients of Steelvest.\textsuperscript{19} He then resigned from Steel Suppliers and Steelvest, incorporated his own company to directly compete with Steelvest, and hired nine employees from Steelvest to work at his new company.\textsuperscript{20} Shortly thereafter, Steelvest began experiencing financial difficulties that eventually led to its filing bankruptcy in 1987.\textsuperscript{21}

In June of 1986, Steelvest filed suit against Scanlan and his investors, alleging a breach of fiduciary duty by Scanlan.\textsuperscript{22} The Kentucky Supreme Court reversed the lower court's granting of summary judgment for defendants, holding that there was sufficient evidence to find that Scanlan breached his fiduciary duties to the plaintiff by planning and organizing a directly competitive business.\textsuperscript{23}

The court noted that a corporation's fiduciaries, such as directors or officers, are generally free to resign from the corporation and, after severing their connection, directly compete with their

\begin{flushleft}
\textsuperscript{16} Id. at 478.
\textsuperscript{17} Id. at 478-79.
\textsuperscript{18} Id. at 479.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. Steelvest alleged a conspiracy on the part of the investors. After extensive discovery, the defendants filed motions for summary judgment which were granted by the trial court and affirmed by the court of appeals. Id.
\textsuperscript{23} Id. at 488. The Kentucky Supreme Court entered into a thorough analysis of the standard for summary judgment in Kentucky courts and in federal courts, and rejected the adoption of the more relaxed federal standard in state courts. The standard in Kentucky courts for the granting of summary judgment is that the movant convince the court, by the evidence of record, of the nonexistence of an issue of material fact, and that it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. Id. at 482-83.
\end{flushleft}
former corporation.\textsuperscript{24} However, a director or officer of the corporation is \textit{not} permitted to establish or attempt to establish a competing enterprise while still serving as a director or officer of the corporation.\textsuperscript{25} The court concluded that an officer or director should terminate his or her position or status when he or she first makes arrangements or begins preparations to directly compete with his or her employer corporation.\textsuperscript{26} This decision is currently limited to situations involving a corporate employer, but may be extended in future cases to include non-corporate employers.

Scanlan was both a director and officer of the corporation, and as such owed a fiduciary duty of loyalty to the corporation, including a duty not to act against the corporation's interest.\textsuperscript{27} The court noted the generally recognized policy of fostering free and vigorous economic competition by giving employees the privilege of preparing to or making arrangements to compete with their employer before they actually leave employment, so long as the employee does not commit fraudulent, unfair, or wrongful acts while preparing to compete.\textsuperscript{28} However, the court noted another important policy of concern for the integrity of the employment relationship which demands from a corporate officer or employee an undivided and unselfish loyalty to the corporation.\textsuperscript{29}

The court felt that the interplay between these two policies meant that commercial competition must be conducted "according

\textsuperscript{24} Id. at 483 (citing 19 C.J.S. \textit{Corporations} § 512 (1990)).
\textsuperscript{25} Id. See \textit{Aero Drapery of Kentucky, Inc. v. Engdahl}, 507 S.W.2d 166 (Ky. 1974). \textit{See also} \textit{Raines v. Toney}, 313 S.W.2d 802 (Ark. 1958); \textit{Witmer v. Arkansas Dailies, Inc.}, 151 S.W.2d 971 (Ark. 1941).
\textsuperscript{26} \textit{Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.}, 807 S.W.2d 476, 483 (Ky. 1991). \textit{See \textit{Aero Drapery}}, 507 S.W.2d at 802; \textit{Covington & Lexington R.R. Co. v. Bowler's Heirs}, 72 Ky. (9 Bush) 468 (1872).
\textsuperscript{28} \textit{Steelvest}, 807 S.W.2d at 483-84 (citing 3 \textit{WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS} § 856 (perm. ed. rev. vol. 1986)). The court noted that this policy was relied upon by the trial court and the appellate court, but was only "one of two policies generally recognized by the courts when defining the scope of the right of a corporate officer to enter into competition with the principal." \textit{Id.} at 483.
\textsuperscript{29} Id. at 484 (citing \textit{FLETCHER, supra} note 28). Prior to termination of employment, a corporate officer or higher-echelon employee is not permitted to solicit, for himself, business which the position requires him to obtain for the employer. Further, he must refrain from actively competing with his employer, and must continue to exert his best efforts on behalf of the employer. \textit{Id.}
to simple and basic rules of honesty and fair dealing."^30 Because Scanlan made plans and arrangements to directly compete with Steelvest while he was still an officer and director of Steelvest, the court found that there were genuine issues of material fact as to whether Scanlan breached his fiduciary duty.^31

B. Piercing The Corporate Veil

The issue of piercing the corporate veil was addressed in United States v. WRW Corp.^32 The United States filed suit against three individual defendants to collect unpaid civil penalties for violation of the Federal Mine Safety and Health Act, which had been assessed against the corporation of which they were sole shareholders as well as officers and directors.^33 After a lengthy discussion about why this civil action did not violate the constitution's prohibition against double jeopardy, the court of appeals turned to a discussion of piercing the corporate veil.^34

WRW was incorporated in Kentucky on November 6, 1980.^35 Noah, William, and Roger each subscribed to purchase one hundred shares of stock in WRW for the sum of $1,000; they were also the sole shareholders, officers, and directors of the corporation.^36 A $5,000 reclamation bond and $46,500 of equipment were purchased in the name of WRW.^37 The purpose of the corporation was to mine coal on land owned by Noah and William.^38

In 1980, WRW purchased a $13,000 tractor using Noah's credit.^39 Also in 1980, Roger completed a loan application to purchase a

^30. Id.
^31. Id.
^33. WRW Corp., 986 F.2d at 140. The individuals had previously been indicted and convicted for willful violations of the Act. The district court granted the Government's motion for summary judgment piercing the corporate veil and holding the individual defendants liable for the civil penalties. Id.
^34. Id. at 142. The court concluded that the civil assessment imposed was not so excessive in relation to its remedial purpose of making the Government whole as to constitute a second punishment. Therefore, the principle of double jeopardy was not violated. Id.
^35. WRW Corp., 778 F. Supp. at 920.
^36. Id.
^37. Id.
^38. Id.
^39. Id. at 921.
dump truck, and the note for the loan was to be signed by each of the shareholders personally. The corporation maintained a separate checking account and filed all of its necessary tax returns. WRW never paid salaries or dividends to Noah, William, or Roger. On January 5, 1982, two of WRW's employees were killed as a result of a mining accident. After liquidation of WRW's assets, all that remained was $217 in cash and the $5,000 reclamation bond. Furthermore, William, Noah, and Roger had loaned the corporation $12,631 which remained unpaid.

The appeals court agreed with the district court's holding that piercing the corporate veil was appropriate under either the equity theory or the alter ego theory. Under the equity theory, five factors are examined to determine whether piercing the veil is warranted: "(1) undercapitalization; (2) a failure to observe the formalities of corporate existence; (3) non-payment or overpayment of dividends; (4) a siphoning off of funds by dominant shareholders; and (5) the majority shareholders having guaranteed corporate liabilities in their individual capacities."

When applying these criteria to the facts in the case, the court first noted that the corporation was undercapitalized. It was incorporated with only $3,000 of capital, an amount which was insufficient to pay normal expenses of operating a coal mine. While undercapitalization alone is not necessarily enough to support piercing the corporate veil, it is significant when considered with other factors. The district court noted that the issue of undercapitalization was "problematic" because Kentucky does not require any minimum paid-in capital before a corporation can begin to do business. However, public policy should protect

40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. WRW Corp., 986 F.2d. at 143.
47. Id. (citing White v. Winchester Land Dev., 584 S.W.2d 56, 62 (Ky. Ct. App. 1979)).
48. Id.
49. Id. The court was not disturbed by the lack of expert testimony on the issue of whether the corporation was undercapitalized, holding that the record was clear to support the district court's findings. Id.
50. Id.
51. Id.
innocent third parties who have no way of knowing that they are dealing with an undercapitalized corporation.\textsuperscript{52}

Second, there was a failure to observe corporate formalities.\textsuperscript{53} Despite allegations by the defendants that corporate bylaws existed and were adopted, no bylaws were produced for the court’s review.\textsuperscript{54} Also, all action taken by the individual defendants was without proper corporate authorization.\textsuperscript{55} The district court listed several actions taken by individual defendants such as opening a corporate checking account, signing loans, applications, and leases on behalf of the corporation, and purchasing mining equipment for the corporation.\textsuperscript{56} Those actions were done without the statutorily required resolutions by the board of directors.\textsuperscript{57} The district court also noted a lack of minutes from any shareholders meetings.\textsuperscript{58}

The court then noted that there was no evidence that any dividends were paid to the individual defendants from the corporation, and that there was no evidence they siphoned off corporate funds.\textsuperscript{59} However, these factors were not dispositive, primarily because of the undercapitalization of the corporation and that it operated at a loss during the two years it existed.\textsuperscript{60} The final factor was not disputed—the individual defendants commingled funds with corporate funds and guaranteed the corporation’s liabilities in their individual capacities.\textsuperscript{61}

The court of appeals agreed with the district court’s finding that the equities of the case warranted the piercing of the corporate veil, and also that under the “alter ego” theory, the veil should be pierced.\textsuperscript{62} The district court’s analysis of the alter ego theory applied a two-step process.\textsuperscript{63} First, the district court determined that there was such unity of interest and ownership that the separate personalities of the corporation and its share-

\textsuperscript{52} WRW Corp., 778 F. Supp. at 923.
\textsuperscript{53} WRW Corp., 986 F.2d at 143.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} WRW Corp., 778 F. Supp. at 923.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} WRW Corp., 986 F.2d at 143.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} WRW Corp., 778 F. Supp. at 924.
holders no longer existed.\textsuperscript{64} Second, the district court determined that inequitable results would occur if the acts were treated as those of the corporation alone because the now-defunct corporation did not have assets to pay the civil penalties assessed against it.\textsuperscript{65} The major factor noted by the court of appeals regarding the alter ego theory was the lack of observance of corporate formalities, such that there was "a complete merger of ownership and control of WRW with the individual Defendants."\textsuperscript{66}

\textbf{C. Personal Jurisdiction Over a Corporation}

1. \textit{Minimum Contacts to Establish Personal Jurisdiction Over a Corporate Defendant}

The court of appeals considered what contacts are sufficient to establish personal jurisdiction over a corporation in \textit{Halderman v. Sanderson Forklifts Co.}\textsuperscript{67} A Kentucky employee was injured in Kentucky by an allegedly defective product made by a British manufacturer.\textsuperscript{68} The British manufacturer had sold three pieces of equipment to a Cincinnati, Ohio distributor, who in turn sold one of them to the Kentucky employer of the plaintiff.\textsuperscript{69} The court affirmed the trial court's dismissal of the suit against the British manufacturer, holding that the court lacked personal jurisdiction.\textsuperscript{70}

The test to determine whether due process is violated by applying personal jurisdiction to a defendant is whether "the defendant purposely established 'minimum contacts' in the forum state."\textsuperscript{71} A defendant must avail himself of the privileges and protection of state law and reasonably anticipate being brought into court there.\textsuperscript{72}

\textsuperscript{64} Id. The court looked to the analysis it performed under the equity theory of piercing the corporate veil, and the lack of a separate corporate personality. Id.
\textsuperscript{65} Id.
\textsuperscript{66} WRW Corp., 986 F.2d at 143 (citing WRW Corp., 778 F. Supp. at 924).
\textsuperscript{67} 818 S.W.2d 270 (Ky. Ct. App. 1991).
\textsuperscript{68} Id. at 271.
\textsuperscript{69} Id. The transaction between the distributor and plaintiff's employer occurred in Ohio.
\textsuperscript{70} Id. at 274.
\textsuperscript{71} Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).
\textsuperscript{72} Halderman, 818 S.W.2d at 274.
The court determined that it would be unreasonable to exercise personal jurisdiction over the British manufacturer, holding that the company did not have sufficient minimum contacts with Kentucky. The court noted that the British manufacturer did not ever seek to directly distribute its product in Kentucky, and had no contact with any person or entity in Kentucky. It was merely "fortuitous" that one of its machines ended up in Kentucky. The court also considered, then rejected, the employee's request to adopt a "stream of commerce" approach to personal jurisdiction.

2. Personal Jurisdiction Due to Actions of a Corporation's Agent

Personal jurisdiction over a corporation was again at issue in Tennessee Farmers Mutual Insurance Co. v. Harris. A Tennessee insurance company issued a liability policy on a Tennessee resident who was involved in an automobile accident in Kentucky with another Tennessee resident. The insureds brought suit in Kentucky against their insurance company seeking to recover uninsured and underinsured benefits. The insurance company defended, saying that Kentucky courts lacked personal jurisdiction over the company. All parties were Tennessee residents, the insurance policy was written and delivered in Tennessee, the insurer did not write coverage in Kentucky, and neither applied for nor received a certificate of authority to do business in Kentucky.

The court of appeals determined that the trial court erred in exercising personal jurisdiction. The Kentucky long-arm statute has been interpreted to extend to the outer limits of the due

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73. Id.
74. Id.
75. Id.
76. Id. The stream of commerce doctrine was rejected by a plurality of the United States Supreme Court in Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), and the court declined to adopt it in the case at bar. Id.
78. Id. at 851.
79. Id.
80. Id.
81. Id. at 852.
82. Id.
process clause, with three criteria for determining personal jurisdiction.  

"First, the defendant must purposefully avail himself of the privilege of acting in the forum state.... Second, the cause of action must arise from the defendant's activities there. Finally, the activities of the defendant ... must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable."  

The only contact the insurance company had with Kentucky was after the traffic accident when an adjuster came to Kentucky to examine the vehicle, obtain a police report, and arrange for salvage of the vehicle. These contacts, which were in furtherance of settling the insurance claim, did not confer personal jurisdiction over the insurance company. A corporation which acts by an agent may be subject to personal jurisdiction in Kentucky under the long-arm statute only if the claim arises from the corporation's transaction of business in Kentucky. The fact that it was necessary for an insurance adjuster to come to Kentucky after the accident to investigate the claim did not amount to transacting business in the state.  

3. Residence of Corporate Owner Regarding Perfection of Mechanic's Lien  

ITT Commercial Finance Corp. v. Madisonville Recapping Co. dealt with the residence of a corporate owner, especially as it related to perfection of a mechanic's lien. The plaintiff had performed services for the defendant in Webster County, the county where the defendant operated a strip mine. The defendant's registered office was in Jefferson County. When no payment was made for the services performed, the plaintiff filed a mechanic's lien in Webster County. When the defendant filed for

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83. Id. at 851.  
84. Id. (quoting Pierce v. Serafin, 787 S.W.2d 705, 706 (Ky. Ct. App. 1990)).  
85. Id. at 852.  
86. Id.  
87. Id. (citing KY. REV. STAT. ANN. § 454.210(2)(a)(1) (Michie/Bobbs-Merrill 1992)).  
88. Id.  
89. 793 S.W.2d 849 (Ky. Ct. App. 1990).  
90. Id. at 850.  
91. Id.  
92. Id.
bankruptcy, an issue arose as to whether the mechanic's lien was perfected in the proper location.93 If the owner is a resident of Kentucky, a lien statement is to be filed in the county in which the owner of the equipment, machine, machinery, or motor resides.94 The court determined that for purposes of filing a mechanic's lien, a corporate owner resides in the county where his registered office is located.95 Because the appellee filed the mechanic's lien in an improper county, it did not properly perfect its lien.96

93. Id.
95. ITT Commercial Fin. Corp., 793 S.W.2d at 851.
96. Id.
AN OUNCE OF PREVENTION: THE KENTUCKY HOTLINE SYSTEM

by Thomas L. Rouse*

I. INTRODUCTION

When the Kentucky Supreme Court abolished the Code of Professional Responsibility's so-called "squeal rule" in 1990 as it adopted the American Bar Association Model Rules of Professional Conduct, it seemed to some that professional discipline took a step back because the rule mandated that a lawyer possessing knowledge of misconduct by any other lawyer or knowledge of judicial misconduct was obligated to disclose this knowledge. Another move the court made during that same time period, however, placed professional conduct in a different light.

In place of being required to engage in "squealing" on a fellow attorney, the court expanded the practical coverage of the advi-

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1. Disciplinary Rule (DR) 1-103, Disclosure of Information to Authorities, provides:
   (A) 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.
   (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

   MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980).

2. DR 1-102, Misconduct, provides:
   (A) A lawyer shall not:
      (1) Violate a Disciplinary Rule.
      (2) Circumvent a Disciplinary Rule through actions of another.
      (3) Engage in illegal conduct involving moral turpitude.
      (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
      (5) Engage in conduct that is prejudicial to the administration of justice.
      (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

   MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980).
sory ethics opinion provision of its rules. In so doing, the supreme court emphasized an attorney’s obligation to recognize a potentially ticklish ethical situation and to seek help before he acts. An ounce of prevention is worth more than a pound of cure for the Kentucky Bar.

II. THE RULE

The Ethics Committee Chairman for the Kentucky Bar Association had valiantly attempted to receive and respond to the inquiries of upset and/or concerned attorneys about ethical dilemmas they faced. The “high paying” position became far too much for one person to handle and, as a result, it became difficult or impossible to reach the Ethics Committee Chairman for the Kentucky Bar Association. In the meantime, as practices became more specialized and sophisticated, more and more problems developed. The advisory opinion system as then configured did not work.

The Kentucky Supreme Court responded to this need in the Fall of 1991 by amending Supreme Court Rule (SCR) 3.530. A

3. Past Ethics Committee Chairmen for the Kentucky Bar Association have included Martin J. Huelsman, Esq., of the Salmon P. Chase College of Law, and his successor, Richard Underwood, Esq., of the University of Kentucky College of Law.

4. SCR 3.530, Advisory opinions—informal and formal, provides:

(1) Any attorney who is in doubt as to the propriety of a. any professional act contemplated by that attorney or b. any course of conduct or act of any person or entity which may constitute the unauthorized practice of law, may make a request in writing or, in emergencies, by telephone to the district committee member for the requestor’s Supreme Court district for an advisory opinion thereon. Local bar associations may also request advisory opinions. The committee member to whom the request is directed shall attempt to promptly furnish the requestor with a telephonic answer and written informal letter opinion as to the propriety of the act or course of conduct in question. A copy of any such informal opinion should be provided to the Director for safekeeping and statistical purposes.

(2) If the Chairman of either the Ethics or Unauthorized Practice Committees determines a question to be of sufficient importance, the Chairman may cause to be issued and furnish a formal advisory opinion prepared by the committee to the Board of Governors for approval as a formal opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to adopt a formal opinion, the committee shall furnish the requestor with an informal opinion in the form of a Chairman’s letter opinion, with a copy to the Director.

(3) Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly,
short version of SCR 3.530 is: If an attorney is concerned about the propriety of an act he or she is thinking of doing, then the attorney should write or, in emergencies, call the Ethics Committee member in his/her supreme court district for an advisory opinion. If the attorney does so, he or she will not be disciplined for any act which complies with the advisory opinion.

In order for an attorney to receive the protection this rule affords, the information that is supplied by the attorney to the Ethics Committee member must be correct and complete, and as impartial as possible. The advisory opinion will be based on these given facts, so if the facts are incomplete or inaccurate, there will be little or no protection.

III. THE HOTLINE

Supreme Court Rule 3.530 makes reference to district committee members for the requestor's supreme court district. These people are members of the Kentucky Bar Association Ethics Committee and have volunteered for service in rendering advisory opinions. These Ethics Committee members are now often referred to as Hotline members. Hotline members can be identified by calling the Kentucky Bar Association office. They are the practitioner's insurance policy against Bar discipline, and this insurance policy is free. There are several actions the attorney must take to invoke the protection this policy affords:

1. Recognize a potential problem;
2. Assemble an impartial summary of the facts and circumstances surrounding the situation;

fairly, accurately and completely states his contemplated professional act.

(4) All formal opinions of the board shall be published in full or in synopsis form, as determined by the director, in the edition of the KENTUCKY BENCH & BAR next issued after the adoption of the opinion.

(5) Any person or entity aggrieved or affected by a formal opinion of the board may file with the clerk within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the director, obtain a review of the board's opinion by the court. The court's action thereon shall be final and the clerk shall furnish copies of the formal order to the original petitioner, the movant and the director.

(6) The filing fee for docketing a motion under paragraph (5) of this Rule 3.530 shall be as provided by Civil Rule 76.42(1) for original actions in the Supreme Court.

3. **Call** the local Hotline member; and

4. **Follow** the advice given.

Supreme Court Rule 3.530 affords no protection if the requestor gives the Hotline member only part of the story, half of the truth, or one side of the conflict. Neither the Kentucky Bar Association nor the supreme court will have much sympathy if the requestor acts upon the advice of a Hotline member who issued an opinion based on false or incomplete information.

Likewise, the requestor will be looked upon with a jaundiced eye if he shops among Hotline members for an opinion that is appealing. One opinion is all he gets! Hotline members submit their opinions to the Ethics Committee Chairman and the Executive Director of the Kentucky Bar Association, who check for shopping expeditions. While each Hotline member has an independent opinion in any given situation which may vary a bit from the opinions of other members, a requestor gets one bite of the apple. If the Hotline member in a particular area is not available, the Kentucky Bar Association may refer a requesting attorney to another member from a different district. Conflicts among the Ethics Committee members' opinions are handled within the Committee structure to ensure consistency. Tough issues sometimes merit a Formal Opinion from the Committee as a whole, authored by the Ethics Committee chairman for the Kentucky Bar Association, and approved by the Committee and the Board of Governors.

There is a particularly interesting aspect to this Hotline process. An Advisory Opinion will protect the requesting attorney whether or not the opinion is actually correct! So long as the Hotline member is given the correct information, the requestor is protected from discipline resulting from actions taken in compliance with the “faulty” advice.

The procedure followed with most of the Hotline calls is that the Hotline member will first talk to the attorney to see if the request is a true emergency needing immediate response and to get a feel for the information needed. The requesting attorney is then asked to reduce the question to writing. When the written

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5. The current Ethics Committee Chairman for the Kentucky Bar Association is Richard Underwood, Esq. The current Executive Director for the Kentucky Bar Association is Bruce Davis, Esq.
question is received, it is scanned to see if there appears to be any missing data. Once assured that the necessary information is available, the opinion is researched and written, then sent to the attorney, with copies to the Ethics Committee Chairman and the Executive Director of the Kentucky Bar Association. The whole process can take several hours or several days. In a true emergency, an oral opinion will be given with a follow-up writing to document the opinion and the facts relayed.

To summarize the Hotline process, there are a few rules to remember: Don’t think it won’t happen, because it will (Murphy’s Law). Look for possible problems in every situation. If a problem is identified, the attorney should call the Hotline member in the appropriate supreme court district with all of the information that can be put together, then follow the advice given. Don’t shop for opinions. Don’t try to be crafty with the information given the Hotline member, because doing so risks the “insurance” provided.

IV. THE MOST COMMON PROBLEM CONFRONTED BY ATTORNEYS: CONFLICTS OF INTEREST

Far and away, the problems most often brought to this writer’s attention involve the conflict of interest rules. A paper clip marks Rules 1.7 and 1.9 in this author’s Rule Book because those pages

6. Rule 1.7 Conflict of Interest: General Rule provides:
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
   (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
   (2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:
   (1) the lawyer reasonably believes the representation will not be adversely affected; and
   (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.


7. Rule 1.9 Conflict of Interest: Former Client provides:
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client
get the most use. Applying these rules to particular fact situations can be tricky, so it is important that the Hotline member is given a complete set of facts. For purposes of this discussion, a few examples should help.

A. Example One

A represents a plaintiff in an auto accident case, and B defends the defendant driver. A's partner, Aa, has been sued for malpractice, and the malpractice insurer has assigned the defense to Bb, B's associate. May Bb take the defense?

The answer is "Who knows?" States have taken opposing viewpoints. 8 Does the representation of Aa by Bb impair B's ability to defend the driver? Probably not. At any rate, if Bb called this writer, he would likely be told to disclose the conflict to the insurer and to Aa. If it's acceptable to them, the representation may proceed. Bb is protected from disciplinary action for this conflict. 9

B. Example Two

Louise drafted a partnership agreement for A and B, who were forming a business. The agreement was never executed, although Louise had talked with both A and B in her office. When the fee was paid, it was with a "partnership" check. Two months later,
Louise drafted a deed for B (unrelated to the business). Months went by. B is now trying to dissolve the partnership, and A has asked Louise to represent him in that case. May she represent A?

A and B are both "former clients" under Rule 1.9. Louise represented them both in a substantially related matter (the partnership's formation) and now their interests are adverse. Upon calling this writer for an opinion, Louise would be told to ask B for his consent. If B says no, the advice would be to stay out of the case. If the Hotline was not called and the insurance not invoked, and the case were accepted, Louise would be at risk. As Murphy's Law would dictate, that is when the Kentucky Bar Association disciplinary machine goes into gear.

C. Example Three

Lew represented C in protracted criminal proceedings where C was accused of a child molestation (not his child). He was convicted and is now in prison. In that case, it was necessary to have discussions with the wife, D, concerning marital assets and other family matters. Three years later, D comes to Lew for representation in a dissolution of marriage from C. May Lew ethically take this case?

Rule 1.9 says Lew can't represent the wife in the same or a similar matter in which her interests are material adverse to C, his former client, unless C consents. Additionally, Rule 1.9 says that Lew can't use information gained in the earlier representation to the former client's disadvantage unless the information has become generally known. Does the Hotline member have enough information to answer this inquiry? There is enough to analyze the first part of the rule: there is no conflict. Responding to part two, however, requires an analysis of what information Lew has from the criminal case, whether he needs to use it, and whether using this information would be adverse to C. Also, Lew needs to determine whether the information has become generally known. This writer's advice to Lew would be not to use the old file at all. Lew may go ahead and take the case, but use none of the information he obtained three years ago.

12. Id. at § (c)(1).
D. Example Four

Wife hired Lew to represent her in a bodily injury (BI) claim resulting from an automobile accident. Husband later hired Lew regarding the consortium claim. As the work proceeded, Husband counseled with Lew regarding financial difficulties the couple was experiencing. Lew hates bankruptcy work, so he referred it out. A Chapter 7 petition was filed for them. Lew now gets a call from the bankruptcy Trustee who wants to appoint Lew as attorney for the estate regarding the BI claim. The Trustee thinks that the consortium claim is worthless, and he will recommend to the bankruptcy court that none of the settlement proceeds be apportioned to the husband's claim. Does Lew have a conflict with the husband if he takes the Trustee's offer to represent the bankruptcy estate?

It appears to this writer that the proceeds of the BI claim now belong to the Trustee, not the clients. The financial obligation to Lew is discharged by the initial stay and subsequent discharge order from the bankruptcy court. As long as the Chapter 7 case proceeds, Lew's representation is over. The bankruptcy estate will become a new client. Since Husband and Wife no longer own the BI claim, there is no conflict, and Lew may take the case offered by the Trustee (and salvage his fee!).

E. Example Five

Lew was contacted by Herb by phone regarding a wreck involving his wife. Wilma, Herb's spouse, was confined to bed. Herb informed Lew that the couple was estranged but attempting reconciliation. A few days later, Lew met with both Herb and Wilma. He decided to represent Wilma only, as there appeared to be continuing marital discord. A fee agreement with Wilma was signed. Months went by as Wilma recovered. She then hired Lew to represent her in a dissolution of marriage. As Lew was walking back from lunch one day, Herb confronted him on the street, accusing him of unethical conduct by taking the dissolution case. Lew notified Herb orally, followed with a certified letter, that no agreement had been reached to represent him in the consortium claim or the dissolution. Lew also advised him of the

13. Query: Are Husband and Wife active clients or former clients?
statute of limitations date for his consortium claim (which was not yet close). Lew, given what had happened to him lately, was worried. He had just attended an ethics seminar to get his CLE hours and, during a brief period between naps, remembered a speaker saying "If you need me, CALL ME!" He called the Kentucky Bar Association, which gave him the phone number of the Hotline committee member in his supreme court district. Does Lew have a conflict?

The answer is, happily, no. Herb was never his client for either matter. Talking with a person doesn't make that person a client. So long as Lew did not mislead Herb, he is okay.

V. CONCLUSION

The approach taken by the Kentucky Supreme Court in amending Supreme Court Rule 3.350\(^\text{14}\) is to place the burden upon Kentucky attorneys to recognize an ethical dilemma and seek help through the Hotline. An incentive to use the system is offered through the promise of protection from disciplinary action if the advice given is followed and the information upon which the opinion is based is a fair and complete summary of facts. The most common problem asked the Hotline involves real and potential conflicts of interest. Kentucky attorneys must concentrate on recognizing potential conflicts and call the Hotline for help. If this is done, the chance of a subsequent disciplinary action is remote.

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14. See supra note 4 for text of SCR 3.530.
This article surveys selected Kentucky state court decisions and changes in state law, from January 1990 through September 1993, which created new law, explained old law, or presaged future law. Much of this article is geared toward practicing real estate lawyers and title examiners.

I. THE DEED AS AN AFFIDAVIT ABOUT FAIR CASH VALUE

On July 13, 1990, the Kentucky General Assembly enacted Kentucky Revised Statutes (K.R.S.) section 382.135. According to this statute, requirements which have nothing to do with real estate, but which have everything to do with taxes, must now be in a deed before the deed can be recorded by the clerk. These requirements include: (a) the mailing address of the grantor and the mailing address of the grantee; (b) a statement of the full consideration; and (c) a sworn acknowledged certificate signed by both the grantor and the grantee, and stating that, in the case of a gift, that the transfer is a gift and estimating the fair cash value of the property, and in the case of any other transfer, that the consideration reflected in the deed is the full consideration paid.

If the transfer is by will or by intestate succession, the personal representative, prior to closing the estate, must file an affidavit with the county clerk of each county in which any of the property is located, stating:

(a) the names and address of the persons receiving the property that passed by will or by intestate succession; and

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(b) the full or fair market value of [the] property as estimated or established for any purpose in the handling of the estate, or stating that no such values were estimated or established.

Effective July 14, 1992, the provisions in K.R.S. section 382.135 were rearranged and two new sections were added. The first of these, K.R.S. section 382.135(2), exempts from regulation under K.R.S. section 382.135 those deeds which: convey only utility easements; transfer property through a court action pursuant to a divorce proceeding; convey right-of-ways involving governmental agencies; convey cemetery lots; or correct errors in previous deeds conveying the same property from the same grantor to the same grantee.

The second addition, K.R.S. section 382.135(3), requires placing, in an exchange of properties, the fair cash value of the property being exchanged in the body of the deed.

Comment: Why was K.R.S. section 382.135 enacted? Did not the prior version of K.R.S. section 142.050(7) accomplish the same result? Isn't the purpose of a deed to transfer title? The change in the law was purely tax driven, but failure to comply with the technicalities could result in an unmarketable title. Curing a defect could be difficult or impossible in this very mobile society.

II. THE BROAD FORM DEED HAS BEEN NARROWED

In Ward v. Harding, the Kentucky Supreme Court sanctioned a narrowing of the broad form deed. In a “broad form” deed, the seller gives the purchaser mineral rights to the property. The extent of the mineral rights granted has been the subject of continuing litigation.

According to the majority opinion in Ward, in the early part of this century, mining companies purchased mineral rights from landowners. At that time, strip mining, as it is known today,

7. 860 S.W.2d 280 (Ky. 1993), cert. denied, 114 S. Ct. 1218 (1994).
8. Id. at 287-88.
9. Id. at 282.
10. Id.
did not exist. The parties to the deed, according to the majority opinion, only had deep mining in mind. The landowner intended to retain full use of the surface.

In the middle of this century, the invention of heavy equipment made strip mining profitable. Strip mining destroys the surface. The owners of the mineral rights claimed the right to remove the minerals by any means possible, including strip mining. The owners of the surface rights objected, and litigation followed. The Kentucky courts eventually upheld the rights of the mineral owner over the surface owner. Deeds for mineral rights transferred in the past several decades have reflected that state of the law.

The story was not yet finished. What the courts interpreted away, the voters gave back. In November of 1988, Section 19(2) was added to the Kentucky Constitution. Section 19(2) requires the interpretation of a broad form deed by reference to the intentions of the parties to the deed at the time of the making of the deed. The Ward court ruled on and upheld the constitutionality of Section 19(2). The court further ruled that any mineral rights deed had to be construed as of the date the mineral rights were originally severed from the surface rights.

Comment: The majority opinion in Ward is very compelling, although the court could have upheld the constitutional amendment without construing it as to upset existing, seemingly settled relationships. For instance, assuming that strip mining was not contemplated in 1900, a broad form deed to a given parcel in 1900 should be construed not to have included strip mining. However, if either the surface rights or the mineral rights in the

11. Id. at 285-86.
12. Id. at 286.
13. Id.
14. Id. at 283.
15. Id.
16. Id. at 282-83.
17. Id.
18. Id. at 283 (citing Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956), overruled by Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987)).
19. Id.
21. Id.
23. Id. at 288.
same property has changed hands since 1950, assuming that strip mining was contemplated at the time of the transfer, the mineral rights should be construed to include strip mining. For the court to take away the right of strip mining from broad form deeds made after 1950 is not logical since it requires that the parties on that date must have envisioned strip mining as a possibility. The marketplace would by then have increased the price for a broad form deed to reflect the right of the buyer to strip mine the surface. But under Ward, as under Buchanan v. Watson, 24 which upheld the right to strip mine, one party is given an unexpected and gratuitous bonanza. Two wrongs do not make a right.

III. A MORTGAGE IS A TRANSFER OF LAND

On June 16, 1966, K.R.S. Chapter 100 was substantially revised. After that date, if a jurisdiction (city or county) had a planning commission, any subdivision of land within that jurisdiction was void without the approval of the planning commission. 25 Likewise void was any transfer or sale of land which had been subdivided without approval of the planning commission. 26 Some bite was taken out of the statute by a later amendment to the statute which made the instrument not void, "but merely not subject to be[ing] recorded unless the subdivision plat subsequently receives final approval of the planning commission." 27 For reasons known only to the General Assembly, K.R.S. section 100.277(5) does not apply to Jefferson County or to cities with an urban county government, such as Lexington in Fayette County. 28

In First National Bank & Trust Co. of Nicholasville v. Carr Building, Inc., 29 the court explored the meaning of "transfer" in K.R.S. section 100.277(3) and the application of K.R.S. section 100.292. 30 The court found that a mortgage is a transfer, and that the particular mortgage was on real estate that had been sub-

24. 290 S.W.2d 40 (Ky. 1956), overruled by Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).
27. Id.
28. Id.
30. Id. at 8.
divided without the benefit of an approved plat. Thus, the court found the mortgage void. Then, since the borrower had transferred part of the real estate to a third party, the court found that First National was not the owner nor the last transferee in the chain of title and therefore could not take advantage of K.R.S. section 100.292. However, this opinion was depublished and is no longer authority.

Comment: Even though the First National case was ordered depublished, the decision was not reversed. Real estate lawyers, lenders, and title insurance companies took note. Some conclusions of the court might be arguable, but not the conclusion that a mortgage is a transfer. A mortgagor (borrower) gives up so many rights to the real estate through the mortgage to the mortgagee (lender) as to effect a very real transfer of title. At every sale of mortgaged property, the payment of the lender precedes the payment of the owner. The owner receives the remainder after satisfying the lienholders.

The court's conclusions that First National could not cure the defect by filing an approved plat and its not being the last transferee in the chain of title were justified; but a much broader reading of K.R.S. section 100.292 would also be consistent with both the letter and the spirit of the law. That section clearly contemplates the original owner correcting the problem by filing an approved plat. Contemplating that innocent purchasers or other transferees would be hurt by the failure of the original owner to file an approved plat, the statute goes on to allow the last transferee in the chain of title to file the plat and seems to define "last transferee" to include "holders of deed which may otherwise be void under KRS 100.277(2)." Logically, the purpose of these statutes is to have an approved plat filed, it making no difference as to the person filing. The wording of K.R.S. section 100.277(3) concerning certain transfers of unapproved subdivisions being valid and enforceable as long as the subdivision plat is

31. Id.
32. Id. at 9.
33. Id.
36. Id.
finally approved, also leads to the conclusion that the approval can be requested by anyone. Again, logically and fairly, the receipt of the approval is the important factor, not the status of the person requesting it.

IV. DEDICATION OF PUBLIC STREETS

Effective July 13, 1990, K.R.S. section 82.400 and K.R.S. section 100.277(4) require a city to accept a public street for maintenance if the street has been built according to the subdivision regulations. Such streets are considered automatically accepted for maintenance by the city forty-five days after inspection and final approval.

Comment: Before this amendment, a plat of property in a city could not be recorded without the city's approval written on the plat. Delays and hard feelings were frequently encountered. The amendment takes the city out of the plat approval loop and makes the platting of real estate that much simpler. The city is protected because, presumably, the plat would not be approved unless the improvements satisfied the subdivision requirements.

V. REQUIREMENT FOR FILING LIS PENDENS

In Cumberland Lumber v. First and Farmers Bank, the bank filed a foreclosure action for over $1,500,000.00. The bank filed a lis pendens on the same day. Sometime after the filing of the lis pendens, but before judgment, two other parties filed judgment liens against the real estate. These two lienholders never intervened nor were they otherwise made part of the action. The court held that the filing of the lis pendens cut off any subsequent claims against the real estate. The remedy of the

37. Id. Such transfers are valid "so long as the subdivision of land contemplated therein is lawful and the subdivision plat subsequently receives final approval of the planning commission." Id.


41. Id. at 404.

42. Id.

43. Id.

44. Id. at 405.

45. Id. at 405-06.
subsequent claimants was to intervene in the action.46 The bank
had no duty to make them parties to the action.47

Comment: Cumberland Lumber provided a very welcome deci-
sion. Courts had previously ruled that a lis pendens was not a
lien48 and that a lis pendens was not process.49 The Cumberland
Lumber case finally explained clearly the effect of the lis pendens.

The lis pendens has always been a mystery. Attorneys from
out of state and even attorneys from this state without a real
estate background frequently file a lis pendens incorrectly or
even fail to file one. Filing a lis pendens without observing all
of the requirements of the statute may make the lis pendens
invalid.50 Finally, perhaps the majority school of thought feels
that a lis pendens should be released after the lawsuit is con-
cluded. Such a position raises the question of how the lis pendens
is to be released. A lien can be released but a lis pendens is a
notice, not a lien. There is also the question of why it should be
released. If the lis pendens cut off a lien, arguably the release
of the lis pendens might revive the lien. The best approach is to
examine the court file for the current status of the litigation and
the affect of the litigation.

VI. REAL ESTATE FORFEITURE FOR CRIMINAL
OFFENSES

Kentucky Revised Statutes section 218A.410(1)(k) lists real es-
tate as subject to being forfeited for certain criminal offenses.51
Effective July 13, 1990, the Commonwealth of Kentucky may
seek a lien under K.R.S. section 218A.450 on all real property
subject to being forfeited to the Commonwealth by virtue of
K.R.S. section 218A.410.52 The lien cannot be defeated by gift,
devise, sale, alienation, or any means except by sale to a subse-
quent bona fide purchaser for value without actual or constructive
notice of the lien.53 The lien commences from the time the

46. Id.
47. Id. at 405.
52. KY. REV. STAT. ANN. § 218A.450(1) (Michie/Bobbs-Merrill 1993).
53. Id.
property becomes forfeit.\textsuperscript{54} It has priority over any other obligation or liability following that time, but is subordinate to any then existing perfected security interest on the property that is not itself subject to forfeiture.\textsuperscript{55}

The state may file a forfeiture lien notice against the real estate.\textsuperscript{56} As soon as is practicable, a copy of the notice must be furnished to any owner or lienholder of record.\textsuperscript{57} Failure to provide the copy does not invalidate or otherwise affect the lien.\textsuperscript{58}

Jurisdiction in the forfeiture proceeding vests in the court in which the conviction occurred "regardless of the value of property subject to forfeiture."\textsuperscript{59} Following a conviction, the court conducts an ancillary hearing to forfeit the property, "if requested by any party other than the defendant or Commonwealth."\textsuperscript{60} There is no provision for giving notice of the hearing to any lienholder on real estate, although notice would be given to the holder of a perfected security interest under the Uniform Commercial Code.\textsuperscript{61} Notice is given to the owner of the property only if the owner of the property is known, in fact, to the Commonwealth at the time of the hearing.\textsuperscript{62} Any real estate forfeited to the Commonwealth may be transferred by deed of general warranty.\textsuperscript{63}

Comment: The Commonwealth's zeal to punish criminals is commendable. After all, criminals are those who take what belongs to another without right. Under K.R.S. sections 218A.405 through 218A.460, that description comes very close to describing the Commonwealth. The criminal law should not destroy for so little cause and with so little reflection the protection for individuals' rights in real property which have evolved over centuries. The Commonwealth is not begrudged its lien, just its method of acquiring it. The lien should arise only upon the conviction of the criminal and upon the filing of the lien notice. The rules for the enforcement of the lien should be no different from the rules

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{58} Id.
\textsuperscript{62} Id.
for the enforcement of a mortgage. This isn't the twelfth century. This statute needs to be brought up to date.

VII. DEFERRED AGRICULTURAL ASSESSMENT LIENS

Effective July 14, 1992, under K.R.S. section 132.454(1), when the use of real estate assessed as agricultural or horticultural changes to any other use, the portion of the real estate for which the use is changed is subject to deferred taxes for that current year.\(^64\) The deferred taxes constitute a lien on the property.\(^65\)

The owner of the property at the time of the land use change must report the change to the property valuation administrator (PVA) within ninety days of the change.\(^66\) The owner must also provide to the PVA information on appraisals, which is useful in determining the fair cash value of the property.\(^67\) The PVA must then reassess the property for that year.\(^68\)

Comment: As the value of real estate skyrocketed over the past thirty or so years, so did the amount of ad valorem real estate tax bills. Farmers were hit very hard because they owned a relatively large amount of real estate. In folklore at least, farms had to be sold to pay the taxes. Many states, including Kentucky, responded by allowing farm land to be assessed at its “farming” value instead of its fair cash value. The difference was usually dramatic. Under the old version of the law, upon a change in use of the land away from farming, the land was automatically subject to deferred taxes for the then-current tax year and the immediately preceding two tax years.\(^69\)

Both the old and new versions of the statute share the difficulty of determining the date of the change of use. Was it the day on which the farmer sold the property to the developer for twenty times the agricultural assessment? Or was it the day on which the developer began to improve the property? Also, who changed the use? If the farmer sells the property, is it the farmer upon


\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id.


\(^{69}\) Ky. REV. STAT. ANN. § 132.454 (Michie/Bobbs-Merrill 1991), amended by Ky. REV. STAT. ANN. § 132.454 (Michie/Bobbs-Merrill Supp. 1992). The only attempt this author ever saw to enforce the statute ended upon the filing of litigation. The PVA withdrew the deferred tax bill.
selling the property to a developer at its full cash value? Or is it the developer upon buying the property for full cash value, even though the developer never had the benefit of the agricultural assessment? Is the new assessment effective for the entire year? Or is it effective only for the remainder of the year after the date of change? Is the flame worth the price of the candle? This type of deferred tax should be eliminated altogether, especially since it is so difficult to enforce. The Commonwealth could more profitably spend its time by being more selective about granting agricultural assessments and by increasing the agricultural value.

VIII. ENFORCING AD VALOREM REAL ESTATE TAX BILLS

Effective July 13, 1990, under K.R.S. section 134.470, a holder of a certificate of delinquency on a county ad valorem real estate tax bill need wait only one year before bringing an action. The action must then be instituted within five years after the expiration of the one-year period.

IX. BREACH OF WARRANTY AGAINST ENCUMBRANCES

In Blankenship v. Stovall, the court held that the breach of general warranty by a lien being on the property occurs at the time of transfer. The court construed the phrase “general warranty,” as used in deeds, to include several different covenants, including that the seller is seized of title and that the land is free from encumbrances. Generally, breach of covenant of title occurs only upon eviction, insolvency of the grantor, fraud of the grantor, or the grantor's being a nonresident. To be breached, the covenant against encumbrances does not require an eviction. It is breached, if at all, upon the deed being given for the real estate.

71. Id.
72. 862 S.W.2d 333 (Ky. Ct. App. 1993).
73. Id. at 334.
74. Id.
75. Id.
76. Id.
77. Id.
X. LINE OF CREDIT MORTGAGES AND REVOLVING CREDIT MORTGAGES

Effective July 14, 1992, the laws of the Commonwealth explicitly recognized the line of credit type mortgage and the revolving credit type mortgage in K.R.S. section 382.385.78

Comment: Arguably, before the enactment of K.R.S. section 382.385, Kentucky law only contemplated a mortgage for a loan in a fixed amount, amortized over a given number of years. The type of mortgage which secured a note which had no maturity date and the balance of which could go up or down daily depending upon draws or payments by the borrower, was, arguably, not explicitly recognized by any statute. Because several years ago there were relatively few such loans secured by real estate, enacting a law on the subject was not considered necessary. If a lender was concerned, the lender would buy a revolving credit endorsement to its title insurance policy.

Then the federal tax laws changed. The taxpayer could no longer deduct interest on credit card charges, but could deduct interest, under certain rules, on loans secured by a mortgage on the taxpayer’s residence. Overnight, the line of credit mortgage for consumer credit mushroomed everywhere. The number and amount of loans secured by this type of mortgage dramatically increased. Financial institutions and title insurance companies had a greater interest in having explicit approval for this type of mortgage. As a result, K.R.S. section 382.385 was enacted. Any time doubt is replaced by certainty, the law is improved.

XI. LIABILITY OF FINANCIAL INSTITUTIONS FOR ENVIRONMENTAL VIOLATIONS

Effective July 14, 1992, K.R.S. section 224.877(11) was renumbered as K.R.S. section 224.01-400(23)(a).79 This section gives the state a lien against the real property of a person liable for actual and necessary costs to respond to a release or a threatened release of a hazardous substance, a pollutant or contaminant, or an environmental emergency.80 The lien must be filed with the

county clerk of the county in which the property of the person is located.\textsuperscript{81}

Also effective July 14, 1992 was K.R.S. section 224.01-400(26).\textsuperscript{82} This statute discusses, at length, certain defenses and limitations that might be available to a financial institution that acquired a contaminated site by foreclosure, assignment, deed in lieu, or otherwise as a result of an enforcement of a mortgage or lien.\textsuperscript{83} For instance, a financial institution which served only in an administrative, custodial, or financial capacity,\textsuperscript{84} did not participate in the day-to-day management of the site before acquisition,\textsuperscript{85} or did not know and had no reason to know that there was a hazardous substance, pollutant, or contaminant disposed at the site\textsuperscript{86} might be relieved from liability for the costs associated with cleaning up the site.

Comment: No survey of current real estate law could be complete without a reference to environmental law. Environmental law is very real estate specific. Of course, the actual polluter is responsible for violations, but so may be a lender or an owner who was only a landlord. A lender understandably does not want to be responsible for a borrower's illegal actions over which the lender had no control. This new section of the statute helps meet those concerns of the lender, but does not remove them.

XII. PLACING JUDGMENT LIENS ON REAL ESTATE

Effective July 15, 1988, a judgment holder can file a notice of judgment lien against a judgment debtor, without referencing it to any particular parcel of real estate of the judgment debtor.\textsuperscript{87} If the notice is properly filed, it will constitute a lien against all of the judgment debtor's real estate in the county.\textsuperscript{88}

Effective July 13, 1990, the Uniform Enforcement of Foreign Judgments Act was adopted.\textsuperscript{89} This act, together with the law

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} Id.
\item \textsuperscript{83} Id.
\item \textsuperscript{88} Id.
\end{itemize}
\end{footnotesize}
discussed in the paragraph above, should result in the filing of many more liens against real estate.

Comment: As any collection lawyer knows, obtaining a judgment is much easier than collecting it. These laws greatly simplify the process of placing a lien against a debtor's real estate and of enforcing a judgment across state lines.

XIII. OTHER CASES OF INTEREST

During the survey period, there were other issues heard by the Kentucky courts, but which were not discussed in this article. Vignettes from these cases include:

(a) A right of re-entry can expire after thirty years, but the conditions and restrictions in the deed may still be enforced. Also, the dedication of land to public use is not confined to usages known at the time of dedication;\(^{90}\)

(b) A license is different from an easement;\(^ {91} \)

(c) The right of redemption is limited to the owner of the property;\(^ {92} \) and

(d) Time is not always of the essence in a real estate option.\(^ {93} \)

XIV. CONCLUSION

Like Atlas, real estate has been made to carry the world on its shoulders. The number of nonconsensual liens that may be placed against real estate has become staggering. Judgment liens, tax liens, mechanic's liens, condominium assessment liens, nuisance liens, environmental liens, criminal forfeiture liens, bail bond liens, and deferred tax liens are all recognized by statute and all have the potential to ruin a title examiner's day.

The Commonwealth should not follow the divine right model of government. Putting liens against property without a judicial determination of fault or amount and foreclosing liens without due process are practices that need to be stopped, not expanded. The Constitution applies to administrative law, too.

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Attempts to clarify the law and make the law adapt to and reflect changing real estate practices are always gratifying. Real estate transactions seek and want certainty and avoid and abhor chaos.

It's hard to interpret the past. It's easy to predict the future. Legislators, judges, and administrators own real estate much more often than not. Most voters probably own real estate. This large lobby generally enacts sensible laws and hands down sensible decisions about real estate.
NOTES

DEGRELLE V. ELSTON: KENTUCKY SUPREME COURT RULES ON AN INCOMPETENT'S RIGHT TO DIE

by Joseph P. Mehrle

I. INTRODUCTION

An incompetent's right to die was an issue of first impression for the Kentucky Supreme Court in DeGrella v. Elston. Martha Sue DeGrella ("Sue") sustained a brutal beating on February 22, 1983. Since that date, Sue languished in a Persistent Vegetative State ("PVS"), maintaining enough of her brain stem function to breathe without medical assistance. However, nutrition and hydration were provided via a gastrostomy tube surgically implanted into her stomach.

Martha Elston, Sue's mother and court-appointed guardian, petitioned the court to have Ms. Elston's judgment substituted for Sue's judgment. Sue's court-appointed guardian ad litem

1. This casenote deals with the issue of an incompetent's right to refuse medical treatment and should be distinguished from a competent's right to refuse medical treatment and the related issue of physician assisted suicide.
2. 858 S.W.2d 698 (Ky. 1993).
3. Id., at 700. Sue was an adult.
4. PVS is defined by the duration of the patient's unconscious state and the degree of the patient's responsiveness. If no improvement is seen after twelve months then PVS is confirmed. Position of the American Academy of Neurology on Certain Aspects of the Case and Management of the Persistent Vegetative State, Part I.B., 39 NEUROLOGY 125 (1989); PERSISTENT VEGETATIVE STATE AND THE DECISION TO WITHDRAW OR WITHHOLD LIFE SUPPORT, AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REPORT (1989). Once the Supreme Court of Kentucky decided Sue's case, she had been unconscious and unresponsive for over ten years. DeGrella, 858 S.W.2d at 698.
5. DeGrella, 858 S.W.2d at 702. Actually, Sue breathed through a tracheal tube inserted into her throat. Id. at 700.
6. Id.
7. Ms. Elston died while awaiting the outcome of the court's decision. Her son, Joseph Elston, was substituted as Sue's legal guardian. Id. at 701 n.2.
8. Id. at 700.
9. Homer Parrent, III was the guardian ad litem for Sue. Id. at 698.
opposed Ms. Elston’s motion. Arguing on behalf of Sue, the
guardian ad litem asserted three primary arguments to the court:
(1) that the Kentucky Living Will Act and the Kentucky Health
Care Surrogate Act evinced a legislative public policy against
the withdrawal of nutrition and hydration, (2) that prior oral
statements made by Sue while competent in contemplation of
life-sustaining medical treatment did not provide an evidentiary
basis upon which Ms. Elston’s judgment could be substituted,
and (3) that no one could legally substitute judgment on behalf
of Sue if to do so would result in her death.

Holding that Ms. Elston could substitute judgment on behalf
of her daughter, the court firmly recognized Sue’s common law
rights of self-determination and informed consent. Legislative
enactments, contrary to the guardian ad litem’s contentions,
explicitly affirm Sue’s common law rights. Adopting a narrow
focus, the court held that the trial court had found that Sue’s
prior oral statements were clear and convincing evidence of Sue’s
desire to forego nutrition and hydration. Finally, analogizing to
Strunk v. Strunk, the majority stated that in certain instances
one may make extremely personal decisions on behalf of an
incompetent, including a decision to withdraw the nutrition and
hydration of the incompetent which may ultimately lead to the
death of the patient. Additionally, the court cited with approval
Rasmussen v. Fleming, which declared that medical non-inter-
vention is often in the best interest of the patient.

10. Id.
preme Court’s decision in DeGrella v. Elston and prior to publication of this casenote,
the Kentucky Legislature repealed the Kentucky Living Will Act and the Kentucky
Health Care Surrogate Act, and enacted the Kentucky Living Will Directive Act, S.B.
311, 1994 Ky. Legis. Sess. This casenote does not incorporate any changes resulting from
the enactment of the Kentucky Living Will Directive Act.
13. Brief for Appellant at 7-11, DeGrella v. Elston, 858 S.W.2d 698 (Ky. 1993) (No. 92-
CI-01099).
14. Id. at 11-14.
15. Id. at 14-19.
16. DeGrella, 858 S.W.2d at 709.
17. Id.
18. Id. at 708.
19. Id. at 706.
20. 445 S.W.2d 145 (Ky. 1969).
21. DeGrella, 858 S.W.2d at 704 (quoting Strunk, 445 S.W.2d at 147).
II. BACKGROUND

Every state considering whether a guardian, acting on behalf of an incompetent, may terminate life-sustaining medical treatment has ruled that the guardian may withdraw treatment. Kentucky is now in accord with its sister states with the DeGrella decision.

Three primary concerns must be considered by any court addressing an incompetent's right to die: (1) the origin of the right; (2) the state's interest in providing treatment; and (3) the allocation of procedural and evidentiary burdens. Each of these will be discussed in turn.

A. Origin of the Right to Die

An individual's right to refuse medical treatment, or right to die, has several independent legal foundations: (1) common law rights of self-determination and informed consent, (2) state constitutional rights to privacy, (3) federal constitutional liberty interests, or (4) applicable state statutes.

Historically, the jurisprudential foundation for the right to refuse medical treatment exists in the common law rights of self-

23. DeGrella, 858 S.W.2d at 705 (quoting Rasmussen, 741 P.2d at 687 (quoting In re Guardianship of Hamlin, 689 P.2d 1372, 1375 (Wash. 1984))).
24. Life-sustaining medical treatment includes artificial nutrition and hydration. Cruzan v. Director, 497 U.S. 261, 279 (1990) (assuming treatment includes artificial nutrition and hydration); id. at 287 (O'Connor, J., concurring); In re Peter, 529 A.2d 419, 427 (N.J. 1987); DECISIONS NEAR THE END OF LIFE, AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS REPORT (1991).
determination and informed consent. These two rights are grounded in the precepts of bodily integrity, personal autonomy, trespass, and battery. Enunciated by the Supreme Court of the United States in the 1891 decision *Union Pacific Railway v. Botsford:* "No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person free from all restraint or interference of other unless by clear and unquestionable authority of law." Moreover, the same Court declared:

> To compel any one ... to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass, and no order or process, commanding such an exposure or submission was ever known to the common law in the administration of justice ....

This right of self-determination was further asserted by Justice Cardozo in *Schloendorff v. Society of New York Hospital:* "Every human being of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his consent commits an assault, for which he is liable in damages." Courts confronted with the right to refuse medical treatment have consistently upheld the common law rights of self-determination and informed consent with overwhelming approval.

Although many courts have declined to find an independent foundation for an individual's right to refuse medical treatment in their state constitutions, several states have found the protection existing as a privacy right.

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29. Id. at 251.
30. Id. at 252.
31. 105 N.E. 92 (N.Y. 1914).
32. Id. at 93.
A third foundation may be found in the United States Constitution. This right provides the strongest legal basis, and although the United States Constitution does not mention an individual's right to privacy, the Supreme Court has found privacy rights existing as a penumbra of several other explicit rights, and implicit in the concept of ordered liberty.

In *Cruzan v. Director*, the United States Supreme Court announced what many state courts had previously inferred: the right to die is protected by the United States Constitution. Specifically, the *Cruzan* Court declared: "It cannot be disputed that the Due Process Clause [of the Fourteenth Amendment] protects an interest in life as well as an interest in refusing life-sustaining medical treatment."  

Finally, many states provide statutes which, if applicable, protect an individual's right to refuse medical treatment. Most of these statutory rights are embodied in Living Will Acts and Health Care Surrogate Acts. Unfortunately, some of these statutes attempt to stringently restrict the ability of the individual to refuse nutrition and hydration, leaving an individual suffering in a PVS without legislative relief.

Even when an independent legal basis is found, the right to refuse medical treatment is not absolute. A state may have a more compelling interest in providing medical treatment to an individual against her will.

**B. State's Interests in Providing Treatment**

A state has been said to have four interests in providing medical treatment to a patient. These interests are: (1) preser-
vation of life, (2) prevention of suicide, (3) protecting the interests of innocent third parties, and (4) safeguarding the integrity of the medical profession. To date, however, no state has been able to assert any of the aforementioned rights successfully over the interests of a patient.

In the case of *In re Quinlan*, the court addressed the state’s interest in preserving the life of a patient suffering in a PVS condition. That court stated: “We think that the state’s interest [in preserving life] weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims.” The state’s most significant interest is in the preservation of life, yet the chance of a PVS patient returning to a cognitive state is virtually nonexistent.

Next, a state may assert an interest in preventing suicide. However, asserting a right to refuse medical treatment has consistently been held not to be the cause of the impending death. Death is said to be caused by the underlying disease. Additionally, the requisite intent to kill oneself is lacking with an individual who seeks not necessarily to kill herself, but rather to allow the natural process of dying to occur by refusing artificial treatment.

A state may also seek to force medical treatment on an individual in order to protect innocent third parties. But when an individual seeks to forego medical treatment, this does not ad-

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46. *Id.* at 664.


50. *Id.*
versely affect the health, safety, or security of others.\textsuperscript{51}

Finally, a state may seek to safeguard the integrity of the medical profession. Nutrition and hydration are considered by the medical profession to be life-prolonging treatments.\textsuperscript{52} The medical profession no longer considers the preservation of life at all costs a primary tenet of its mission; rather, its duty is to promote the welfare of its patients.\textsuperscript{53}

Even when a legal foundation exists allowing an individual to forego medical treatment, and no overriding state interests are found, a court must still decide how an incompetent's intent may be legally recognized through the allocation of procedural and evidentiary burdens.

\textbf{C. Allocation of Procedural and Evidentiary Burdens}

As a practical matter, the allocation of procedural and evidentiary standards is the most difficult question confronted by the courts. Recently, the Supreme Court in \textit{Cruzan} declared that a state \textit{may} require clear and convincing evidence that an incompetent wishes to decline medical treatment.\textsuperscript{54} Yet, to date only New York and Missouri have required such a high degree of proof on the part of the patient.\textsuperscript{55} In fact, many states require a much smaller burden of proof. In \textit{Rasmussen}, the court sought to protect an incompetent's right to refuse treatment by appointing a guardian ad litem. The guardian ad litem was permitted to use several factors in determining whether to cease treatment of the patient.\textsuperscript{56} These factors, although not exclusive, were as follows: (1) facts about the incompetent, such as age and familial relationships; (2) medical facts, including prognosis of recovery and intrusiveness of treatment; (3) facts concerning the state's interest in preserving life, such as the existence of dependents;

\textsuperscript{51} See id.

\textsuperscript{52} E.g., DeGrella v. Elston, 858 S.W.2d 698, 707 n.5 (Ky. 1993) (citing \textsc{National Center for State Courts}, \textsc{Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases 143-45} (2nd. ed. 1992)); \textit{see also Decisions Near the End of Life, AMA Council on Ethical and Judicial Affairs Report} (1991).

\textsuperscript{53} Degrella, 858 S.W.2d at 707 n.5.


\textsuperscript{56} Rasmussen v. Fleming, 741 P.2d 674, 690 (Ariz. 1987).
and (4) facts about the guardian, the family, or others close to the incompetent.\textsuperscript{57} If after considering these facts the guardian ad litem determines that it is in the best interest of the incompetent to cease medical treatment, then no judicial intervention is necessary.\textsuperscript{58}

Additionally, \textit{Cruzan} recognized that an incompetent does not lose the constitutional right to refuse treatment once that individual becomes unable to communicate that right.\textsuperscript{59} However, others have maintained that the incompetent retains an equal interest in life, and because of that interest, if errors are to be made, the procedural and evidentiary burdens should be more heavily allocated to those seeking to terminate life-prolonging treatment.\textsuperscript{60} Some advocates of this principle have lobbied the courts to accept a beyond a reasonable doubt standard like the one applicable in criminal trials, and necessary to commit one to a hospital against one's wishes.\textsuperscript{61} No court to date has gone this far. Still others have argued that the right to life and the right to die should come before the court on equal footing, because to err on either side would be irreversible.\textsuperscript{62}

Essentially, courts have developed two standards by which an incompetent may exercise her right to refuse unwanted medical treatment through a surrogate. These standards are the substituted judgment test and the best interest test.\textsuperscript{63} Under the substituted judgment test the inquiry is subjective; the decision is made on the basis of what the incompetent would decide if the incompetent could communicate her choice.\textsuperscript{64} The best interest test is used when no reliable evidence exists to determine the

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Cruzan v. Director, 497 U.S. at 279-80 (although recognition of an incompetent's right to refuse medical treatment may require additional procedural safeguards).
\textsuperscript{60} E.g., id. at 281.
\textsuperscript{61} Brief of Amicus Curiae Ethics and Advocacy Task Force of the Nursing Home Action Group at 6-10, \textit{DeGrella} (Ky. 1993) (92-CI-01099).
\textsuperscript{62} See Cruzan v. Director, 497 U.S. at 301-30 (Brennan, J., dissenting); see also id. at 330-57 (Stevens, J., dissenting). "If the goal in fact is to determine the patient's state of mind, then the legal starting point should be a neutral position." Brief of Amicus Curiae Kentucky Hospital Association in Support of Appellee at 13, \textit{DeGrella} (92-CI-01099).
\textsuperscript{64} Id. (citing \textsc{President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research, Deciding to Forego Life-Sustaining Treatment} 1, 132 (1983)).
patient's choice. Here, a surrogate assesses what medical treatment would be in the incompetent's best interest, determined by using objective criteria such as relief from suffering and the value of continuing life from the incompetent's perspective.

Most courts have adopted the substituted judgment standard where evidence of the incompetent's intent could be found. Often, however, the procedural burden allocated to the surrogate is the clear and convincing standard, and the only available evidence to demonstrate an incompetent's choice are prior oral statements made to friends or family members. The Missouri Supreme Court in *Cruzan v. Harmon* decided that such prior oral statements did not provide a foundation to establish clear and convincing evidence, and on appeal the United States Supreme Court agreed. Yet Justice Brennan in his dissent stated: "The testimony of close friends and family members, on the other hand, may often be the best evidence available of what a patient's choice would be. It is they with whom the patient most likely will have discussed such questions and they who know the patient best."

Finally, several states including Kentucky have decided to remove the judiciary from the decision making process entirely unless there is disagreement with the decision to remove life-prolonging treatment. However, these courts often add the caveat that factual findings of the decision making process made

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65. Rasmussen, 741 P.2d at 689 n.22 (citing Foody v. Manchester Memorial Hosp., 482 A.2d 713, 721 (Conn. Super. Ct. 1984); In re Conroy, 486 A.2d 1209, 1231 (N.J. 1985)).
66. Id.
70. Cruzan v. Director, 497 U.S. at 283.
71. Id. at 325 (Brennan, J., dissenting).
72. E.g., In re Peter, 529 A.2d 419, 430 (N.J. 1987). "Courts are not the proper place to resolve the agonizing personal problems that underlie these cases. Our legal system cannot replace the more intimate struggle, that must be borne by the patient, those caring for the patient, and those who care about the patient." Robert Steinbrook, M.D. & Bernard Lo, Artificial Feeding—Solid Ground not Slippery Slope, 318 NEW ENG. J. MED. 286, 289 (1988) (citing In re Peter, 529 A.2d at 430).
by the doctors and family members must be well documented in
order to avoid civil and criminal liability.\footnote{73. \textit{E.g.}, DeGrella v. Elston, 858 S.W.2d 698, 710 (Ky. 1993).}

It was against this enormous body of evolving law that the
Kentucky Supreme Court decided the \textit{DeGrella} case. The court
cautiously and narrowly elected to decide the case on Sue's
common law rights of self-determination and informed consent.\footnote{74. \textit{Id.} at 709.}

Also, the court allowed Sue's guardian to substitute judgment,
deciding only that the trial court had found clear and convincing
evidence of Sue's wish to forego life-prolonging medical treatment
and declaring that on the facts of Sue's case that finding was
supported by the record.\footnote{75. \textit{Id.} at 706.}

\section*{III. FACTS}

On February 22, 1983, Sue suffered a severe beating and
sustained an acute subdural hematoma.\footnote{76. \textit{Id.} at 700.} She remained in a PVS
until the Kentucky Supreme Court rendered its decision on July
15, 1993.\footnote{77. \textit{Id.}} Sue was being maintained through a gastrostomy tube
surgically implanted into her stomach which provided her nutri-
tion and hydration.\footnote{78. \textit{Id.}} Doctors advised that there was virtually no
chance that she would regain consciousness.\footnote{79. \textit{Id.}} She had suffered
irreversible brain damage which had destroyed her higher level
brain functioning.\footnote{80. \textit{Id.} at 702.} Only her brain stem remained operational,
allowing her heart to beat and lungs to breathe without the aid
of a medical device.\footnote{81. \textit{Id.}}

Prior to her 1983 ordeal, Sue had suffered injuries in an
automobile accident and, as a result, she was placed on a venti-
lator.\footnote{82. \textit{Id.} at 703.} Even though there was no question that she would com-
pletely recover from this accident, she objected when connected
to a ventilator.\footnote{83. \textit{Id.}} Additionally, Sue had repeatedly stated to
friends that she found the continued treatment of Karen Ann Quinlan to be abhorrent.

Sue's mother, Ms. Elston, acting as Sue's guardian, petitioned the court to substitute her judgment on behalf of Sue. A court-appointed guardian ad litem objected to Ms. Elston's request, arguing: (1) that the Kentucky Legislature had enacted two statutes (Living Will Act and Health Care Surrogate Act) which evinced a legislative public policy to circumscribe an individual's right to refuse nutrition and hydration, (2) that the state did not have the authority to permit anyone to remove the nutrition and hydration of Sue because it would result in the death of Sue, and (3) that prior oral statements made by Sue did not provide an evidentiary basis for Ms. Elston's substituted judgment.

IV. THE COURT'S REASONING

Justice Leibson, writing for the majority, began by affirming a competent individual's common law rights of self-determination and informed consent. Justice Leibson then stated that an incompetent retains those same common law rights despite incompetency. Next, the court embraced the concept of substituted judgment and declared that contrary to the guardian ad litem's contention, the subsequently enacted Kentucky Living Will Act and Health Care Surrogate Act actually affirmed the common law rights of self-determination and informed consent. Prior statements made by Sue while competent were exceptions

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84. Sue was referring to the incompetent in In re Quinlan, 335 A.2d 647 (N.J.), cert. denied, 429 U.S. 922 (1976).
85. DeGrella v. Elston, 858 S.W.2d 698, 702-03 (Ky. 1993).
86. Ms. Elston died while awaiting the outcome of the court's decision. Her son, Joseph Elston, was substituted as Sue's legal guardian. Id. at 701 n.2.
87. Id. at 700.
88. Homer Parrent, III was the guardian ad litem for Sue. Id. at 698.
91. Brief for Appellant at 7-11, DeGrella (No. 92-CI-01099).
92. Id. at 14-19.
93. Id. at 11-14.
94. DeGrella, 858 S.W.2d at 702-04.
95. Id. at 710.
98. DeGrella, 858 S.W.2d at 706.
to Kentucky's Hearsay Rule\textsuperscript{99} and admissible to establish an evidentiary basis upon which Ms. Elston could substitute judgment.\textsuperscript{100} Finally, the court went a step further by deciding that no judicial intervention is necessary when physicians and family members all agree with the decision to remove life-prolonging medical treatment, providing adequate documentation of the factual findings is kept by the parties involved.\textsuperscript{101}

Justice Leibson started the opinion with many qualifications, declaring that the court was not "step[ping] onto a slippery slope ...."\textsuperscript{102} He asserted that the case was addressing Sue's right to self-determination and not the quality of Sue's life.\textsuperscript{103}

Next, Justice Leibson affirmed a competent individual's common law rights of self-determination and informed consent by quoting \textit{Union Pacific Railway v. Botsford}\textsuperscript{104} and Justice Cardozo in \textit{Schloendorff v. Society of New York Hospital}.\textsuperscript{105} Finally, the majority extended these rights of a competent individual to an incompetent by analogizing to the Kentucky case \textit{Tabor v. Sco-bee}.\textsuperscript{106} In \textit{Tabor}, a minor underwent surgery for appendicitis.\textsuperscript{107} Upon opening the minor for surgery, the surgeon discovered diseased fallopian tubes and removed them, although the condition of the fallopian tubes was not immediately life threatening to the minor child.\textsuperscript{108} The minor's mother was available to obtain consent, but the surgeon elected to exercise his own professional judgment.\textsuperscript{109} It was held that the unconscious minor child had her common law right of informed consent violated by the re-

\begin{itemize}
\item \textsuperscript{99} Ky. R. Evid. 803(3).
\item \textsuperscript{100} DeGrella, 858 S.W.2d at 709 (citing Ky. R. Evid. 803(3)).
\item \textsuperscript{101} Id. at 710.
\item \textsuperscript{102} Id. at 702.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} 141 U.S. 250 (1891). The famous quote by this court is as follows: "No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of other unless by clear and unquestionable authority of law." Id. at 251.
\item \textsuperscript{105} 105 N.E. 92 (N.Y. 1914), overruled by Bing v. Thunig, 143 N.E.2d 3 (N.Y. App. Div. 1957). Stated Justice Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Id. at 93.
\item \textsuperscript{106} 254 S.W.2d 474 (Ky. 1951).
\item \textsuperscript{107} Id. at 476.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\end{itemize}
moval of the fallopian tubes.\textsuperscript{110} Since Sue was unconscious, as was the minor obtaining surgery in \textit{Tabor}, the court reasoned that Sue retained her rights as did the minor in \textit{Tabor}.\textsuperscript{111}

\textit{Strunk v. Strunk}\textsuperscript{112} provided the majority with the rationale it needed to authorize a guardian to make a personal decision on behalf of an incompetent.\textsuperscript{113} In \textit{Strunk}, a mother was permitted to substitute her judgment for that of her mentally retarded son, so that a kidney could be removed from the mentally retarded son and donated to her other dying son.\textsuperscript{114} The court in \textit{Strunk} held that if the incompetent had the capacity to consent, he would have consented, because he was so emotionally dependent upon his dying brother.\textsuperscript{115} Rationalizing that an individual's right to die is no more personal than an individual's right to retain a kidney, the \textit{DeGrella} court refuted the guardian ad litem's claim that no one should be permitted to make a personal judgment for an incompetent which results in death.\textsuperscript{116} Buttressing this argument, the court quoted with approval an Arizona right to die case, \textit{Rasmussen v. Fleming}:\textsuperscript{117} "A competent person clearly has the ability to exercise the right to refuse medical treatment. So, too, does an incompetent individual who has made his or her medical desires known prior to becoming incompetent."\textsuperscript{118} \textit{Rasmussen} was again quoted when the court sought to emphasize that "non-intervention [of medical treatment] in some cases may be appropriate and, therefore, in the ward's best interest."\textsuperscript{119}

Turning its attention to the procedural burden of an incompetent, the court declined to hold whether a mere preponderance of the evidence would suffice, stating only that: "In the present case the trial court used 'clear and convincing evidence' as the standard for making its decisions, so we need not decide whether

\footnotesize{\textsuperscript{110} Id. at 477.}
\footnotesize{\textsuperscript{111} DeGrella v. Elston, 858 S.W.2d 698, 703-04 (Ky. 1993) (quoting Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1951)).}
\footnotesize{\textsuperscript{112} 445 S.W.2d 145 (Ky. 1969).}
\footnotesize{\textsuperscript{113} DeGrella, 858 S.W.2d at 704 (quoting Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969)).}
\footnotesize{\textsuperscript{114} Strunk, 445 S.W.2d at 149.}
\footnotesize{\textsuperscript{115} Id. at 146.}
\footnotesize{\textsuperscript{116} DeGrella, 858 S.W.2d at 704.}
\footnotesize{\textsuperscript{117} 741 P.2d 674 (Ariz. 1987).}
\footnotesize{\textsuperscript{118} Id. at 685-86.}
\footnotesize{\textsuperscript{119} DeGrella, 858 S.W.2d at 705 (quoting Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987)).}
a mere preponderance of evidence would have sufficed."

Finally, the majority addressed the guardian ad litem's claim that the Kentucky Living Will Act and the Kentucky Health Care Surrogate Act evinced a legislative policy which sought to restrict the withdrawal of nutrition and hydration in a patient suffering in a PVS. Citng the Living Will Act, the majority announced that the Act actually affirms, rather than supersedes, an individual's common law rights:

[T]he Living Will Act begins with a reaffirmation of the common law right, a legislative finding "that all adults have the fundamental right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, withheld, or withdrawn."

Additionally, the statute provided one method by which an individual may exercise the statutory rights, via a written living will. In fact, the Act specifically excludes nutrition and hydration from the statutorily defined phrase "life-prolonging treatment."

But the court found that K.R.S. section 311.640(1) states

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120. Id. at 706.
123. DeGrella, 858 S.W.2d at 706-08; Brief for Appellant at 7-11, DeGrella (No. 92-CI-01099).
124. Ky. Rev. Stat. Ann. §§ 311.622-644 (Baldwin 1991). The section which the court addressed was K.R.S. § 311.622, the text of which is as follows:

(1) The General Assembly finds that all adults have the fundamental right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, withheld, or withdrawn.

(2) In order that the dignity, privacy, and sanctity of adults with terminal conditions may be respected even after they are no longer able to participate actively in decisions concerning their medical care, the General Assembly hereby declares that the laws of the Commonwealth of Kentucky shall recognize the right of an adult to make a written declaration pursuant to the provisions of KRS 311.626, instructing the adult's physician to withhold or withdraw life-prolonging treatment in the event such person is diagnosed as having a terminal condition.

Id. (emphasis added).
127. Id. (citing Ky. Rev. Stat. Ann. § 311.624(5)(b) (Baldwin 1991)). The text of K.R.S. § 311.624 is as follows:
that the Act "'creates no presumption concerning the intention of an adult who has revoked or has not executed a declaration,'" and K.R.S. section 311.640(2) states the Act "'shall not ... impair or supersede any common law or statutory right ....'" Sue did not execute a living will. In fact, Sue could not have executed a living will since the Act was enacted after her ordeal. The same Act states that it does not authorize or condone euthanasia, or affirmative acts to end life "'other than to permit the natural process of dying.'" Sue's choice to forego nutrition and hydra-

As used in KRS 311.622 to 311.644:
(1) "Adult" means a person eighteen (18) years of age or older and who is of sound mind.
(2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient.
(3) "Declaration" means a witnessed document in writing, voluntarily made by the declarant in accordance with the requirements of KRS 311.626.
(4) "Health care facility" means any institution, place, building, agency ... used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care, and licensed pursuant to KRS Chapter 216B.
(5) "Life-prolonging treatment" means any medical procedure, treatment, or intervention which:
   (a) Utilizes mechanical or other artificial means to sustain, prolong, restore, or supplant a spontaneous vital function or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition; and
   (b) When applied to a patient in a terminal condition, would serve only to prolong the dying process. "Life-prolonging treatment" shall not include the administration of medication or the performance of any medical procedure deemed necessary to alleviate pain or for nutrition or hydration.
(6) "Physician" means a person licensed to practice medicine in the Commonwealth of Kentucky.
(7) "Qualified patient" means an adult patient of sound mind who has:
   (a) Made a declaration in accordance with KRS 311.626;
   (b) Been diagnosed by the attending physician and one (1) other physician as having a terminal condition, with said condition noted by both in the patient's medical record; and
   (c) Who is not known to be pregnant, provided that for any adult woman of child-bearing age who has made a declaration and been diagnosed in writing as having a terminal condition, the attending physician shall cause a test to be made to determine if the woman is pregnant.
(8) "Terminal condition" means a condition caused by injury, disease, or illness which, to a reasonable degree of medical probability, as determined solely by the qualified patient's attending physician and one (1) other physician, is incurable and irreversible and will result in death within a relatively short time, and where the application of life-prolonging treatment would serve only to artificially prolong the dying process.

KY. REV. STAT. ANN. § 311.624 (emphasis added).
128. DeGrella, 858 S.W.2d at 706 (citing KY. REV. STAT. ANN. § 311.640(1) (Baldwin
tion would result in her death by allowing the natural process of dying to proceed.133

Similarly, the Health Care Surrogate Act134 was useless to the guardian ad litem because it applies to one with decisional capacity to designate another as a surrogate.135 Sue did not have

1991)). The text of K.R.S. § 311.640 is as follows:

(1) KRS 311.622 to 311.644 creates no presumption concerning the intention of an adult who has revoked or has not executed a declaration with respect to the use, withholding, or withdrawal of life-prolonging treatment in the event of a terminal condition.

(2) KRS 311.622 to 311.644 shall not affect the common law or statutory right of an adult to make decisions regarding the use of life-prolonging treatment, so long as the adult is able to do so, or impair or supersede any common law or statutory right that an adult has to effect the withholding or withdrawal of medical care.

KY. REV. STAT. ANN. § 311.640(1) (emphasis added).

129. DeGrella, 858 S.W.2d at 706 (citing KY. REV. STAT. ANN. § 311.640(2) (Baldwin 1991)). See supra note 128 and accompanying text.

130. DeGrella, 858 S.W.2d at 713 (Wintersheimer, J., dissenting).

131. Id.

132. DeGrella, 858 S.W.2d at 706-07 (citing KY. REV. STAT. ANN. § 311.638 (Baldwin 1991)). The text of K.R.S. § 311.638 is as follows:

Nothing in KRS 311.622 to 311.644 shall be construed to condone, authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act to end life other than to permit the natural process of dying.

KY. REV. STAT. ANN. § 311.638 (emphasis added).

133. DeGrella, 858 S.W.2d at 707.

134. KY. REV. STAT. ANN. §§ 311.970-.986 (Baldwin 1991).

135. DeGrella, 858 S.W.2d at 707-08 (citing KY. REV. STAT. ANN. § 311.978(3)(c) (Baldwin 1991)). The text of K.R.S. § 311.978 is as follows:

(1) Except as specifically limited in the designation or in KRS 311.970 to 311.986, the surrogate may make any health care decisions for the grantor which the grantor could make individually if he or she had decisional capacity, provided all such decisions shall be made in accordance with accepted medical practice. Whenever making any health care decision for the grantor, the surrogate shall consider the recommendation of the attending physician, the decision the grantor would have made if the grantor then had decisional capacity, if known, and the decision that would be in the best interest of the grantor.

(2) The surrogate may not make a health care decision in any situation in which the grantor's attending physician has determined in good faith that the grantor has decisional capacity. The attending physician shall proceed as if there were no designation if the surrogate is unavailable or refuses to make a health care decision.

(3) Notwithstanding the designation of a health care surrogate, nutrition and hydration shall always be provided to a person with the following exceptions: artificial nutrition and hydration may be withheld or withdrawn in the following circumstances:

(a) When inevitable death is imminent, which for the purposes of this provision shall mean when death is expected, by reasonable medical judgment, within a few days; or

(b) When the provision of artificial nutrition cannot be physically assimilated by
decisional capacity. However, the Act explicitly excludes a surrogate's right to cease nutrition and hydration. Yet the court noted an exception in the Act which states nutrition and hydration may be withdrawn by a surrogate when the burden of the provision of artificial nutrition and hydration itself shall outweigh its benefit. Reasoning that the trial court had found that Sue had clearly and convincingly made her burden known, the court held that to Sue the burden was clearly high. The court stopped short of defining "burden," stating only that it was a subjective inquiry as viewed from the patient's perspective.

Next, the court stated that Sue's prior oral statements about being maintained with life-prolonging treatment were examples of Sue's "then existing state of mind" and were admissible as evidence under Kentucky's hearsay exception. Arguing that wills, property interests, and some contracts require written evidence in court, the guardian ad litem wanted the court to find a like requirement for Sue's desire to end treatment. However, the court said those interests derive their legal existence from legislative statutes, unlike Sue's interests which derive from the the person; or

(c) When the burden of the provision of artificial nutrition and hydration itself shall outweigh its benefit, provided that the determination of burden shall refer to the provision itself and not to the quality of the continued life of the person. Even in the exceptions listed in paragraphs (a), (b), and (c) of this subsection, artificial nutrition and hydration shall not be withheld or withdrawn if it is needed for comfort or the relief of pain.

(4) Notwithstanding the designation of a health care surrogate, life sustaining treatment and artificial nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty, as certified on the woman's medical chart by the attending physician and one (1) other physician who has examined the woman, such procedures will not maintain the woman in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication.

KY. REV. STAT. ANN. § 311.978 (emphasis added).

136. DeGrella, 858 S.W.2d at 700.
137. Id. at 707-08 (citing KY. REV. STAT. ANN. § 311.978(3)(c) (Baldwin 1991)). See supra note 135 and accompanying text.
138. DeGrella, 858 S.W.2d at 708.
139. Id.
140. Id. at 709 (citing KY. R. EVID. 803(3)).
141. Id.
142. Id.
143. Id. at 708.
common law and which were not abrogated by any statute.\textsuperscript{144}

Finally, the court declared that when all interested parties are in agreement with the decision to remove life-prolonging nutrition and hydration, no judicial sanction is required, provided all findings are well-documented.\textsuperscript{145}

\section*{V. ANALYSIS}

Kentucky should be commended for ensuring that justice was served to Sue, albeit late justice. Following cautiously in the footsteps of prior states,\textsuperscript{146} the court recognized Sue's right to refuse nutrition and hydration.\textsuperscript{147} However, in the court's attempt to proceed slowly, it has left this issue open to future litigation at the expense of those who follow in DeGrella's wake. As a result, Kentucky has not yet established whether it will follow the majority of states to consider this issue,\textsuperscript{148} or whether it will follow the minority courts, consisting of New York\textsuperscript{149} and Missouri.\textsuperscript{150}

Desiring not to overturn portions of the Kentucky Living Will Act\textsuperscript{151} and the Kentucky Health Care Surrogate Act,\textsuperscript{152} the court only recognized Sue's common law rights of self-determination
and informed consent, electing to ignore the federal constitutional liberty interest enunciated in *Cruzan*.

Additionally, the court failed to define what burden of proof suffices for an incompetent exercising her right to die. Finally, if any interested party objects to the withdrawal of treatment, a court challenge may be initiated. This unanimity requirement will ensure delayed justice and embroiled litigation for many languishing in a PVS.

**A. Constitutional Right to Die**

In *Cruzan*, the Supreme Court of the United States recognized what previous state courts had assumed: an incompetent has a right to refuse unwanted medical treatment which includes nutrition and hydration. However, the Supreme Court essentially delegated the task of how to recognize that right by declaring that the state has a general interest in preserving life. Missouri was permitted to require clear and convincing evidence of an incompetent's intent. If Missouri desired, it could require more than prior oral statements made by the incompetent while competent to establish clear and convincing proof. In fact, Justice O'Connor explicitly acknowledged this reality by stating that the Supreme Court had essentially committed this issue to the "'laboratory' of the [s]tates." For many years prior to *Cruzan*, state courts had often found independent justifications for an individual to refuse medical treatment, making *Cruzan* the Supreme Court's first decision on the issue.

By failing to recognize Sue's federal constitutional right to die, *DeGrella* leaves open the possibility that the Kentucky Legisl-
ture will more explicitly revise its Living Will Act\textsuperscript{162} and Health Care Surrogate Act\textsuperscript{163} to abrogate an incompetent's right to refuse nutrition and hydration. A formal recognition of Sue's federal constitutional right might have required the court to declare parts of the two Acts unconstitutional. Yet the court's construction of the Acts makes this scenario unlikely.

Unduly focusing on Sue's common law rights of self-determination and informed consent, the court ignored Sue's federal constitutional liberty interest.\textsuperscript{164} Kentucky's Living Will Act\textsuperscript{165} attempts to restrict an individual's right to refuse nutrition and hydration by stating that "life prolonging treatment" does not include administration of nutrition or hydration.\textsuperscript{166} The majority finds other wording in the statute to avoid ruling on the constitutionality of this clause. It appears that the Act attempts to revoke a patient's right to refuse unwanted medical treatment.

Likewise, the Health Care Surrogate Act\textsuperscript{167} explicitly excludes a surrogate's right to cease nutrition and hydration of a patient.\textsuperscript{168} In a similar fashion, the court found that an exception to this limitation was a clause which permitted cessation of nutrition and hydration in instances where the burden of treatment outweighed the benefits.\textsuperscript{169} This latter construction by the court will at least make it possible under the existing Health Care Surrogate Act\textsuperscript{170} for any incompetent to exercise the right to refuse nutrition and hydration, because the burden is subjectively high to an incompetent.\textsuperscript{171} However, because \textit{DeGrella} refused to formally recognize a constitutional right to refuse treatment, a subsequently enacted statute could bring the issue before the court again.

\begin{footnotes}
\footnote{164. "Constitutional questions would arise only if these Acts were interpreted as a legislative effort to impair self-determination." \textit{DeGrella} v. Elston, 858 S.W.2d 698, 708 (Ky. 1993).}
\footnote{166. \textit{DeGrella}, 858 S.W.2d at 708 (citing Ky. Rev. Stat. Ann. § 311.624 (Baldwin 1991)). See \textit{supra} note 127 and accompanying text.}
\footnote{169. Id.}
\footnote{171. \textit{DeGrella}, 858 S.W.2d at 708.}
\end{footnotes}
Adopting pieces of the *Rasmussen* decision, the majority stopped short of recognizing an independent state constitutional right to privacy for one seeking to forego medical treatment, as the *Rasmussen* court found.\(^{172}\) Few decisions are more personal than an individual's decisions about family matters and medical treatment.\(^{173}\) Arguing that an individual has a greater interest in being maintained alive misses the point, because to not determine the true choice of the incompetent would be as irrevocable as death:

> From the point of view of the patient, an erroneous decision in either direction is irrevocable. An erroneous decision not to terminate life-support . . . robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.\(^{174}\)

Very few individuals have the foresight to plan for events which lead to a PVS.

Kentucky's Living Will Act\(^{175}\) and Health Care Surrogate Act\(^{176}\) were inapplicable to Sue's case. She did not have the benefit of the statutes before she became incapacitated.\(^{177}\) Additionally, Sue was not terminally ill as required by the Living Will Act.\(^{178}\) The court focused on these provisions because the guardian ad litem raised the issues on appeal.\(^{179}\) This should have been an invitation for the court to strike the offending provisions as violations of Sue's federal constitutional liberty interests or her state constitutional rights to privacy. Yet the court chose to side-step the issue and leave offending portions of the statutes intact,\(^{180}\) leaving

\(^{172}\) *Id.* at 705 (quoting *Rasmussen* v. Fleming, 741 P.2d 674 (Ariz. 1987)).

\(^{173}\) "Medical decisions may profoundly affect the patient's physical or psychological well being. They can mean the difference between a life of pain and a life of pleasure." Brief for Appellee at 28 (citing Andrews v. Ballard, 498 F.Supp. 1038, 1047 (S.D. Tex. 1980), *DeGrella* (92-CI-01099)).


\(^{177}\) *DeGrella*, 858 S.W.2d at 713 (Wintersheimer, J., dissenting).


\(^{179}\) *DeGrella*, 858 S.W.2d at 706-09; see also Brief for Appellant at 7-11, *DeGrella* (No. 92-CI-01099).

\(^{180}\) *DeGrella*, 858 S.W.2d at 708.
open the possibility that the legislature will once again attempt to revoke an individual's right to refuse unwanted medical treatment. For the aforementioned reasons, the Kentucky Supreme Court should have found a state constitutional right to refuse medical treatment and formally acknowledged the federal liberty interest in the same.

B. Procedural Burden of the Incompetent

Once the majority recognized that Sue's common law rights of self-determination and informed consent were not derogated by the Kentucky statutes, it proceeded to the issue of what procedural burden should be allocated to Sue.\footnote{181. Id.} On this issue, the court took a more pragmatic approach by allowing past oral statements to be admitted as grounds by which the trial court could find clear and convincing evidence of Sue's intent.\footnote{182. Id. at 709.}

Sue was in a unique situation, having previously been connected to a ventilator as a result of a car accident.\footnote{183. Id. at 703.} Although being connected to a ventilator is different than receiving nutrition and hydration, the incident provided the court with strong evidence of Sue's wishes.\footnote{184. Id. at 703, 709.} Unfortunately, individuals in a condition similar to Sue's may not have had the benefit of such an incident. As a result, because the court elected to not decide on whether a mere preponderance of the evidence would suffice to establish an incompetent's decision,\footnote{185. Id. at 706.} the difficult issue of procedural burden will resurface in the courts.

Additionally, the court declined to address whether a best interest standard could be used by a surrogate acting on behalf of an incompetent.\footnote{186. The best interest standard uses objective criteria when no reliable evidence of the patient's intent exists. Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987).} Several other courts to date have adopted the best interest test where no reliable evidence of the incompetent's intentions can be found.\footnote{187. DeGrella v. Elston, 858 S.W.2d 698, 705 (Ky. 1993) (declining to address whether the best interest standard would apply in Kentucky).} In \textit{In re Conroy},\footnote{188. See, e.g., Rasmussen v. Fleming, 741 P.2d 674 (Ariz 1987); \textit{In re Conservatorship of Drabick}, 245 Cal. Rptr. 840 (Ct. App. 1988), \textit{cert. denied}, Drabick v. Drabick, 488 U.S. 958 (1998).} the court
extended its decision to include a best interest test even though it did not have to do so, as evidence existed that the patient clearly did not desire treatment.\textsuperscript{190} Yet, the \textit{Conroy} court held that even in absence of trustworthy evidence, a patient may still decline life-sustaining treatment where the net burdens of the treatment outweigh the benefits a person derives from life with the treatment.\textsuperscript{191}

It is understandable that few courts want to become embroiled in a quality of life issue which appears to be implicit in any best interest test. Yet, this is precisely what the majority in \textit{DeGrella} used when it determined that the Health Care Surrogate Act\textsuperscript{192} was irrelevant to Sue, because to Sue, her burdens clearly outweighed the benefits of her continued life.\textsuperscript{193} Although the majority declared this was from Sue's perspective and not the court's perspective,\textsuperscript{194} it was a distinction in form only. If the court is worried about the subjective intent of the patient, then the allocation of the procedural burdens should come before the court on neutral grounds.\textsuperscript{195} The best evidence test offers the court the means by which a court can truly determine the intentions of the patient. It also creates a right to refuse treatment which is exercisable by all, and not only by those who had the foresight to execute written instruments, or the luck to have had previous accidents demonstrate current intentions. In short, a best evidence rule would give substance to one's right to refuse unwanted medical treatment.

Lastly, the Kentucky Legislature should enact legislation which more truly reflects the desires of its constituents. Several public opinion polls illustrate that the vast majority of individuals find a PVS to be abhorrent and desire the right to refuse medical treatment.\textsuperscript{196} It is true that Kentucky, like other states, has

\begin{footnotes}
\textsuperscript{190} Id. (adopting best interest standard even when clear and convincing evidence was found).
\textsuperscript{191} Id.
\textsuperscript{192} Ky. REV. STAT. ANN. §§ 311.970-.986 (Baldwin 1991).
\textsuperscript{193} DeGrella v. Elston, 858 S.W.2d 698, 708 (Ky. 1993).
\textsuperscript{194} Id.
\textsuperscript{195} See Cruzan v. Director, 497 U.S. 261, 301-30 (Brennan, J., dissenting); see also id. at 330-57 (Stevens, J., dissenting). "If the goal in fact is to determine the patient's state of mind, then the legal starting point should be a neutral position." Brief of Amicus Curiae Kentucky Hospital Association in Support of Appellee at 13, \textit{DeGrella} (92-CI-01099).
\textsuperscript{196} According to a nationwide survey by the \textit{New York Times} in May and June of
enacted statutes that allow an individual to effectuate a desire to forego medical treatment. But the Kentucky Legislature has explicitly attempted to circumscribe this right as it applies to receiving nutrition and hydration. Additionally, other polls indicate that few people take advantage of living will laws, believing their families will know best what they desire. However, few realize that even the best intending family members may not be able to effectuate that desire because of the current state of the law.

C. Unanimity Requires No Judicial Intervention

Perhaps the brightest aspect of the majority’s opinion was the decision that in some circumstances the judiciary is not the place to resolve the emotional issue of death. Family members know best what an individual would desire, having intimate knowledge about the make-up of the individual. It is in the memory of family members that the individual who elects to die will continue to live. Litigation is an expensive process, as well as one that is emotionally trying on family members who no doubt struggle with the decision that they must make on behalf of their loved one. Unfortunately, requiring all individuals to agree with a


Family members are the best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient’s approach to life, but also because of their special bonds with him or her. Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they who provide for the patient’s comfort, care, and best interests ... and they who treat the patient as a person, rather than a symbol of a cause.

*Id.* at 445.
decision to forego medical treatment may actually engender litigious action.

Often an individual will be transferred to the nearest available hospital when suffering a trauma. If the hospital subscribes to certain religious beliefs, then the hospital will inevitably object to the discontinuation of life-sustaining treatment. Hospitals and nursing homes also have a financial interest in keeping a patient alive. Additionally, some family members not close to the patient may hold religious beliefs which prevent them from agreeing to cease treatment. Even after a close family member is able to resolve these conflicts in court, that same family member may be financially responsible for interim treatment of the patient. Only a clear medical opinion substantiated with factual findings, and the opinion of those closest to the patient should be required to avoid judicial intervention. Only then will the courts truly do justice to the patient and to those who will carry the memory of the patient. In fact, a sad reality of today's society is that often family members are not close-knit.

Courts need to recognize that the judiciary is not the place for decisions involving the right to forego life-sustaining treatment. Although the Kentucky Supreme Court attempted to recognize this in the DeGrella decision, the requirement of unanimity by all parties involved in the decision to withdraw medical treatment may leave many individuals suffering in a PVS without a means to achieve expedient justice.

VI. CONCLUSION

Sue suffered in a PVS for more than ten years before the Kentucky Supreme Court heard her appeal for justice. Sue's mother never lived to see that justice, although she had been involved in the battle for nearly nine years. It is true that Sue's heart beat and her lungs breathed without the aid of medical devices. But Sue had no chance of ever regaining

203. Id. at 700.
204. Ms. Elston died while awaiting the outcome of the court's decision. Her son, Joseph Elston, was substituted as Sue's legal guardian. Id. at 701 n.2.
205. Id. at 702. Actually, Sue breathed through a tracheal tube inserted into her throat. Id. at 700.
cognitive thought and doctors had intrusively inserted a tube into her stomach to provide her nutrition and hydration. Sue and her family desired only that Sue be permitted to die with dignity.

Kentucky's highest court eventually brought justice to Sue and her family and for that it should be commended. Finding that Sue had the common law rights of self-determination and informed consent, the court joined the vast majority of states when it permitted Sue's feeding tubes to be removed. However, by refusing to acknowledge Sue's federal constitutional liberty interest in death and focusing unduly on distinguishing offending provisions of Kentucky's Living Will Act and Health Care Surrogate Act, the court left open the possibility that future legislative enactments might bring more litigation in these highly personal decisions. Additionally, because the court declined to declare whether a best interest test may be used by a surrogate on behalf of a patient, future patients with less evidence will again be forced to litigate. Also, patients fortunate enough to be in an amenable hospital with like-minded doctors and family members may now avoid judicial approval in these matters of death. But individuals with objecting hospitals, doctors, or family members will be forced to acquire judicial sanctions before a dignified death may occur.

The DeGrella decision is an important first step in the Kentucky Supreme Court's attempt to grapple with an individual's right to die with dignity. However, Kentucky has not yet established whether it will follow the majority of states on this issue, or whether it will follow the minority. The first two pages of the court's decision were replete with qualifications defining what the court did not wish to address. Unfortunately, this excessive judicial restraint will ensure greater future judicial involvement, and this is precisely what the court did not want.

206. Id. at 701.
207. Id. at 700.
208. Id. at 709.
211. DeGrella v. Elston, 858 S.W.2d 698, 705 (Ky. 1993).
212. Id. at 709.
213. Id. at 701-02.
DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.: SOUNDING THE DEATH KNELL FOR FRYE V. UNITED STATES IN THE COMMONWEALTH?

by Gregory W. Catron

I. INTRODUCTION

On June 28, 1993, the United States Supreme Court decided the highly publicized case Daubert v. Merrell Dow Pharmaceuticals, Inc. Prior to the Court's decision in Daubert, the "general acceptance" test formulated in Frye v. United States provided the standard in a majority of jurisdictions, state and federal, for determining whether to admit expert testimony based upon a novel scientific technique into evidence at trial. After the adoption of the Federal Rules of Evidence in 1975, however, controversy over the continued authority of Frye steadily increased, resulting in a split among the lower federal courts as to whether Frye or a more flexible "relevancy standard" based on the Federal Rules should govern the issue. In Daubert, a unanimous Supreme Court held that Frye had been superseded by the adoption of the Federal Rules of Evidence and, therefore, the Federal Rules, not Frye, provide the standard for admitting expert scientific testimony into evidence in a federal trial.

The Court's decision in Daubert did not, however, end the controversy over the continued vitality of Frye. Daubert is a non-constitutional federal decision and, therefore, is not binding on the state courts. Consequently, since Daubert was decided, the high courts of a number of states have thumbed their noses at the

2. 293 F.2d 1013 (D.C. Cir. 1923).
4. See Daubert, 113 S. Ct. at 2793 n.5.
5. Id. at 2790.
6. See discussion infra part IV.
Supreme Court and held that they will continue to follow Frye, even though their own state rules of evidence are patterned after the Federal Rules of Evidence that were interpreted in Daubert. Nevertheless, Daubert provides highly persuasive precedent for rejecting Frye, especially in those states that have adopted rules of evidence patterned after the Federal Rules. In fact, the high courts of some of those states have already rejected Frye, opting for the more flexible approach used in Daubert. Many other states, including Kentucky, have thus far avoided deciding the issue. Thus, the debate over which is the proper standard to apply, Frye or Daubert, continues at the state level.

In the past, Kentucky has always applied Frye. In its recent opinion in Staggs v. Commonwealth, however, handed down after Daubert was decided, the Supreme Court of Kentucky implied that it may be ready to reassess the continued vitality of Frye in the Commonwealth. In Staggs, the court characterized Frye as the rule that existed prior to the adoption of the Kentucky Rules of Evidence. For procedural reasons, however, the court declined to interpret the recently adopted Kentucky Rules. The Kentucky Rules of Evidence are modeled after the Federal Rules of Evidence. In fact, the Kentucky Rules regarding the admissibility of expert scientific testimony are virtually identical to their corresponding counterparts in the Federal Rules. Therefore, although the decision in Daubert is not binding on the Supreme Court of Kentucky, it will at least provide persuasive precedent as that court begins to construe the newly adopted Kentucky Rules. This note evaluates the arguments for and against the Frye test, and concludes that the Kentucky Supreme

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7. See infra notes 159-64 and accompanying text.
8. See infra notes 152-58 and accompanying text.
9. See infra notes 152-58 and accompanying text.
10. See infra notes 165-73 and accompanying text.
11. See infra notes 37-60 and accompanying text.
13. Id. at *2.
14. Id.
15. Id.
16. See infra note 184 and accompanying text.
Court should reject *Frye* in favor of the more flexible approach used in *Daubert*.\(^{19}\)

**II. BACKGROUND AND FACTS**

**A. The Controversy Over Frye**

On December 3, 1923, the Court of Appeals of the District of Columbia decided *Frye v. United States*.\(^{20}\) In that now famous case, the court formulated the so-called "general acceptance" test for determining when expert opinion testimony based on a novel scientific technique should be admitted into evidence at trial.\(^{21}\) The advantage of *Frye* is that it provides a bright-line test that is straightforward and easy to apply. Under *Frye*, if the trial court determines that the scientific principle upon which an expert's opinion is based is generally accepted as reliable in the particular scientific community to which it belongs, then it is admissible. If it is not generally accepted, it is not admissible.\(^{22}\) Over the course of the next seventy years, a majority of federal and state jurisdictions, including Kentucky, adopted this test.\(^{23}\)

In 1975, however, the United States Supreme Court adopted the Federal Rules of Evidence to govern proceedings in federal court.\(^{24}\) With the adoption of the Federal Rules, controversy over the merits and continued authority of *Frye* increased.\(^{25}\) A growing minority of federal and state courts began abandoning *Frye* in favor of a more flexible approach under the Federal Rules and their state counterparts.\(^{26}\)

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19. See discussion *infra* parts IV, V.
20. 293 F. 1013 (D.C. Cir. 1923).
21. The exact language used by the court in *Frye* in formulating the "general acceptance" test is found in the following often quoted passage:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.* at 1014.
22. *Id.*
25. *See Daubert*, 113 S. Ct. at 2793 nn.4-5.
26. *Id.*
On June 28, 1993, the United States Supreme Court ended the controversy among the federal courts when it handed down its opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc. In Daubert, the Court held that Frye had been superseded by the Federal Rules of Evidence. Therefore, the Federal Rules, not Frye, provide the standard for admitting expert scientific testimony in a federal trial. The Court's holding did not completely foreclose the controversy over Frye, however, because Daubert is not binding on the state courts.  

Prior to the decision in Daubert, the states were split over whether and in what context to apply Frye. Traditionally, Frye had "been understood as a doctrine governing criminal trials . . . ." Prior to Daubert, twenty-five states had either rejected, declined to adopt, or refused to use the Frye test exclusively in determining the admissibility of novel scientific evidence in criminal and quasi-criminal cases. The majority of remaining states, twenty in all, including Kentucky, applied Frye in the criminal, but not the civil context. Finally, a small number of states had applied Frye in both the criminal and civil contexts, at least in a limited way. Since Daubert, many states have continued to apply the "general acceptance" test used in Frye. Others have rejected Frye in favor of the more flexible approach used in Daubert. Kentucky has yet to decide what approach it will take for the future.

B. Kentucky's Historical Position on Frye

Since 1940, Kentucky has followed the principles of Frye to determine the admissibility of novel scientific evidence. While
not always citing Frye, Kentucky courts have consistently used the requirement of “general acceptance” as the litmus test for determining whether to admit novel scientific evidence.\textsuperscript{38}

The Supreme Court of Kentucky first began applying the principles of Frye over fifty years ago in Shelton v. Commonwealth.\textsuperscript{39} In that case, the court applied the principles of Frye to determine the admissibility of expert fingerprint identification analysis.\textsuperscript{40} Twenty years later, in Dugan v. Commonwealth,\textsuperscript{41} the court again applied the principles of Frye to decide the admissibility of the results of a truth serum test.\textsuperscript{42} In Conley v. Commonwealth,\textsuperscript{43} the Kentucky Court of Appeals used the principles of Frye to refuse to admit operator testimony regarding the results of a lie-detector test.\textsuperscript{44} Concerned with the scientific trustworthiness of the device, the court declined to permit general use of lie-detector evidence in court until its “endorsement by a larger segment of the psychological and physiological branches of science . . . .”\textsuperscript{45} Finally, in Honeycutt v. Commonwealth,\textsuperscript{46} the court of appeals again used the principals of Frye to admit radar detector evidence for the first time.\textsuperscript{47}

In Perry v. Commonwealth ex rel. Kessinger,\textsuperscript{48} the Kentucky Supreme Court finally cited Frye in support of its application of the “general acceptance” test.\textsuperscript{49} The court in that case used the

\begin{footnotes}
\item[38] See infra notes 39-47.
\item[39] 134 S.W.2d 653 (Ky. 1940).
\item[40] Id.
\item[41] 333 S.W.2d 755 (Ky. 1960).
\item[42] Id. at 756.
\item[43] 382 S.W.2d 865 (Ky. 1964).
\item[44] Id. at 867.
\item[45] Id.
\item[46] 408 S.W.2d 421 (Ky. 1966).
\item[47] Id. at 423.
\item[48] 652 S.W.2d 655 (Ky. 1983).
\item[49] Id. at 661.
\end{footnotes}
test to admit expert testimony evidence of paternity based upon a blood grouping test.\textsuperscript{50} "In sum," the court concluded, "our review of the reported cases and recent literature convinces us that [blood grouping tests] to determine paternity are generally accepted in the scientific community as reliable."\textsuperscript{51}

\textit{Frye} has also been cited extensively in the Commonwealth as the standard of admissibility for expert testimony in the field of psychology. In a recent series of cases, the Kentucky Supreme Court has consistently applied \textit{Frye} to refuse to admit expert psychiatric testimony regarding the "child sexual abuse accommodation syndrome."\textsuperscript{52} Similarly, in \textit{Dyer v. Commonwealth},\textsuperscript{53} the court again used \textit{Frye} to refuse to admit testimony regarding a "pedophilia" profile.\textsuperscript{54} In \textit{Commonwealth v. Rose},\textsuperscript{55} although failing to cite \textit{Frye}, the court held that expert opinion testimony regarding the "battered wife syndrome" was admissible, because the expert witness had "provided background information sufficient to demonstrate the scientific acceptability of the battered wife (or spouse abuse) syndrome as a mental condition or entity generally recognized in the medical community."\textsuperscript{56}

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\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See, e.g., Bussey v. Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985) ("the prosecution did not establish that the syndrome is a generally accepted medical concept . . ."); Lantrip v. Commonwealth, 713 S.W.2d 816, 817 (Ky. 1986) ("There was no evidence that the so-called 'sexual abuse accommodation syndrome' has attained a scientific acceptance or credibility among clinical psychologists or psychiatrists."); Hester v. Commonwealth, 734 S.W.2d 457, (Ky. 1987), \textit{cert. denied}, 484 U.S. 989 (1987) ("While the phrase 'sexual abuse accommodation syndrome' was not used in the case at bar, we fail to see any significant difference between the testimony given in \textit{Lantrip} and in this case."); Mitchell v. Commonwealth, 777 S.W.2d 930, 933 (Ky. 1989) ("We hold that the testimony concerning the so-called child sexual abuse accommodation syndrome was erroneously admitted into evidence because: (1) there was no medical testimony that the syndrome is a generally accepted medical concept . . ."); Brown v. Commonwealth, 812 S.W.2d 502, 504 (Ky. 1991) ("this court has consistently held that the admission of evidence of the syndrome or symptoms thereof is reversible error.").

\textsuperscript{53} 816 S.W.2d 647 (Ky. 1991).
\textsuperscript{54} Id. at 653.
\textsuperscript{55} 725 S.W.2d 588 (Ky. 1987), \textit{cert. denied}, 484 U.S. 838 (1987).
\textsuperscript{56} Id. at 590. It should be noted that in \textit{Rose}, before applying the principals of \textit{Frye} to determine the admissibility of the battered wife syndrome, the court noted that, "[i]nherent in the trial court's decision to permit the expert to testify as to the existence and nature of the . . . syndrome was a finding that this syndrome" is admissible under Rule 702 of the Federal Rules of Evidence. \textit{Id.} Having noted the trial court's use of Rule 702 to decide the issue, however, the court proceeded to ignore it and applied \textit{Frye} anyway. \textit{Id.}
In its most recent opinion applying Frye, before Daubert was handed down, the Supreme Court of Kentucky left little doubt about the standard to be applied in the Commonwealth. In Harris v. Commonwealth, the court expressly embraced Frye. In that case, the court concluded that, "in deciding whether to allow the admission of new, scientific evidence, this Court has required trial courts to follow the dictates of Frye v. United States." On July 1, 1992, however, Kentucky adopted the new Kentucky Rules of Evidence. The Kentucky Rules of Evidence regarding the admissibility of expert scientific testimony are virtually identical to the corresponding Federal Rules of Evidence. Rule 702 of the new Rules specifically governs the admissibility at trial of expert scientific testimony. Like its federal counterpart, it makes no mention of Frye. As is evident from the Kentucky cases listed above, prior to the adoption of Rule 702, Kentucky courts had always applied the "general acceptance" test enunciated in Frye to determine the admissibility of expert opinion testimony based on a novel scientific technique. The adoption of new Kentucky Rule 702 and the Supreme Court's decision in Daubert construing the identical Federal Rule 702, however, bring the future of Frye in the Commonwealth into question.

As noted above, in the Supreme Court of Kentucky's most recent opinion touching on the issue, handed down by the court after Daubert was decided, the court has implied that it is ready to reassess the continuing vitality of the Frye test in the Commonwealth. While the United States Supreme Court's decision in Daubert is not binding on the Supreme Court of Kentucky, it

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57. 846 S.W.2d 678 (Ky. 1992).
58. Id. at 681.
59. Id. (citation omitted).
60. Ky. R. Ct. 323.
61. See supra note 17.
62. Kentucky Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ky. R. EVID. 702.
63. Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.
64. See discussion infra part IV.
65. See Harris, 846 S.W.2d at 681.
is important, however, because it will at least provide persuasive precedent as that court begins to reassess Frye and construe the effect of the newly adopted Kentucky Rules of Evidence on the admissibility of expert testimony.66

C. The Facts Before the Court in Daubert

The plaintiffs in Daubert, Jason Daubert and Eric Schuller, are minor children who were born with limb reduction birth defects.67 They and their parents sued Merrell Dow Pharmaceuticals, Inc. ("Dow") in California state court alleging that their birth defects were caused by their mothers' use during pregnancy of the prescription anti-nausea drug, Bendectin.68 Until it was pulled from the market in 1983, Bendectin was manufactured and marketed by Dow.69 Dow subsequently removed the suits to federal court on diversity grounds.70 After extensive discovery, Dow moved the Federal District Court for summary judgment, claiming that Bendectin does not cause birth defects and that plaintiffs could not produce any admissible evidence that it does.71

In support of its motion for summary judgment, Dow "submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances."72 In his affidavit, Lamm stated that he had reviewed all the available published literature on the effects of Bendectin on human birth defects.73 This literature consisted of thirty studies, involving over 130,000 patients.74 On the basis of this review, Lamm concluded that no published epidemiological study to date had demonstrated a statistically significant association between Bendectin and human birth defects.75 Therefore, "maternal use of Bendectin during the first trimester of pregnancy ... [was not] shown to be a risk factor for human birth defects."76

66. See infra note 184 and accompanying text.
68. Daubert, 113 S. Ct. at 2791.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
Plaintiffs responded to Dow's motion primarily with the expert testimony of eight of their own well-credentialed experts.77 Plaintiffs' experts based their opinion testimony on: (a) in vitro and in vivo animal studies that purportedly found a link between Bendectin and birth defects; (b) pharmacological studies of Bendectin's chemical makeup that attempted to show that the makeup of Bendectin is similar to other substances known to cause birth defects; and (c) re-analysis of previously published epidemiological studies.78 Based on this evidence, plaintiffs' experts concluded that Bendectin can cause birth defects.79

The district court held that plaintiffs' experts' conclusions were inadmissible, because the evidence upon which they were based was not the "generally accepted" method for determining causation in such a case.80 The court found that expert opinion testimony must be based on epidemiological studies to be admissible in Bendectin cases.81 Since plaintiffs' experts' opinions were based on animal studies and chemical analysis, and the reanalyses upon which the plaintiffs' experts further relied were not published or subjected to peer review, but were generated solely for the purposes of litigation, they failed to meet the standard and thus were inadmissible.82 Having refused to admit the plaintiffs' experts' opinion testimony that Bendectin caused birth defects, the court found that the plaintiffs could not meet their burden of proving that Bendectin caused their birth defects, and accordingly, granted Dow's motion for summary judgement.83 Citing Frye as the applicable test, the Ninth Circuit Court of Appeals affirmed.84 The United States Supreme Court granted certiorari to resolve a division among the circuit courts over the proper standard of admissibility in such cases.85

III. THE COURT'S REASONING

In Daubert v. Merrell Dow Pharmaceuticals, Inc.,86 a unanimous United States Supreme Court held that the "general acceptance"

77. Id.
78. Id. at 2791-92.
79. Id. at 2791.
80. Id. at 2792.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. 113 S. Ct. 2786 (1993).
test enunciated in *Frye v. United States*\(^8\) for determining the admissibility of expert scientific testimony in a federal trial was superseded by the adoption of the Federal Rules of Evidence.\(^8\) A seven member majority of the Court went further. In dicta, the Court commented extensively upon the limits placed on the admissibility of expert scientific testimony by the reliability and relevancy requirements set out under Rule 702 of the Federal Rules of Evidence, by the role of the trial judge as gatekeeper under Rule 104(a) of the Federal Rules, and by the role of the jury and the adversarial process as safeguards against any adverse impact "junk science" might have in the courtroom.\(^8\)

**A. A Brief Background of Frye**

The *Daubert* Court set up its analysis with a brief discussion of the background of the "general acceptance" test formulated in *Frye*.\(^9\) The Court noted that, although *Frye* had come under increasing attack recently, in the seventy years since its formulation, the "general acceptance" test had been, and continued to be, the rule followed in a majority of jurisdictions.\(^9\) The Court next set out the facts of *Frye*, and quoted the famous passage from the case setting out the "general acceptance" test.\(^9\) The Court noted the growing controversy over the merits and proper scope and application of *Frye*, and then focused on the issue at hand.\(^9\) The Court emphasized that the continued authority of the rule, also a topic of much controversy, was at issue, not its content.\(^9\) The Court then reached the subject of its opinion, the petitioner's contention "that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence."\(^9\)

87. 293 F. 1013 (D.C. Cir. 1923).
88. *Daubert*, 113 S. Ct. at 2790.
89. The *Daubert* court summarized its admissibility scheme with the following language: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.
90. *Id.* at 2792-93.
91. *Id.*
92. *Id.* at 2793.
93. *Id.*
94. *Id.*
95. *Id.*
B. Frye is Superseded by the Federal Rules of Evidence

To determine whether *Frye* survived the adoption of the Federal Rules of Evidence, the Court began by laying the ground rules for interpreting the Federal Rules. Noting its intention to interpret the Federal Rules of Evidence, as it would any other statute, the Court looked first to Rule 402 to ascertain the basic standard for determining what evidence is admissible at trial.\(^{96}\) The essence of Rule 402 is that all relevant evidence is admissible and evidence which is not relevant is not admissible.\(^{97}\) The Court then looked to Rule 401 to determine what evidence is relevant, and thus admissible under Rule 402.\(^{98}\) Rule 401 defines "relevant evidence" as evidence that tends to make an outcome determinative fact in the case more or less probable to exist.\(^{99}\) In light of this language, the Court found the Rule's basic standard of relevance to be a liberal one.\(^{100}\)

Noting that *Frye* predated the Rules by fifty years, the Court turned next to the effect, if any, the common law might continue to have on the interpretation and application of the Federal Rules.\(^{101}\) The Court noted that, while it had previously held that the Federal Rules occupy the field, the common law still serves as a guide in their interpretation and application.\(^{102}\) The Court gave two examples. First, in *United States v. Abel*,\(^{103}\) the Court found the common law rule at issue consistent with Rule 402's general admissibility requirement and deemed it unlikely that the drafters intended to alter that rule.\(^{104}\) Thus, they left it intact. In *Bourjaily v. United States*,\(^{105}\) on the other hand, the Court noted

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96. Id.
97. Federal Rule of Evidence 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.
98. *Daubert*, 113 S. Ct. at 2794.
99. Federal Rule of Evidence 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.
100. *Daubert*, 113 S. Ct. at 2794.
101. Id.
102. Id.
104. *Daubert*, 113 S. Ct. at 2794.
that since it was unable to find the particular common law doctrine at issue in that case in the Rules, it was superseded by the Rules.106

Next, the Court applied this interpretive scheme to *Frye*. The Court noted that Rule 702, governing expert testimony, is specifically addressed to the issue of admissibility dealt with in *Frye*.107 Looking at the text of Rule 702, the Court found nothing to indicate that the Rule "establishes general acceptance as an absolute prerequisite to admissibility."108 The Court also noted that Dow had not shown any clear indication that the drafters had intended the Rules in general, or Rule 702 in particular, to incorporate a "general acceptance" standard.109 The Court pointed out that the Rules' drafting history did not even mention *Frye*.110 Furthermore, the Court noted that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'"111 Thus, the Court concluded, "[g]iven the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention 'general acceptance,' the assertion that the Rules somehow assimilated *Frye* is unconvincing."112

C. Scientific Validity as the Basis For Evidentiary Reliability Under Rule 702

Having effectively eliminated the traditional test for the admissibility of expert scientific testimony, a majority of the Court felt compelled to give some further guidance to the courts below. According to the Court, just because *Frye* no longer provides the appropriate test for limiting the admissibility of scientific evidence does not mean there are no limits.113 The Court commented that the appropriate source of these limits is to be found in the requirements of Rule 702.114 According to the Court, Rule 702

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).
112. *Id.*
113. *Id.* at 2794-95.
114. *Id.* at 2795.
requires the trial judge to act as an evidentiary gatekeeper, preventing proffered evidence from being admitted unless it is both relevant and reliable.\textsuperscript{115}

In order for expert scientific testimony to be reliable, and thus admissible, under Rule 702, "[t]he subject of an expert's testimony must be 'scientific ... knowledge.'"\textsuperscript{116} In order to qualify as "scientific knowledge," an inference or assertion, "must be derived by the scientific method."\textsuperscript{117} Therefore, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."\textsuperscript{118} Hence, "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."\textsuperscript{119}

D. Relevance Under Rule 702: The Concept of "Fit"

Rule 702 also has a relevancy requirement; to be relevant, and thus admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."\textsuperscript{120} This "helpfulness" standard "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."\textsuperscript{121} The Court expressed this connection in terms of "fit."\textsuperscript{122} It noted that "'fit' is not always obvious," because, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."\textsuperscript{123}

E. The Trial Judge as Gatekeeper

In the Court's Rule 702 admissibility scheme, the trial judge is the evidentiary gatekeeper. It is he or she who must, pursuant to Rule 104(a),\textsuperscript{124} initially determine whether proffered expert scien-
scientific testimony is reliable and relevant and thus, admissible.\textsuperscript{125} To be reliable and relevant, expert testimony must be based upon scientifically valid reasoning and methodology that can be properly applied to the facts in issue.\textsuperscript{126} To guide the trial judge in making this reliability/relevancy determination, the Court set out a non-exhaustive, non-exclusive list of factors to be considered. First, the trial court should consider whether the scientific technique sought to be relied upon has been tested.\textsuperscript{127} Second, the trial court should consider whether the scientific technique sought to be relied upon has been published and reviewed by peers.\textsuperscript{128} Third, the court should examine the known or potential risk of error in applying the technique.\textsuperscript{129} Finally, general acceptance still has a role to play in making the reliability determination. The trial court should consider whether the scientific technique sought to be relied upon has been generally accepted (or rejected) in the scientific field to which it belongs.\textsuperscript{130}

The Court emphasized that its Rule 702 approach is a flexible one that should not be considered exclusive.\textsuperscript{131} It noted that similar approaches that emphasized other factors in making the Rule 702 determination were equally valid.\textsuperscript{132} The Court warned, however, that, "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission," are the subject of the inquiry.\textsuperscript{133} Thus, "the focus ... must be solely on principles and methodology, not on the conclusions that they generate."\textsuperscript{134}

To ensure that the Federal Rules strike an equitable balance between admission and exclusion, thus allowing in only that evidence which truly is relevant and reliable, the Court went even

\textsuperscript{125} It should be noted that the Court did not limit the requirements of Rule 702 to expert opinion testimony on "novel" scientific evidence. All scientific evidence comes under its purview and must meet its requirements to be admissible. \textit{Daubert}, 113 S. Ct. at 2796 n.11.

\textsuperscript{126} \textit{Id.} at 2796.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} at 2797.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at n.12.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.}
further in its analysis of the gatekeeping role of the trial judge. The Court noted that the trial judge should be mindful of other applicable rules, and use them to exclude evidence when the trial court deems it necessary. The Court made specific mention of Rules 703, 706, and 403.

F. The Adversarial Process and the Role of the Jury as Safeguards Against "Junk Science"

The Court concluded its discussion by noting that allowing the trial judge to perform his gatekeeping duties under Rule 702 by allowing in expert opinion testimony under the new, more flexible standard, will not flood the courtroom with "junk science" or overwhelm juries with incomprehensible "scientific theories." The Court noted that traditional safeguards already in place allay this fear. The Court pointed out that after admitting evidence

135. Id. at 2797-98.
136. Federal Rule of Evidence 703 provides:
   The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
   FED. R. EVID. 703.
137. Federal Rule of Evidence 706 provides, in relevant part:
   (1)(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
   FED. R. EVID. 706.
138. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.
139. Daubert, 113 S. Ct. at 2798.
under Rule 702, the trial judge remains free to direct a verdict or grant summary judgment if the evidence turns out to be insufficient to meet the required burden of proof.\textsuperscript{140} In the Court's view, "[t]hese conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702."	extsuperscript{141} The adversarial system, and the role of the jury therein, provide another such safeguard: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."\textsuperscript{142}

On the opposite side of the coin, the Court found no reason to expect that a gatekeeping role for the trial judge would be too oppressive to the search for truth in the legal context.\textsuperscript{143} Noting the differences between purely scientific and legal inquiry, the Court commented,

We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.\textsuperscript{144}

\textbf{G. The Dissent}

The dissenters in \textit{Daubert} concurred with the Court that the Federal Rules had superseded \textit{Frye}.\textsuperscript{145} They felt the Court had gone further than necessary, however, when it went beyond this holding and, in dicta, commented on the application of the Federal Rules when not presented with a factual dispute raising the issue.\textsuperscript{146} The dissenters felt that "further development of this important area of the law [should be left] to future cases."\textsuperscript{147}

\begin{flushright}
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 2798-99.
\textsuperscript{145} Id. at 2799 (Rehnquist, J., dissenting).
\textsuperscript{146} Id. at 2800.
\textsuperscript{147} Id.
\end{flushright}
IV. ANALYSIS

Because it is a federal decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is not binding on the state courts, the majority of which, like Kentucky, have traditionally followed *Frye v. United States*. *Daubert* is, however, a ruling by the highest court in the land on a highly controversial and critical area of the law. As such, it will be difficult to ignore. Furthermore, like Kentucky, many states have recently adopted state rules of evidence modeled after the Federal Rules of Evidence. Because *Daubert* interprets the Federal Rules upon which these state rules are based, it will provide highly persuasive precedent as the courts of these various states begin to interpret their own, new state rules.

A. Other States’ Reactions to *Daubert*

In support of their position on which choice Kentucky should make, proponents and opponents on both sides of the issue will no doubt point to other states’ interpretations of the impact *Daubert* has on those states’ rules. A significant number of states have already begun to grapple with the choice between *Frye* and the flexible alternative provided by *Daubert*. Their opinions generally fall into one of three categories. First, a number of states have rejected *Frye* and adopted the more flexible relevancy standard of *Daubert*. Second, a number of states have rejected *Daubert* and reaffirmed their commitment to *Frye*. Finally, a majority of states have managed to avoid the issue for the moment.

At present, those states that have expressly rejected *Frye* and embraced *Daubert* include Arkansas, Delaware, New Mexico,
Ohio, Oregon, South Dakota, and Wyoming. Those states that have expressly rejected Daubert in favor of Frye include Florida, Maryland, Minnesota, Missouri, New York, and Washington. For the moment, however, most states remain undecided. These states include Arizona, California, Colo-
rado, Massachusetts, and New Hampshire. Furthermore, appellate courts in Connecticut, Delaware, Illinois, Minnesota, and Oklahoma have, with little or no commentary, noted Daubert, but continued to follow Frye until the issue is decided by their respective state supreme courts.

B. Kentucky’s Approach for the Future

In Staggs v. Commonwealth, the Supreme Court of Kentucky joined those state courts that have avoided deciding the issue and continued to apply Frye. The court used language in that case, however, which implies that a change in Kentucky law in this area may be on the horizon:

This matter arose and was tried prior to the effective date of the Kentucky Rules of Evidence. We therefore are not called to interpret KRE 702. On the question of the acceptance of art therapy as a reliable scientific technique applicable to an issue in this case, our pre-KRE rule is that enunciated in the decision of [Frye].

Although the court then proceeded to apply the Frye test to the case at bar, the above quoted language, used by the court as a preface to its application of Frye, was sufficiently ambiguous regarding the future vitality of Frye after the adoption of the Kentucky Rules of Evidence that it prompted the following response from the concurrence therein:

I write separately to emphasize the importance of a trial judge’s duty to scrupulously observe the familiar principles that set forth

166. The Supreme Court of Colorado also has avoided deciding the issue but has implied that Daubert will influence that decision when it is eventually made. See Public Serv. Co. of Colorado v. Willows Water Dist., 856 P.2d 829 (Colo. 1993).
167. See Commonwealth v. Smith, 624 N.E.2d 604, 609 (Mass. App. Ct. 1993) (“Rule 702 of the Proposed Massachusetts Rules of Evidence is identical [to Federal Rule 702], but neither in this case nor any that has come to our attention has the issue been argued whether the Daubert approach should be grafted onto Massachusetts practice.”).
175. Id. at *2.
176. Id. (emphasis added).
177. Id. at *2-3.
the standard against which a novel scientific discipline is to be measured before it is properly admissible as the subject of expert testimony.

This Court has long recognized the dictates of [Frye], which place on the proponent the burden of clearly establishing that a discipline has gained in the scientific community “general acceptance in the particular field in which it belongs.” In *Harris v. Commonwealth*,178 we reiterated the absolute necessity of such proof, and categorically stated that this Court is unwilling to embrace the sole testimony of an offering party’s expert as conclusive of the matter.179

When the court is eventually called on to interpret Kentucky Rule of Evidence 702, valid arguments can be made both for following the analysis of *Daubert* and rejecting *Frye* and for following the *Staggs* concurrence’s staunch adherence to *Frye*.

Since the Kentucky Rules of Evidence are virtually identical to the Federal Rules of Evidence,180 the Supreme Court of Kentucky could easily apply an analysis paralleling the one used by the United States Supreme Court in *Daubert* to interpret the Federal Rules of Evidence, to the Kentucky Rules of Evidence and find that they supersede *Frye* in the Commonwealth. That analysis could proceed along the following lines.

To begin, the *Commentary to the Kentucky Evidence Code*, prepared by the Evidence Rules Study Committee of the Kentucky Bar Association (“the Committee”),181 states that, “these Rules should be determinative of all issues concerning the admissibility of evidence in the trial of civil and criminal cases.”182 In order to interpret “these Rules,” the Commentary contains language indicating that the Supreme Court of Kentucky should look to *Daubert* and to state precedent applying the *Daubert* analysis to various state versions of the Federal Rules for guidance:

An early decision was made by the Committee to strive for uniformity with the Federal Rules of Evidence and to propose a departure

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178. 846 S.W.2d 678 (Ky. 1992).
180. Compare *Ky. R. Evid. 104(a), 401, 402, 702, 703, and 706, with Fed. R. Evid. 104(a), 401, 402, 702, 703, and 706* (the language of the respective rules is for all intents and purposes identical).
181. It should be emphasized here that the Study Committee drafted the Kentucky Rules of Evidence. *Judge William S. Cooper et al., Kentucky Rules of Evidence § J, at J-1 (UK/CLE Monograph 1992).*
182. *Id.*
from the Federal Rules only for good reason. Uniformity between the state and federal rules would serve the purpose of minimizing the possibility of forum shopping and would in time add to the efficiency of the judicial system. The Federal Rules have been in operation since 1975; several states have adopted rules patterned after the Federal Rules. As a result there is a substantial and growing body of case law construing these Rules, case law which can be of invaluable assistance in the application of a new set of evidence rules for Kentucky.\textsuperscript{183}

As noted above, however, the \textit{Commentary on the Rules of Evidence} was prepared by the Committee, not by the Kentucky Supreme Court. The court has neither officially adopted nor officially approved it.\textsuperscript{184} Thus, while highly persuasive since it was written by the drafters of the Rules, it is not necessarily binding on the supreme court.

In \textit{Daubert}, the Supreme Court began its analysis by noting its intention to interpret the Federal Rules of Evidence as it would any other statute—by their plain meaning. Kentucky also uses the "plain meaning" doctrine of statutory interpretation. Under that doctrine, if the language of a statute is plain and unambiguous, it must be given effect.\textsuperscript{185} The Kentucky Rules of Evidence were enacted as statutes by the state legislature.\textsuperscript{186} The Kentucky Supreme Court has since adopted the Rules under its constitutional rule-making authority effective July 1, 1992.\textsuperscript{187} As statutes, therefore, they should be interpreted by their plain meaning, just like their federal counterparts.

To determine the "plain meaning" of the Federal Rules, the Supreme Court noted that Rule 402 provides the "baseline."\textsuperscript{188} This is also true of Rule 402 of the Kentucky Rules of Evidence, which is virtually identical to Federal Rule 402.\textsuperscript{189} "The principles

\begin{itemize}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{ORDER OF ADOPTION OF KENTUCKY RULES OF EVIDENCE, KENTUCKY RULES OF COURT STATE 1994}, at 323 (West Publishing Company 1993) [hereinafter KENTUCKY RULES].
\item \textsuperscript{185} See, e.g., Layne v. Newburg, 841 S.W.2d 181 (Ky. 1992); Commonwealth v. Shivley, 814 S.W.2d 572 (Ky. 1991); Lincoln County Fiscal Court v. Commonwealth, 794 S.W.2d 162 (Ky. 1990).
\item \textsuperscript{186} KENTUCKY RULES, supra note 184, at 324.
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Daubert}, 113 S. Ct. at 2793.
\item \textsuperscript{189} Kentucky Rule of Evidence 402 provides:
\begin{quote}
All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General
contained in this provision are the foundation upon which the bulk of evidence law is built."\textsuperscript{190} The gist of both rules is that all relevant evidence is admissible, while evidence that is not relevant is not admissible.\textsuperscript{191} The Supreme Court next looked to Rule 401 for the definition of "relevant evidence" under the Federal Rules.\textsuperscript{192} Relevant evidence is defined identically under both Federal and Kentucky Rule 401 as any evidence that tends to make an outcome determinative fact in the case more or less probable to exist.\textsuperscript{193} Looking at Rule 401 and 402 together, the court concluded that, "[t]he Rule's basic standard of relevance thus is a liberal one."\textsuperscript{194} This language comports well with the Study Committee's Commentary on Kentucky Rule 401: "The law of evidence is and always has been inclusionary rather than exclusionary in thrust.... Rule 401 provides an equally liberal standard of measurement for Kentucky."\textsuperscript{195}

Having established the "liberal thrust" of the Federal Rules, the court continued by noting that \textit{Frye} was a common law doctrine that predates the Federal Rules.\textsuperscript{196} The court clarified the place of pre-existing common law after passage of the Federal Rules of Evidence by citing case law to the effect that common law is theoretically superseded by the Rules of Evidence, but continues to play a role as a source of guidance in their application.\textsuperscript{197} Where the common law doctrine at issue is consistent with the Rule's general requirements, it is left intact.\textsuperscript{198} Where, however, the common law doctrine at issue is either not compatible

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\textsuperscript{191} \textit{Daubert}, 113 S. Ct. at 2794.
\textsuperscript{192} \textit{Daubert}, 113 S. Ct. at 2794.
\textsuperscript{193} \textit{Frye} was a common law doctrine that predates the Federal Rules.
\textsuperscript{194} \textit{Daubert}, 113 S. Ct. at 2794.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.}
with or not to be found in the Rules, it is superseded by them.\textsuperscript{199}

The court next pointed out that in a case such as \textit{Daubert} dealing with the admissibility of expert opinion testimony, Rule 702 speaks specifically to the issue.\textsuperscript{200} Kentucky Rule 702 is identical to the federal version.\textsuperscript{201} Looking at the plain meaning of Rule 702, the court found that nothing in the text of the Rule established "general acceptance" as an absolute prerequisite to admissibility.\textsuperscript{202} The court found further that the drafting history of the Rule made no mention of \textit{Frye}, and "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach' of relaxing the traditional barriers to 'opinion' testimony."\textsuperscript{203} All these observations of the court hold equally true for Kentucky Rule 702.

Finally, the court concluded that \textit{Frye} has been superseded by the Federal Rules:

Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated \textit{Frye} is unconvincing. \textit{Frye} made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.\textsuperscript{204}

Given the desire of the Committee, noted above, to strive for uniformity with the Federal Rules, the same conclusion with regard to Kentucky Rule 702 would seem to be inescapable.

It should be noted, however, that there is language in the Study Committee's Commentary on Kentucky Rule 702 that lends itself to the argument that the Kentucky Supreme Court should reject the analysis contained in \textit{Daubert} and continue to adhere to \textit{Frye}: "Rule 702 is identical to a provision in the Federal Rules and in every essential respect is identical to the law which has existed in Kentucky for many years."\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{199} \textit{Id.}
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{Compare Ky. R. Evid. 702, supra note 62, with Fed. R. Evid. 702, supra note 63.}
\item \textsuperscript{202} \textit{Daubert, 113 S. Ct. at 2794.}
\item \textsuperscript{203} \textit{Id. (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).}
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{JUDGE WILLIAM S. COOPER ET AL., KENTUCKY RULES OF EVIDENCE § J, at J-61 (UK/ CLE Monograph 1992) (emphasis added).}
\end{itemize}
The "law which has existed in Kentucky for many years" in regard to admitting novel expert opinion testimony is the "general acceptance" test used in Frye. This language seems to indicate that the Study Committee may have intended to "assimilate Frye" within Rule 702. Also the Commentary to Rule 402 notes that while, "most of the exceptions to the rule that all relevant evidence is admissible are contained in this set of rules [the Kentucky Rules of Evidence], Rule 402 recognizes, however, that relevant evidence may have to be excluded because of exclusionary rules contained elsewhere in the law." This presents the issue of whether Frye may be considered one of the "exclusionary rules contained elsewhere in the law" contemplated by the Committee. This language, coupled with the fact that Daubert is not binding on the Kentucky Supreme Court, could form the basis for an opinion rejecting Daubert in favor of Frye, as other states have done.

The plain meaning of the statute, however, tends to contradict these assumptions. If the Committee had wished to assimilate Frye into the new rules as the law governing proceedings in Kentucky courts, it could have easily mentioned Frye by name in the Rules or in the commentary thereto. Furthermore, as noted above, the Study Committee's Commentary is not in any way binding on the court. The court could choose to ignore the language quoted above and construe Rule 702 as it sees fit. This interpretation would better serve the goal stated by the drafters of the Kentucky Rules of being in uniformity with the Federal Rules in order to minimize forum shopping and promote judicial efficiency.

Should the Kentucky Supreme Court decide to follow the lead of Daubert and reject Frye in favor of the Kentucky Rules of Evidence, it still will be faced with the Supreme Court's commentary, in dicta, in that case on the proper application of the Federal Rules. The court noted in Daubert that Rule 702 puts limits on the admissibility of scientific evidence. It requires the trial judge to act as an evidentiary gatekeeper, preventing proffered expert scientific evidence from being admitted unless it is both relevant and reliable. "The subject of an expert's testimony must be 'scientific ... knowledge.'" In order for an inference or assertion to

206. See discussion supra part II.B.
208. Daubert, 113 S. Ct. at 2795-96.
209. Id. at 2795 (quoting Fed. R. Evid. 702).
qualify as scientific knowledge it, "must be derived by the scientific method." 210 Therefore, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." 211 "In a case involving scientific evidence, evidentiary reliability will be based on scientific validity." 212

Rule 702 also has a relevancy requirement; expert testimony must assist the trier of fact in understanding the evidence or in determining a fact in issue to be relevant. This "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. The court expressed this connection in terms of "fit," and notes that "fit" is not always obvious, and that, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." 213

In the court's admissibility scheme then, the trial judge is the evidentiary gatekeeper, who must initially determine, pursuant to Rule 104(a), 214 whether proffered expert scientific testimony is based upon scientifically valid reasoning and methodology that can be properly applied to the facts in issue and is therefore reliable and relevant, and thus admissible. To guide the trial judge in making the relevancy/reliability determination, the court set out a non-exhaustive, non-exclusive list of factors to consider. First, has the scientific technique sought to be relied on been tested? Second, has the technique been published and subjected to peer review? Third, the court should consider the known or potential rate of error in applying the technique. Finally, general acceptance still has a role to play in making the reliability determination. The court emphasized that its Rule 702 approach is a flexible one. It noted that similar approaches emphasizing other factors to make the Rule 702 determination were equally valid. The court warned, however, that "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission," are the subject of the inquiry. 215 Thus, "[t]he focus ... must be solely on principles and methodology, not on the conclusions that they generate." 216

210. Id.
211. Id.
212. Id. at n.9.
213. Id. at 2796.
214. See supra note 124.
215. Daubert, 113 S. Ct. at 2797.
216. Id.
The court derived this list of factors from federal case law and a variety of secondary sources, none of which would be binding on the Commonwealth. Thus, should the Supreme Court of Kentucky decide to apply a "Daubert" analysis to the Kentucky Rules, it would be free to adopt the list used in Daubert, adopt one of the variations of the flexible relevancy inquiry used in another jurisdiction, or it could formulate its own list of factors, placing the emphasis where it thought it would produce the best and most reliable results.

To ensure that the Federal Rules strike an equitable balance between admission and exclusion and thus allow in only that evidence that is relevant and reliable under the Rules, the court went even further in its analysis of the gatekeeping role of the trial judge. The court noted that the judge should be mindful of other applicable rules, and use them to exclude evidence when the trial court deems it warranted. The court made specific mention of the use of Rules 703, 706, and 403. The Kentucky counterparts to these rules are virtually identical and could be used by the courts of the Commonwealth in similar fashion.

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217. See supra note 136.
218. See supra note 137.
219. See supra note 138.
220. Kentucky Rule of Evidence 703 provides in relevant part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

KY. R. EVID. 703. Compare with FED. R. EVID. 703, supra note 136. Kentucky Rule of Evidence 706 provides, in relevant part:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

KY. R. EVID. 706. Compare with FED. R. EVID. 706, supra note 137.

Kentucky Rule of Evidence 403 provides: "Although relevant, evidence may be excluded
The court concluded by noting that there are traditional safeguards in place that allow the trial judge to perform his gatekeeping duties under Rule 702 without flooding the courtroom with “junk science” and overwhelming juries with incomprehensible “scientific theories.” After admitting evidence under Rule 702, the trial court remains free to direct a verdict or grant summary judgement if the evidence turns out to be insufficient to meet the required burden of proof. Kentucky courts could also use these traditional devices to police confusing and prejudicial scientific evidence that is otherwise admissible under Rule 702. Furthermore, the court noted the role played by the jury and the adversarial system in ferreting out dubious, but otherwise admissible, scientific evidence. Kentucky courts and Kentucky juries are equally competent and capable of accomplishing this function. There would seem to be little reason to continue trying to protect them from the confusing effects of expert testimony. The Kentucky Supreme Court will be failing to give Kentucky juries their due if it sees fit to continue to follow Frye and keep new forms of evidence from them.

On the opposite side of the coin, there is no reason to expect that a gatekeeping role for the trial judge would be too oppressive to the search for truth in the legal context. The court in Daubert noted the differences between the purely scientific and the legal inquiry:

We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Under a “Daubert” analysis of the Kentucky Rules, the burden on the trial judges of the Commonwealth would be greatly increased. Furthermore, the real effect of the new Rules would be contingent if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

221. Daubert, 113 S. Ct. at 2799.
222. See discussion supra part III.F.
upon their taking the time to make a balanced analysis under the Daubert approach. There is no reason to expect that Kentucky's judges are not up to this task.

Finally, the dissenters in Daubert concurred with the court that the Federal Rules had superseded Frye, but they felt that the Court had gone further than necessary when it went beyond this holding and, in dicta, commented on the application of the Federal Rules when not presented with a factual dispute.\textsuperscript{224} The dissent felt that "further development of this important area of the law" should be left to future cases.\textsuperscript{225} The dissent provides the Kentucky Supreme Court another option. Since the Court's decision in Daubert is only persuasive, Kentucky could adopt only those parts of the opinion that it felt were relevant to the interpretation of the Kentucky Rules. The Kentucky court could thus find that the Kentucky Rules supersede Frye in the Commonwealth, but leave the contours of the application of the Rules to future cases.

V. CONCLUSION

For over fifty years, Kentucky has consistently applied the "general acceptance" test formulated in Frye v. United States\textsuperscript{226} to determine whether expert opinion testimony based on a novel scientific method is admissible into evidence at trial. Like many other states, however, Kentucky has recently adopted state rules of evidence which are patterned after the Federal Rules of Evidence. In a recent landmark decision in Daubert v. Merrell Dow Pharmaceuticals, Inc.,\textsuperscript{227} the United States Supreme Court held that the adoption of the Federal Rules of Evidence superseded the Frye test and now provide the standard for determining the admissibility of expert scientific opinion testimony in federal court. Since Kentucky's new Rules of Evidence are virtually identical to the Federal Rules of Evidence, precedent interpreting the Federal Rules is persuasive precedent for the Supreme Court of Kentucky in interpreting the Kentucky Rules.

Kentucky could use an analysis like that used in Daubert to reject Frye as superseded in the Commonwealth by the adoption

\textsuperscript{224} Id. at 2799-2800 (Rehnquist, J., concurring in part and dissenting in part).
\textsuperscript{225} Id. at 2800.
\textsuperscript{226} 293 F.2d 1013 (D.C. Cir. 1923).
\textsuperscript{227} 113 S. Ct. 2786 (1993).
of the Kentucky Rules. *Daubert* is a federal decision, however, and thus is not binding on Kentucky. Kentucky could, therefore, follow the lead of a number of her sister states and reject *Daubert* in favor of retaining the more rigid rule of *Frye*. In keeping with the stated objectives of the drafters of the Kentucky Rules of uniformity with the Federal Rules, the reduction of forum shopping, and the increased efficiency of the judicial system, Kentucky should abandon *Frye* and apply the Kentucky Rules of Evidence to determine the admissibility of expert scientific opinion evidence at trial.