KENTUCKY LAW ISSUE

ARTICLES

Workplace Investigations in Kentucky .................... Richard A. Bales 201
Richard O Hamilton, Jr.


Health Care Reform in Kentucky: Setting the Stage for the Twenty-First Century? ............... Vickie Yates Brown 319
Barbara Reid Hartung
Andrew J. Murray
Tate M. Bombard

The Loch Ness Monster, Big Foot, Repossession Titles and Other Myths: Defenses and Counterclaims in a Repossession as an Alternative to Bankruptcy .......... Patrick B. McClure 360

Third-Party Standing in Child Custody Disputes: Will Kentucky's New "De Facto Guardian" Provision Help? .... Lawrence Schlam 368

Execution Impact Evidence in Kentucky: It Is Time to Return the Scales to Balance .................... Tad Thomas 411

NOTES

Commonwealth, Transportation Cabinet, Bureau of Highways v. Roof: When Should There be a Requirement to Reduce Awards at the Board of Claims for Benefits Received from Collateral Sources? ...................... Michael A. Galasso 430

Commonwealth v. Allen: An Eye-Opener for Kentucky's Teachers ....................... Eric A. Hamilton 447
WORKPLACE INVESTIGATIONS IN KENTUCKY

by Richard A. Bales & Richard O. Hamilton, Jr.

I. INTRODUCTION

II. CAUSES OF ACTION

A. FALSE IMPRISONMENT
   1. Intentional Restraint
   2. Involuntary Restraint
   3. Lack of Authority to Restrain
   4. Summary and Observations

B. ASSAULT
   1. Intent
   2. Unlawful Offer of Corporeal Injury
   3. Reasonable Apprehension
   4. An Apparent Ability to Make Contact
   5. Immediate Threat of Injury
   6. Summary and Observations

C. DEFAMATION
   1. A False and Defamatory Statement
   2. Statement Concerns the Plaintiff
   3. Reckless or Negligent Communication to Third Person
   4. Injury to Plaintiff’s Reputation
   5. The Application and Effect of “Malice”
   6. Privileges and Defenses to Publication
      a. Absolute Privilege
      b. Qualified Privilege
   7. Summary and Observations

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D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
   1. Intentional or Reckless Conduct
   2. Extreme and Outrageous Conduct
   3. Causation
   4. Severe Emotional Distress
   5. Summary and Observations

E. INVASION OF PRIVACY
   1. Intrusion upon Seclusion
   2. Public Disclosure of Private Facts
   3. False Light
   4. Summary and Observations

III. EMPLOYER PRACTICES

A. BACKGROUND CHECKS AND CREDIT REPORTS

B. QUESTIONING EMPLOYEES

C. WORKPLACE SEARCHES

D. INTERCEPTION OR SEARCH OF POSTAL AND ELECTRONIC MAIL

E. SURVEILLANCE AND MONITORING
   1. Visual Surveillance
   2. Wiretapping, Eavesdropping, and Monitoring of Telephone Conversations
   3. Electronic Performance Monitoring

F. DRUG AND ALCOHOL TESTS

G. POLYGRAPH TESTS

H. HONESTY AND PERSONALITY TESTS

I. PUBLICIZING THE EMPLOYER RESPONSE
IV. INVESTIGATION STRATEGIES

A. MAINTAINING PRIVILEGES
   1. Attorney Client Privilege
   2. Attorney Work Product

B. MINIMIZING STATE ACTION

V. CONCLUSION
WORKPLACE INVESTIGATIONS IN KENTUCKY

I. INTRODUCTION

Employers in Kentucky have a legitimate interest in controlling their workplaces for various reasons, including promoting safety, maximizing productivity, avoiding claims of negligence, and deterring theft. Kentucky law, however, limits the tactics and the extent to which an employer can utilize those tactics in controlling the workplace. Statutes and common law provide the balance between employer and employee interests. An employer who ignores this legal balance will find itself subject to civil liabilities, criminal sanctions, or both. It is imperative that employers know the limitations, and that employees know how to protect themselves from overzealous employers.

This article provides an in-depth analysis for private sector, nonunion employer and employee legal counsel who deal with employee misconduct or employer investigations of misconduct. Part II of this article examines Kentucky's torts of false imprisonment, assault, defamation, intentional infliction of emotional distress, and invasion of privacy. Each of the torts has an effect on the relationship between the employer and the employee, and each of the torts imposes constraints on an employer's ability to conduct workplace investigations through employee reviews, investigations of theft, interviews, and workplace monitoring. An employer, to protect itself from liability, should be cognizant of these causes of action before conducting a workplace investigation. Employees and attorneys who represent them should be cognizant of these causes of action.


   Employers have a legitimate interest in knowing what employees are doing in order to maximize efficiency and minimize conduct which, whether directly or indirectly, could harm the employer. For example, an employer should be able to gather, use, and disclose information about employees in order to guard against theft; hire and retain honest and competent employees; evaluate and improve employee performance; minimize shirking; provide a safe working environment; comply with anti-discrimination statutes; control health care costs; ascertain the most efficient method of production; avoid claims of negligent hiring or retention; minimize employee misconduct that could expose the employer to liability or damage the employer’s reputation; and prevent employees from disclosing proprietary information to competitors.

   Id. at 221 (internal footnotes omitted).
as a remedy to intrusive and/or abusive employer actions. Part II analyzes each of these torts, their elements, and their impact on the employment relationship.

Part III applies these torts to nine specific investigatory practices: background checks and credit reports; questioning employees; workplace searches; interception or search of postal and electronic mail; surveillance and monitoring; drug and alcohol tests; polygraph tests; and publication by employers of employee misconduct. It discusses in detail exactly what an employer may and may not do, and the consequences of exceeding those parameters.

Part IV offers strategies that an employer can use when planning a workplace investigation. These strategies will help the employer to preserve, to the extent possible, the privileged status of the product of employer investigations. Part IV advises the employer how to keep information confidential that may otherwise be used against the employer in court. The employee's counsel is also alerted as to what information from a workplace investigation is discoverable. Finally, Part IV discusses the role of the Fourth Amendment when an employer conducts an investigation for the purposes of pursuing criminal charges against an employee.

II. CAUSES OF ACTION

A. FALSE IMPRISONMENT

The tort of false imprisonment developed from the common law action of trespass *vi et armis*. Kentucky defines false imprisonment as "the intentional restraint or willful detention or interference with one's liberty or freedom, contrary to his will and without authority of law." The elements of a false

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5. J.J. Newberry Co. v. Judd, 82 S.W.2d 359 (Ky. 1935); accord Great Atl. & Pac. Tea Co. v. Billups, 69 S.W.2d 5 (Ky. 1934); see also Grayson Variety Store, Inc. v. Shaffer, 402 S.W.2d 424, 425 (Ky. 1966) (defining "[false] imprisonment as being any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise."); Ford Motor Credit Co. v. Gibson, 566 S.W.2d 154, 155 (Ky. Ct. App. 1977) (same); Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 278 (Ky. Ct. App. 1981) ("To prosecute successfully a claim for false imprisonment, there must have been established (1) Defendant's act by force or threats of force
imprisonment tort action in Kentucky are: (1) the intentional restraint or detention of a person; (2) involuntarily; and (3) without authority of law.\textsuperscript{6}

1. Intentional Restraint

   The intent element of the tort of false imprisonment is satisfied when the defendant acts inconsistently with another's freedom from confinement.\textsuperscript{7} The Restatement (Second) of Torts defines confinement as "an act, [which] is done with intent to confine another [and] it is immaterial whether the act directly or indirectly causes the confinement."\textsuperscript{8}

   An illustration of the intent requirement is found in \textit{Karfunkel v. Compagnie Nationale Air France}, a case from the United States District Court for the

against person or property (2) Which with intent caused plaintiff to be confined to an area certain.”).\textsuperscript{6}

6. Kentucky courts have not specifically spelled out the elements of the tort for false imprisonment in such a manner. The courts appear to adopt a definition specifically detailed for the facts of the case before them. The aforementioned elements, however, are consistent with Kentucky case law and the Restatement of Torts, the latter of which states:

   (1) An actor is subject to liability to another for false imprisonment if
   
   (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
   (b) his act directly or indirectly results in such confinement of the other, and
   (c) the other is conscious of the confinement or is harmed by it.

   (2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

   \textit{Restatement (Second) of Torts: False Imprisonment} § 35 (1977).


8. \textit{Restatement (Second) of Torts} § 37 (1977); \textit{see also Restatement (Second) of Torts: Malice} § 44 (1977). "If an act which causes another's confinement is done with the intention of causing the confinement, the actor is subject to liability although his act is not inspired by personal hostility or desire to offend." \textit{Restatement (Second) of Torts: Malice} § 44 (1977). To make the actor liable under [section 35, False Imprisonment], it is only necessary that he intend to confine the other or a third person or that he know that such confinement will, to a substantial certainty, result. The actor's motives in so confining the other are immaterial. Therefore, it is not important that he did not act maliciously or from motives of personal hostility or desire to offend the other.

\textit{Id.} § 44 cmt. a.
In *Karfunkel*, an aircraft was hijacked shortly after leaving Athens, Greece. The passengers sued the airline, alleging, among other things, that the airline was liable for false imprisonment as a result of the hijacking. The district court found that the air carrier never intended to confine the passengers, and therefore could not be liable for a claim of false imprisonment because of the actions of the hijackers.

2. *Involuntary Restraint*

False imprisonment occurs when one person deprives another of freedom of movement against her will for whatever period of time. This deprivation of liberty may be achieved when the other has a reasonable apprehension that force will be used against her if she does not submit. The inducement of fear may arise out of conduct or words, or through a restraint of the person's

10. Id. at 973.
11. Id. at 973.
12. Id. at 977 (granting the airline’s motion for lack of subject matter jurisdiction).
14. Ford Motor Credit Co. v. Gibson, 566 S.W.2d 154, 155 (Ky. Ct. App. 1977); see also Restatement (Second) of Torts: Confinement by Threats of Physical Force § 40 (1977) (providing that “[t]he confinement may be by submission to a threat to apply physical force to the other’s person immediately upon the other’s going or attempting to go beyond the area in which the actor intends to confine him.”) (emphasis added). Notice the immediacy requirement for the application of force. “A tells B that if he leaves the room he, A, will shoot him the next time he meets him on the street. B, in submission to the threat, remains in the room. A has not confined B.” Restatement (Second) Of Torts § 40 cmt. b, illus. 2 (1977).
15. Ford Motor Credit Co., 566 S.W.2d at 155; see also Restatement (Second) Of Torts: Confinement by Physical Barriers § 38 (1977) (providing that “[t]he confinement may be by actual or apparent physical barriers.”). For example, “A locks the door of the room in which B is sitting. A knows, but believes B does not know, that there is an unlocked but concealed door through which B could, if he knew it, escape. B does not know of the unlocked door. A has confined B.” Restatement (Second) Of Torts § 38 cmt. a, illus. 1 (1977); and Restatement (Second) Of Torts: Confinement by Physical Force § 39 (1977) (providing that “[t]he confinement may be by overpowering physical force, or by submission to physical force.”). For example, “A, a small and weak man, takes hold of B’s coat for the purpose of detaining him against his will. B is a much larger man and could, with little exertion, free himself at once. B submits. A has confined B.” Restatement (Second) Of Torts § 39 cmt. a, illus. 2 (1977).
However, false imprisonment does not exist when one voluntarily submits to verbal directions. Words, in and of themselves, that do not deprive another of freedom of movement do not constitute false imprisonment. In White v. Levy Brothers, the plaintiff was employed as a clerk in the defendant’s department store, and was asked by the defendant to show the contents of her purse. The court found that the plaintiff voluntarily complied with the request since there was no evidence that she was forced to open her purse, or that there was any coercion while she was being questioned. The plaintiff testified “that she was ‘afraid she was going to be arrested’ and that she had been ‘ordered’ into the office of her superior . . . “. The court found this testimony to be of little significance, since the plaintiff also testified that “she did not have to sit there and listen to them accuse her.” The court also found a lack of involuntary restraint from the fact that the plaintiff left the office and the store where she was being questioned of her own free will.

The fear of losing one’s employment is not necessarily sufficient to constitute involuntary restraint. In Columbia Sussex Corp., Inc. v. Hay, the Kentucky Court of Appeals refused to find restraint when an employee was required to choose between submitting to a lie detector test regarding a theft, and being fired. The court held that “the restraint evidenced by one’s interest in retaining an untenured [at-will] position” is insufficient to prove false

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16. See Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312 (Ky. 1946); see also Restatement (Second) of Torts: Confinement by Other Duress § 40A (1977) (providing that “[t]he confinement may be submission to duress other than threats of physical force, where such duress is sufficient to make the consent given ineffective to bar the action.”).

17. Grayson Variety Store, Inc., 402 S.W.2d at 425.

18. Id.


20. Id.

21. Id.

22. Id.

23. Id.


25. Id.
imprisonment. The employment interest must be "a vested property right or interest" such as tenure or contract employment.

Furthermore, an employee who submits to an interrogation, in an attempt to clear her reputation in hopes of continuing her employment with her employer, has not been detained against her will. In Stump v. Wal-Mart Stores, Inc., the plaintiff stated in her deposition, "[n]ever did they tell me I was not allowed to leave the room. They actually asked me to leave the room. I was not in prison. I was asked to leave the store, leave the premises." She continued, "he just kept trying to get me to leave the store and I wouldn't leave." The court, therefore, found no false imprisonment.

However, restraining a person's property may be sufficient to establish involuntary restraint. In Ashland Dry Goods Co. v. Wages, the store accused the plaintiff, a customer, of stealing merchandise by putting it in her purse. A store manager approached the plaintiff and insisted on seeing the purse, but the plaintiff refused and denied stealing anything. The manager then took the purse from the plaintiff and began searching it. When the plaintiff later sued for false imprisonment, the store argued that the plaintiff had not been restrained and was free to go her way. The court, however, reasoned that though the plaintiff may have been capable of leaving the store and was not forcibly detained, if she had left, she would have immediately given up her purse. The store's retention of her purse was sufficient to establish the plaintiff's claim for

26. Id. at 278. The court based this decision on the fact that Ms. Hay did not submit to the polygraph test to cleanse her reputation but rather to retain her job. Id. The plaintiff agreed to the test in writing without duress or coercion and having been advised of her legal rights. Id. The plaintiff was also free to leave at any time during the examination, but chose to stay of her own free will. Id.

27. Id. ("A job is not a vested property right or interest absent additional considerations such as tenure, contract, etc., none of which was present here.").


29. Id.

30. Id.

31. Id. at 347.

32. E.g., Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312 (Ky. 1946).

33. Id. at 313.

34. Id.

35. Id.

36. Id. at 316.

37. Id.
involuntary restraint. 38

3. Lack of Authority to Restrain

An action for false imprisonment will stand only when the confinement is not authorized by law. 39 This authority is not limited to police officers. 40 In Kentucky, two statutes give non-law enforcement personnel the lawful authority to make a citizen's arrest. 41

Section 431.005(5) of the Kentucky Revised Statutes grants a private person limited authority to make arrests. 42 Authority under this section is limited to felonies, and therefore, the general rule is that a private person may not make an arrest for a misdemeanor. 43 However, section 433.236 of the Kentucky Revised Statutes also grants limited authority to security agents, merchants, or merchants' employees who have probable cause to believe that an item or good has been stolen, to take that person into custody for limited time and for limited purposes. 44 A merchant, with probable cause, may detain a person so as to

38. Id.; see supra note 16.
39. Rader v. Parks, 258 S.W.2d 728, 729 (Ky. 1953); see also Restatement (Second) of Torts: Confinement by Asserted Legal Authority § 41 (1977) (providing that "[t]he confinement may be by taking a person into custody under an asserted legal authority [and] the custody is complete if the person against whom and in whose presence the authority is asserted believes it to be valid, or is in doubt as to its validity, and submits to it.").
42. Ky. Rev. Stat. Ann. § 431.005(5) (Banks-Baldwin 1999) ("A private person may make an arrest when a felony has been committed in fact and he has probable cause to believe that the person being arrested has committed it.").
44. Ky. Rev. Stat. Ann. § 433.236 (Banks-Baldwin 1999). This statute provides:
   (1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person may take the person into custody and detain him in a reasonable manner for a reasonable length of time, on the premises of the mercantile establishment or off the premises of the mercantile establishment, if the persons enumerated in this section are in fresh pursuit, for any or all of the following purposes:
      (a) To request identification;
      (b) To verify such identification;
"inform . . . [a] law enforcement agency of the detention of the person and to surrender the person to the custody of a peace officer. . . ."^{45}

The Kentucky General Assembly enacted section 433.236 in response to the case of *SuperX Drugs of Kentucky, Inc. v. Rice*, where Rice, the plaintiff, was held by store managers for shoplifting.^{46} While Rice was detained, one of the store managers contacted the police department and went to the city police judge to obtain a warrant for her arrest.^{47} The police arrived at the merchant's store, took Rice into custody, and then upon arrival at the police station she was served with the warrant for her arrest.^{48} Rice subsequently brought an action for false imprisonment.^{49} The Kentucky Court of Appeals held that a merchant's limited privilege to recover goods believed to have been stolen also includes the privilege to detain the person for the time necessary to make a reasonable investigation of the facts.^{50} The court remanded for a new trial on the issue of

\[(c)\] To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise, and to make reasonable investigation of the ownership of such merchandise;

\[(d)\] To recover or attempt to recover goods taken from the mercantile establishment by such person, or by others accompanying him;

\[(e)\] To inform a peace officer or law enforcement agency of the detention of the person and to surrender the person to the custody of a peace officer, and in the case of a minor, to inform the parents, guardian, or other person having custody of that minor of his detention, in addition to surrendering the minor to the custody of a peace officer.

(2) The recovery of goods taken from the mercantile establishment by the person detained or by others shall not limit the right of the persons named in subsection (1) of this section to detain such person for peace officers or otherwise accomplish the purpose of subsection (1).

(3) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments.

*Id.* (as amended in 1978).


46. *SuperX Drugs of Kentucky*, 554 S.W.2d at 904-05.

47. *Id.* at 905.

48. *Id.*

49. *Id.* at 903.

50. *Id.* at 907. The court did state in its opinion that "we do not need to decide whether the [pre-1978] shoplifting statute authorizes the merchant to detain a suspect after the goods have been recovered and any investigation completed when the sole purpose of the continued detention of the suspect is to permit an arrest by the police." *Id.*
whether the store had held Rice for an unreasonable length of time.\textsuperscript{51} The appellate court instructed the trial court that Rice could only recover, if at all, under her claim of false imprisonment for "the period of her detention after the goods were recovered and before she was arrested at the police station."\textsuperscript{52} The Kentucky General Assembly subsequently amended section 433.236 to allow merchants to detain alleged shoplifters until the arrest by a police officer.\textsuperscript{53}

The court further explained Rice's claim for false imprisonment was limited because SuperX acted under authority of law.\textsuperscript{54} If an arrest is made under the authority of a valid statute or process, then the remedy is an action for malicious prosecution, not false imprisonment:\textsuperscript{55}

\textit{[W]here there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution. The want of lawful authority is an essential element in an action for false imprisonment. Malice and want of probable cause are the essentials in an action for malicious prosecution.}\textsuperscript{56}

The plaintiff, to prove malicious prosecution, must show that the action against her was done with malice and that the defendant lacked probable cause in believing the plaintiff committed the alleged offense.\textsuperscript{57} If the plaintiff can show a lack of probable cause, then malice may be inferred.\textsuperscript{58}

Following these principles, the court in \textit{SuperX Drugs of Kentucky} found that "[f]rom the point in time when [the plaintiff] was lawfully arrested pursuant to the warrant, her detention could no longer be considered unlawful. After her arrest pursuant to the warrant, [the plaintiff] had only one possible claim for relief, an action for malicious prosecution."\textsuperscript{59} However, even though there had

\begin{itemize}
\item\textsuperscript{51} \textit{Id.} at 909.
\item\textsuperscript{52} \textit{Id.} at 907.
\item\textsuperscript{53} Taylor Drug Stores, Inc. v. Story, 760 S.W.2d 102, 103 (Ky. 1988).
\item\textsuperscript{54} \textit{Id.}
\item\textsuperscript{55} \textit{Id.}; accord Rader v. Parks, 258 S.W.2d 728, 729 (Ky. 1953).
\item\textsuperscript{56} \textit{SuperX Drugs of Kentucky}, 554 S.W.2d at 907 (citing Roberts v. Thomas, 121 S.W. 961, 962 (Ky. 1909)); accord Rader, 258 S.W.2d at 729.
\item\textsuperscript{57} Massey v. McKinley, 690 S.W.2d 131, 133 (Ky. Ct. App. 1985).
\item\textsuperscript{58} \textit{Id.} This case provided when there is "full and fair disclosure of all material facts to the attorney advising prosecution[, the] then advice of counsel is a defense to malicious prosecution. \textit{Id.} at 135. "However, if there is a dispute about a material fact that is disclosed," then the question goes to the jury. \textit{Id.} Also a plaintiff may recover for "humiliation, mortification and loss of reputation" in an action for malicious prosecution. \textit{Id.}
\item\textsuperscript{59} \textit{SuperX Drugs of Kentucky}, 554 S.W.2d at 907 (stating that "wrongful detention giving rise to an action for false imprisonment could be followed by an arrest which could be the basis for an
never been a trial of her indictment, the plaintiff failed to plead and prove that criminal charges had been decided in her favor.\textsuperscript{60} The court stated, "[i]n the absence of a favorable final disposition of charges, [the plaintiff] could not maintain an action for malicious prosecution."\textsuperscript{61}

4. Summary and Observations

When an employer is investigating an employee for wrongful conduct, that employer must be careful not to give the impression to the employee that she must remain against her will. This impression of detention can be accomplished through conduct or words that give the impression that force will be used if the employee does not submit, or by detaining property of the employee. The exception to detaining an employee against her will occurs when the employer is privileged to do so under authority of law. Employers are cautioned, however, that when conducting such an arrest under a valid statute or process, they should be sure to have probable cause prior to taking action.

B. ASSAULT

Although there are no Kentucky employment cases on point, it is not inconceivable that an employer, engaged in overzealous interrogation techniques, could commit an assault upon an employee.\textsuperscript{62} The tort of assault in Kentucky is defined as "an unlawful offer of corporeal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of immediate peril."\textsuperscript{63} The elements for assault are: (1) the intentional; (2) unlawful offer of corporeal injury; (3) which creates a reasonable apprehension; (4) by an apparent ability; and (5) an immediate threat of injury.\textsuperscript{64}

\textsuperscript{60} SuperX Drugs of Kentucky, 554 S.W.2d at 907.
\textsuperscript{61} Id. at 907-08; accord Van Arsdale v. Caswell, 311 S.W.2d 404 (Ky. 1958).
\textsuperscript{62} Bales, supra note 3, at 226.
\textsuperscript{63} Smith v. Gowdy, 244 S.W. 678 (Ky. 1922); see Jenkins v. Kentucky Hotel, 87 S.W.2d 951 (Ky. 1935); Brown v. Crawford, 177 S.W.2d 1 (Ky. 1943) (same); see also Perkins v. Stein, 22 S.W. 649 (Ky. 1893) (defining assault as "an inchoate violence to the person of another, with the present means of carrying the intent into effect."); Morgan v. O'Daniel, 53 S.W. 1040 (Ky. 1899) ("an assault is an attempt unlawfully to apply any, even the least, actual force to the person of another, directly or indirectly....").
\textsuperscript{64} The Restatement (Second) of Torts, provides in part:
1. Intent

In Kentucky, in the context of the tort of assault, intent can be inferred by the actions of the aggressor, so long as the plaintiff's apprehension of the aggressor's actual gestures is reasonable. In *Morgan v. O'Daniel*, the trial court gave jury instructions which in effect instructed the jury to find for the defendant, unless the jury believed that the defendant intended to strike the plaintiff. The court of appeals ruled that this instruction was in error. The appellate court held that when an actor uses gestures against another, and those gestures give the other a reasonable apprehension that the actions are meant to apply force, then an assault has been committed. The actor's lack of intent to do actual harm is irrelevant, if the actor intentionally creates a reasonable apprehension of immediate harm through those actions.

Transferred intent occurs when an actor, while intending to harm one person,
also puts another person in reasonable apprehension of harm. \(^{70}\) Kentucky courts, however, do not recognize the doctrine of transferred intent absent actual physical injury to the third party. \(^{71}\) In *McGee v. Vanover*, the defendant beat the plaintiff's husband while the plaintiff looked on. \(^{72}\) The plaintiff brought a cause of action for assault and battery based solely on the attack upon her husband. \(^{73}\) The plaintiff's complaint stated that the defendant's beating of her husband made her afraid for her own safety. \(^{74}\) The complaint did not allege, however, that the defendant had threatened or physically contacted her. \(^{75}\) The court, on defendant's appeal of the verdict for the plaintiff, reversed the judgment and award because the plaintiff was not actually physically injured by the defendant. \(^{76}\)

### 2. Unlawful Offer of Corporeal Injury

An "offer of a corporeal injury" is an action or gesture made by an actor that gives effect to a perception of a possible physical injury. \(^{77}\) Mere words do not

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70. *Restatement (Second) of Torts* § 32(2) (1977) ("If an act is done with the intention of affecting a third person in the manner stated in Subsection (1) but puts another in apprehension of a harmful or offensive contact, the actor is subject to liability to such other as fully as though he intended so to affect him."). For the text of "Subsection (1)," see supra note 64.


72. *Id.*

73. *Id.* at 745. It should be kept in mind that plaintiff did not bring a claim for intentional infliction of emotional distress because Kentucky did not formally recognize this cause of action until 1984: *Id.* See *Craft v. Rice* 671 S.W.2d 247 (Ky. 1984). For a discussion on intentional infliction of emotional distress, see infra notes 214-251 and accompanying text.

74. *McGee*, 147 S.W. at 743.

75. *Id.*

76. *Id.* at 745; see *Reed v. Ford*, 112 S.W. 600 (Ky. 1908). Absent an apprehension of any danger or injury to her person, damages sought for pain and suffering resulting from fright "are too remote and speculative." *Id.* at 601.

The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately compensated. The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer, the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain.

*Id.* (citations omitted).

77. *Black's Law Dictionary* 343 (6th ed. 1990) (including in its definition of corporeal that
amount to an actionable assault.\textsuperscript{78} However, when words are combined with other acts or circumstances, a reasonable apprehension of physical harm may arise.\textsuperscript{79} This offer of corporeal injury must also be unlawful.\textsuperscript{80}

3. Reasonable Apprehension

For an assault claim to exist, the plaintiff must have a reasonable apprehension that harm will come to her.\textsuperscript{81} In \textit{Jenkins v. Kentucky Hotel, Inc.}, the plaintiff was in a hotel lobby waiting for her brother and sister-in-law, who were attending a meeting in the hotel.\textsuperscript{82} As the plaintiff waited, the hotel detective inquired as to her presence in the lobby, and upon hearing her reason, "told her in a rude and insulting manner, that no such meeting as she claimed was being held in the hotel, and ordered her to leave the premises."\textsuperscript{83} The plaintiff claimed that the rude and insulting manner accompanying the order to leave the hotel was an assault.\textsuperscript{84} The court held that there was not an unlawful offer of injury, and nothing "from which a reasonable person might anticipate the exercise of more force than the law permitted."\textsuperscript{85} This holding incorporates a reasonable person standard into the tort of assault.\textsuperscript{86}

\textsuperscript{78} Gargotto v. Isenberg, 51 S.W.2d 443, 445 (Ky. 1932) ("[O]pprobrious words or epithets do not justify an assault."); Hixson v. Slocum, 161 S.W. 522, 523 (Ky. 1913) ("[W]ords do not constitute an assault, and therefore they cannot be the beginning of one.").

\textsuperscript{79} See \textit{RESTATEMENT (SECOND) OF TORTS} § 31 (1977) ("Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.").

\textsuperscript{80} See \textit{Jenkins v. Kentucky Hotel, Inc.}, 87 S.W.2d 951 (Ky. 1935) (noting that the parties here admitted plaintiff was a licensee of a hotel, and that "if she had been requested in a proper manner to leave the lobby and had failed to do so, reasonable force could lawfully have been used to eject her.").

\textsuperscript{81} Jenkins v. Kentucky Hotel, Inc., 87 S.W.2d 951 (Ky. 1935).

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. ("[The plaintiff] says that [the detective’s] manner and demeanor were so menacing and threatening that she believed that unless she followed his instructions he would use bodily force to evict her. Rather than be subjected to physical force, she says she left the premises and went out into the rain where she remained [until she decided to go back into the hotel] and join her brother and sister-in-law in the meeting.").

\textsuperscript{85} Id.

\textsuperscript{86} WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 3-3, 45 (Lawyers Co-op. 1988). \textit{But see
4. An Apparent Ability to Make Contact

An assault requires an attempt to commit bodily harm. It does not require that the aggressor have the actual ability to make contact, only that there is an apparent ability that the contact may occur. Examples of conduct that meet this element include: “holding up a fist, striking at another with a stick which does not touch the latter, or throwing anything at a person which misses him, or by any similar act of inchoate violence showing an intention to do injury[...].”

5. Immediate Threat of Injury

However, an assault does require that the circumstances “create a well-
However, an assault does require that the circumstances "create a well-founded fear of immediate peril." An aggressor who makes threats regarding injury that may occur in the distant future is not liable under the tort of assault.

6. Summary and Observations

Employers' interrogations of employees suspected of wrongdoing should be conducted carefully. Strong-arm tactics, especially those that involve threats of physical violence or harm, should be avoided. Employers should be aware of the possible civil and criminal liabilities incurred for such conduct.

C. DEFAMATION

Defamation is an injury to a person's reputation resulting from a communication by a third person. Although in Kentucky, defamation consists of the two distinct torts of libel and slander, for simplicity they will be discussed under the single tort of defamation. Kentucky's elements for defamation consist of the following: (1) a false and defamatory statement; (2) about the plaintiff; (3) communicated to a third person recklessly or negligently; (4) which results in injury to plaintiff's reputation; (5) that is made without

90. Brown v. Crawford, 296 S.W.2d 1, 3 (Ky. 1943); accord Perkins, 22 S.W. at 650 (stating that an assault requires the "present means of carrying the intent into effect.").

91. RESTATEMENT (SECOND) OF TORTS § 29 (1977). This section provides:

   (1) To make the actor liable for an assault he must put the other in apprehension of an imminent contact.

   (2) An act intended by the actor as a step toward the infliction of a future contact, which is so recognized by the other, does not make the actor liable for an assault under the rule stated in section 21.


93. WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 8-1, 163 (Lawyers Co-op. 1988). The Restatement (Second) of Torts defines a communication as defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

94. Riley v. Lee, 11 S.W. 713 (Ky. 1889); see discussion on injury to plaintiff's reputation infra notes 126-56 and accompanying text. Libel is a written defamatory statement, Smith v. Pure Oil Co., 128 S.W.2d 931, 932 (Ky. 1939), whereas slander is a spoken defamatory statement, Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951).
privilege. Constitutional actual malice and common law malice are discussed to show their respective effects on defamation claims.

1. A False and Defamatory Statement

To be actionable, the defamatory statement made must be false. The truth of the words, spoken or written, is a complete defense to an action for defamation. The motive of the person making the statement is irrelevant, if the statement made is truthful. If the statement is truthful, any injury suffered by the plaintiff is deemed to be a result of the plaintiff's actions, not a result of the defendant making public knowledge of the plaintiff's actions. For example, in Haynes v. McConnell, the plaintiff applied for employment and was hired prior to the completion of his background check.

95. See Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981) ("Four elements are necessary to establish an action: 1. defamatory language, 2. about the plaintiff, 3. which is published, and 4. which causes injury to reputation."); see also William S. Haynes, Kentucky Jurisprudence § 8-2, 168 (Lawyers Co-op. 1988) ("[I]t is necessary to establish (a) a false and defamatory statement (b) concerning the plaintiff (c) was made to a third person (d) with fault or in a negligent manner (e) which was unprivileged and (f) which resulted, either directly or indirectly, in injury to the reputation of plaintiff."); accord Restatement (Second) of Torts § 558 (1977) ("[T]here must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."). However, because this Restatement was issued prior to the Supreme Court's decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985), fault probably is no longer an element of plaintiff's claim in purely private cases.

96. Pennington v. Little, 99 S.W.2d 776, 778 (Ky. 1936).

97. Id. The defendant, in his pleading, denied that he falsely made statements about the plaintiff, to which the court interpreted as "inapty attempting to plead the truth of the statements made." Id. at 777. Although truth is a complete defense and the burden of proving the truth of the publication is upon the defendant, it is unclear, in Kentucky, whether truth is required to be pled as an affirmative defense. See also William S. Haynes, Kentucky Jurisprudence § 8-5, 178 (Lawyers Co-op. 1988).

98. Pennington, 99 S.W.2d at 778.

99. Id. at 779 ("[The defendant] is certainly not to be held responsible for any criticism arising from [the plaintiff's] admitted acts, which [plaintiff] claims humiliates and discredits him. If such injury has been suffered by [plaintiff], it is rather to be attributed to his doing such an act, rather than to [defendant's] written statement.").

plaintiff started work, a County Judge/Executive issued an internal report to the Chief Judge, the plaintiff’s employer, based on the completed background check, which revealed that the plaintiff had a default judgment against him, a pending court claim for a due note and mortgage, and an income tax lien. The plaintiff sued the County Judge/Executive for defamation, and claimed that the facts upon which the County Judge/Executive based his opinion were false, since the plaintiff had satisfied many of the judgments against him at the time the report was issued. The court found that the written report was based on the truth of the matters contained in the filings in court offices. Therefore, the court held that since the plaintiff did not contest the genuineness of the filings uncovered in the background check, the truth of the documents conclusively established the truth of the facts stated in the report.

2. Statement Concerns the Plaintiff

The person claiming injury must be able to demonstrate that she was defamed by the statement. This can easily be established if the plaintiff is named in the defamatory statement. However, if the plaintiff is a member of a class or group referenced by a defamatory statement, then the plaintiff must show that she was the target of the statement. In a small group, such as a family consisting of a husband, wife and their children, there may be little difficulty in establishing who is defamed. In Louisville Times Co. v. Emrich,
the Louisville Times reported that a fire at the house where the plaintiff husband and wife resided was caused by illegally-stored whiskey in a secret attic closet. The plaintiffs, in fact, rented the house from another person. The article never mentioned the plaintiffs by name, but it identified the house and alleged that there were illegal operations occurring within. The court held that absent proof of a lease or other lack of control over the premises by the plaintiffs, the article was calculated to induce the reasonable reader to conclude that the husband was responsible for the operations. The court went on to say:

It is not necessary that all the world should understand that the charge referred to plaintiff, it is sufficient that those who know plaintiff can make out that he is the person meant, but the liability of defendant depends on whether the defamation was calculated from its intrinsic quality to lead other persons to believe that it referred to plaintiff.

However, as the size of the group increases, the ability of the plaintiff to demonstrate that she is the one defamed becomes increasingly difficult. In Louisville Times v. Stivers, the Louisville Times reported about a continuing feud between the Stivers and the Bakers which had lasted over fifty years. The plaintiff, a Stivers family member, sought damages for defamation against the Louisville Times. The court found that since the statement covered a span of fifty years, and it was not known how many members were in the Stivers family, it was impossible to determine that the statement referred specifically to the plaintiff.

Professor David Elder has noted that Kentucky seems to have adopted the "dubious and arbitrary numerical orientation of the group libel rules in the

1895).

109. Louisville Times Co. v. Emrich 66 S.W.2d 73, 75 (Ky. 1933).
110. Id.
111. Id.
112. Id. The court presumed that the defamation concerned the husband and not the wife, since the public would perceive the husband usually has control over the household, and there was no evidence that the wife had actually rented the house. Id. This reason is rather dated, and today would likely be subject to challenge on equal protection grounds.
113. Id.
114. Stivers, 68 S.W.2d at 412.
115. Id. at 411.
116. Id.
117. Id. at 412.
Restatement (Second) of Torts, limiting the small group to twenty-five or fewer. The Restatement provides that one who publishes defamatory matter concerning a group of less than twenty-five members is liable to each individual member.

Applied in the employment context, if an employer makes the statement, "the night shift supervisor is a thief," the employer could be liable for defamation if there is only one night shift supervisor. If there are more than one but less than twenty-five night shift supervisors, then the employer could be liable to each individual supervisor. However, if the employer makes the statement, "some of the night shift workers are stealing company property," and there are some thirty night shift workers, it will be more difficult for any employee to have a successful claim for defamation. As a result, when a defamatory statement is made regarding a large class or group, and no reference is made to a particular person, then the plaintiff cannot recover for defamation.

3. Reckless or Negligent Communication to Third Person

The fourth element of an action for defamation is publication of the defamatory matter to a third person. In some states, a company is considered to be a single entity or person. As such, an internal publication may not be equivalent to a publication required for the purposes of satisfying this element.

120. Id.; see also Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8 (Ky. 1978). Colonel Sanders made general remarks concerning the poor quality of food served at KFC restaurants which was published in a Louisville newspaper. Id. The court found that the remarks were general and did not particularly refer to the Bowling Green restaurant. Id. The court, therefore, affirmed the dismissal of the action. Id.; accord Mario's Enters., Inc. v. Morton-Norwich Prods., Inc., 487 F. Supp. 1308 (W.D. Ky. 1980).
121. See Fordson Coal Co. v. Carter, 108 S.W.2d 1007, 1009 (Ky. 1937) ("Without publication there can be no libel and consequently no injury."); accord RESTATEMENT (SECOND) OF TORTS § 577 (1) (1977) (providing, in part, that a "publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.").
122. See Wyant v. SCM Corp., 692 S.W.2d 814, 815-16 (Ky. Ct. App. 1985). Plaintiff alleged that an internal report damaged his reputation and thus led to his termination. Id. The court held that there was no evidence of publication to a third party thereby treating the corporation as a single entity. Id.
In Kentucky, a communication within a company from one supervisor to another or to a secretary may or may not be sufficient to constitute a publication, depending on the purpose of the communication and the extent to which it was published.\textsuperscript{123} Reckless or negligent communication can be illustrated as occurring when a writer has reason to believe a letter containing defamatory matter would be opened and read by a person other than the person to whom it is addressed.\textsuperscript{124} The publication, oral or written, is made when a third party hears or reads the statement and understands that the statement concerns the plaintiff.\textsuperscript{125}

\textbf{4. Injury to Plaintiff's Reputation}

Libel is a written defamatory statement,\textsuperscript{126} whereas slander is a spoken defamatory statement.\textsuperscript{127} As mentioned above, Kentucky law distinguishes between slander and libel.\textsuperscript{128} Kentucky courts are more likely to find written statements actionable than statements that are merely spoken.\textsuperscript{129} Written defamation is premeditated and tends to do much greater injury than mere

\begin{itemize}
  \item \textsuperscript{123} Brewer v. American Nat'l Ins. Co., 636 F.2d 150, 153 (6th Cir. 1980); see also Caslin v. General Electric Co., 608 S.W.2d 69 (Ky. Ct. App. 1980); see discussion on privileges and defenses to publications \textit{infra} notes 174-213 and accompanying text.
  \item \textsuperscript{124} Fordson Coal Co., 108 S.W.2d at 1009.
  \item \textsuperscript{125} See Vanover v. Wells, 94 S.W.2d 999, 1001 (Ky. 1936) ("[A]ddressing a defamatory remark to a party in the presence and hearing of others is a publication of it."); see also Justice v. Wellman, 86 S.W.2d 132 (Ky. 1935) ("[A]n insulting and slanderous remark in the presence and hearing of others [is] sufficient publication.").
  \item \textsuperscript{126} Smith v. Pure Oil Co., 128 S.W.2d 931, 932 (Ky. 1939).
  \item \textsuperscript{127} Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951).
  \item \textsuperscript{128} See \textit{supra} note 94 and accompanying text; see also \textit{RESTATEMENT (SECOND) OF TORTS} § 568 (1977). This section of the Restatement provides:
    \begin{itemize}
      \item (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
      \item (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in subsection (1).
      \item (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is libel rather than a slander.
    \end{itemize}
  \item \textsuperscript{129} Riley v. Lee, 11 S.W. 713 (Ky. 1889).
\end{itemize}
spoken words.\textsuperscript{130} Spoken words are typically uttered in haste, with little reflection or intention, and may be forgotten or retracted.\textsuperscript{131} Traditionally, a written statement requires deliberation, is more permanent and typically more widely disseminated, and as such, courts give more credence to a libel action than a slander action.\textsuperscript{132}

A libelous \textit{per se} injury results when the defamatory language subjects the plaintiff to hatred, ridicule, contempt, or disgrace, or tends to induce an evil opinion of him in the minds of right-thinking people,\textsuperscript{133} and deprives him of their friendly intercourse and society.\textsuperscript{134} For example, a statement that imputes an infectious disease, which is likely to exclude the plaintiff from society, is defamatory \textit{per se}.\textsuperscript{135} Slander \textit{per se} exists when the words spoken impute to another the commission of a crime involving moral turpitude, the affliction of an infectious disease that would exclude the person from society, or statements that would tend to cause a disinheritance.\textsuperscript{136} It also includes statements that imply that a person is not fit to perform duties associated with his occupation, employment or office, or that prejudice him in his profession.\textsuperscript{137} If the written words are defamatory \textit{per se}, then general damages are presumed.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} Bell v. Courier-Journal and Louisville Times Co., 402 S.W.2d 84, 86 (Ky. 1966).
\item \textsuperscript{134} Shields v. Booles, 38 S.W.2d 677, 681 (Ky. 1931); accord Riley, 11 S.W. at 714. In Riley, the court stated:
\begin{quote}
So it may be regarded as thoroughly settled that if the written or printed publication tends to degrade the person about whom it is written or printed,—that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances or the public from a higher to a lower grade, or tends to disgrace him,—if it tends to deprive him of the favor and esteem of his friends or acquaintances, or the public, or tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances, or the public,—it is, \textit{per se}, actionable libel.
\end{quote}
\textit{Id.} at 714.
\item \textsuperscript{135} Conner v. Taylor, 26 S.W.2d 561, 562 (Ky. 1930).
\item \textsuperscript{136} Shields, 38 S.W.2d at 680.
\item \textsuperscript{137} \textit{Id.}
\end{itemize}

Under slander \textit{per se} the very nature of the defamatory utterance is presumptive evidence of the injury to reputation and of the ill will otherwise necessary to support a punitive
A libelous *per quod* injury results when the words can be interpreted as having either a defamatory meaning or an innocent meaning.\(^{139}\) The words are made defamatory by extrinsic factors and by whether the public would regard the words as having such negative meaning.\(^{140}\) Slander *per quod* also requires extrinsic facts to show that the defamatory statement has damaged the person.\(^{141}\) The words are defamatory because of the extrinsic facts, which may include transitory gestures or other communications not considered libel.\(^{142}\) To sustain a defamatory *per quod* cause of action, the plaintiff is required to show evidence of a pecuniary loss that is the result of the defamation.\(^{143}\)

In *Wymer v. JH Properties, Inc.*, the plaintiff worked for the defendant, Jewish Hospital, when she was kicked by a patient coming out of anesthesia, resulting in an injury to her shoulder.\(^{144}\) Her shoulder was further injured during treatment by the physical therapist, another employee of the defendant.\(^{145}\) Upon returning to work, the plaintiff was limited to clerical work.\(^{146}\) The plaintiff then filed a worker’s compensation claim and a negligence action against the defendant.\(^{147}\) The defendant gave the plaintiff eight days to find a permanent position within the company, or be terminated.\(^{148}\)

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\(^{139}\) Sweeney & Co. v. Brown, 60 S.W.2d 381, 383 (Ky. 1933). The Kentucky Court of Appeals illustrated the difference between libel *per se* and libel *per quod* as:

> [I]n determining whether a writing or publication is libelous *per se*, it must ‘be stripped of all innuendo, colloquium and explanatory circumstances’, and, when so construed, it must be defamatory on its face, ‘within the four corners thereof’.... The general rule is that a libel depending upon an innuendo is *per quod*, and is only actionable for such special damages as those directly and proximately caused by it.

*Id.* at 384.

\(^{140}\) *Sweeney*, 60 S.W.2d at 383.

\(^{141}\) Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951).

\(^{142}\) See William S. Haynes, *Kentucky Jurisprudence* § 8-2, 166 (Lawyers Co-op. 1988); see also *Restatement (Second) of Torts* § 568(2) (1977).

\(^{143}\) *Sweeney*, 60 S.W.2d at 383; see also Cullen v. South East Coal Co., 685 S.W.2d 187, 190 (Ky. Ct. App. 1983) (citing *Sweeney*, 60 S.W.2d at 381).

\(^{144}\) *Wymer*, 1999 WL 731591, at *1.

\(^{145}\) *Id.*

\(^{146}\) *Id.* at *2.

\(^{147}\) *Id.*

\(^{148}\) *Id.*
A meeting was scheduled with the human resources assistant, but the meeting never took place, since the plaintiff insisted on having her attorney present. The plaintiff was subsequently terminated.

The plaintiff asserted that she was defamed in various documents generated by Jewish Hospital employees which contained derogatory statements about her employment. She alleged Jewish Hospital’s response to her insurance claim was false and defamatory because it failed to mention that the plaintiff was promised a job as an outpatient surgery clerk. She also alleged that the defendant made false statements concerning her failure to make efforts to discuss job opportunities with Jewish Hospital. However, the plaintiff also testified that she was unaware of anyone whose opinion of her was lowered as a result of the statements. The trial court found that the plaintiff could not produce evidence that she sustained any injury as a result of the defendant’s publication of the documents. The appellate court affirmed, holding that the documents published were not defamatory per se, and therefore needed to be viewed in light of the extrinsic facts, which was properly performed by the trial court.

5. The Application and Effect of "Malice"

The United States Supreme Court has defined constitutional actual malice as "knowledge of falsity or reckless disregard for the truth." "Constitutional actual malice focuse[s] on the defendant's attitude toward falsity, while common law malice focuse[s] on the defendant's attitude toward the plaintiff." When the plaintiff is a public figure, the plaintiff is required to show constitutional actual malice. Determining what constitutes reckless disregard for the truth is

149. Id.
150. Id.
151. Id. at *4.
152. Id.
153. Id.
154. Id.
155. Id. at *5.
156. Id. at *4-5.
157. For an expansive discussion on constitutional actual malice and common law malice, see David A. Elder, Defamation: A Lawyer’s Guide, ch. 7 (West 1993).
performed on a case-by-case basis.\textsuperscript{161}

[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice.\textsuperscript{162}

The Supreme Court of Kentucky allows examination of common law malice, or motivation, not to prove constitutional actual malice by and of itself, but as "credence to other circumstances which the [plaintiff] asserts as proof of actual malice."\textsuperscript{163} "A plaintiff is entitled to prove the defendant’s state of mind

\begin{flushleft}
Cholmondelay, 569 S.W.2d 700, 704 (Ky. Ct. App. 1978); see Ball v. E.W. Scripps Co., 801 S.W.2d 684, 688-89 (Ky. 1990). \textit{Ball} provides:

\begin{quote}
New York Times Co. v. Sullivan, and its progeny, interpret the First Amendment guarantees of freedom of speech and press as imposing constitutional limitations on state libel laws, holding that misstatements of fact published by the news media about the conduct of public officials enjoy constitutional privilege unless made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.
\end{quote}
\end{flushleft}

\textit{Id.} (internal citations omitted). \textit{See also} \textsc{Restatement (Second) of Torts} § 580A (1977). This section provides:

\begin{quote}
One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if but only if, he
\begin{itemize}
  \item[(a)] knows that the statement is false and that it defames the other person, or
  \item[(b)] acts in reckless disregard of these matters.
\end{itemize}
\end{quote}
\textit{Id.}

\begin{flushleft}
\textsuperscript{161} St. Amant v. Thompson, 390 U.S. 727, 730 (1968); accord E.W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700, 704 (Ky. Ct. App. 1978) (citing St. Amant v. Thompson, 390 U.S. 727 (1968)); \textit{see also} Ball v. E.W. Scripps Co., 801 S.W.2d 684, 689 (Ky. 1990) ("[T]he concept of 'reckless disregard' cannot be fully encompassed in one fallible definition. [It] is described as a 'high degree of awareness of ... probable falsity,' and as circumstances proving the publisher must have 'entertained serious doubts as to the truth of his publication.'") (internal citations omitted).

\textsuperscript{162} \textit{St. Amant}, 390 U.S. at 731; accord E.W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700, 704 (Ky. Ct. App. 1978) (citing St. Amant v. Thompson, 390 U.S. 727 (1968)).

\end{flushleft}
through circumstantial evidence.”164 This proof must be shown with “convincing clarity which the constitutional standard demands.”165

The United States Supreme Court has adopted the rights of states to “define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”166 The states, however, may “not impose liability without fault,”167 and must, at a constitutional minimum, require a negligence standard for proof of actual damages.168 Kentucky has adopted the negligence standard.169

For a private individual to receive presumed and punitive damages, constitutional actual malice must be proved,170 which is the same burden a public figure must meet to receive compensatory damages.171 However, when the statement is defamatory per se, malice is presumed.172 As this article has

165. Ball, 801 S.W.2d at 689.

If the matter was of public or general interest, Rosenbloom subjected the private person to the demanding constitutional actual malice standard, despite the factors- access to the means of rebuttal, assumption of the risk of enhanced media scrutiny- that distinguished private from public persons. On the other hand, if the matter did not meet the public or general interest test, defendant would be subject to strict liability and to presumed (and even punitive) damages under state-defined damage rules.

167. Gertz, 418 U.S. at 347.
168. Id. at 349.
172. See E.W. Scripps Co., 569 S.W.2d at 702; accord KY. REV. STAT. ANN. § 411.051 (Banks-Baldwin 1999) (providing for libel actions against newspapers and other publications); see also
discussed, a statement that detrimentally affects a person's employment or prospect for employment is considered defamatory per se. Malice therefore will be presumed in most defamation cases that arise in the employment context.

6. Privileges and Defenses to Publication

Kentucky law generally recognizes two categories of privileges to defamatory statements made about a person: absolute and qualified. Different defenses make up these privileges, including truth, consent, pure opinion, and necessary communications.

a. Absolute Privilege

Absolute privilege is traditionally limited to communications made in the course of judicial and legislative proceedings, communications regarding military affairs, communications made under a duty authorized by law, and communications made by heads of executive departments of state. For example, in Haynes v. McConnell, a letter regarding a background check which revealed facts found in court filings was held absolutely privileged.

WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 8-3, 172-173 (Lawyers Co-op. 1988); accord RESTATEMENT (SECOND) OF TORTS § 580B (1977). This section of the Restatement provides:

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if but only if, he

(a) knows that the statement is false and that it defames the other,
(b) acts in reckless disregard of these matters, or
(c) acts negligently in failing to ascertain them.

Id.

173. See discussion on per se injury supra notes 133-38 and accompanying text, and discussion on qualified privilege infra notes 195-213 and accompanying text.

174. See WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 8-6, 182 (Lawyers Co-op. 1988).

175. Tanner v. Stevenson, 128 S.W. 878, 881 (Ky. 1910); KY. CONST. § 43 (absolute privilege for speech regarding debates made in the Senate and House); Hayes v. Rodgers, 447 S.W.2d 597, 599 (Ky. 1969) (stating absolute privilege for “pleadings, motions, affidavits, and other papers in any judicial proceedings is absolutely privileged, though false and malicious. . . .”); Haynes v. McConnell, 642 S.W.2d 902, 902 (Ky. Ct. App. 1982).

176. Haynes, 642 S.W.2d at 902 (finding an absolute privilege for letter written to judge about county employee based on facts filed in court offices regarding employee’s financial difficulties which implied employee was subject to bribes).
Consent granted to another to publish is an absolute defense to a defamation action as well. In the employment context, an absolute privilege can be expressed or implied through collective bargaining agreements, which are authorized by law. In Louisville and Nashville Railroad Co. v. Marshall, the collective bargaining agreement required the company to provide the union with a written explanation any time the company disqualified an employee from a new position during the employee’s probationary period. Marshall, an employee covered by the collective bargaining agreement, was disqualified during his probationary period. Marshall’s supervisor wrote an unflattering report concerning his work performance. The supervisor gave the report to the secretary to type, and distributed it to other supervisory employees. Marshall brought an action for libel against his supervisor and employer. The court held that consent was implied for publication of the report to employees of the defendant “with a legitimate interest in the subject matter” since the employees’ union and the employer entered into the bargaining agreement, which required a “full statement of facts . . . bearing upon the disputes.” As a result, the court found an absolute privilege through implied consent.

As already discussed, in order for a defamation action to exist the statement made must be false. Even if the statements made are defamatory per se, truth is a complete defense. Pure opinion is also an absolute defense when the

178. See id.
179. Id. at 274.
180. Id. at 275.
181. Id. at 278-79.
182. Id. at 282-83.
183. Id. at 280.

[N]otices of dismissal for cause which are contemplated by a collective bargaining agreement and which are published by the employer only to those with a legitimate interest in the subject matter may not be made the subject of an action in libel, regardless of whether the allegations of cause are true or false and regardless of the actual motive behind the dismissal.

185. Louisville and Nashville R.R. Co., 586 S.W.2d at 283-84.
186. Pennington v. Little, 99 S.W.2d 776, 778 (Ky. 1936); see discussion on defamation supra notes 96-104 and accompanying text.
publisher gives the facts upon which his opinion is based. In Buchholtz v. Dugan, a machine shop manager was the subject of an audit for using University of Kentucky facilities, materials, and machinists for personal projects. The University's Office of Management and Organization conducted the audit and created a report that alleged violations of University policies and several criminal statutes. Buchholtz sued the University and several employees for defamation. However, the court found that Buchholtz admitted to using University machinists for personal work, and therefore truth was an absolute defense. The court went on to find that the author of the report had delineated the precise bases for his conclusions. The court held that the author's conclusions consisted of pure opinion, which therefore were absolutely privileged.

b. Qualified Privilege

A qualified privilege exists when, with belief of truth and lack of actual malice, the publisher has an interest in the subject matter of the communication, and communicates with another having the same interest in the communication. In Kentucky, the issue of whether a privilege exists is a matter of law for the court to determine. The issue of malice, in a qualified privilege case, is given to the finder of fact to decide.

and Louisville Times Co., 402 S.W.2d 84, 87 (Ky. 1966).
188. Buchholtz, 977 S.W.2d at 28 (citing Yancey v. Hamilton, 786 S.W.2d 854, 857 (Ky. 1989) (which adopted the Restatement of Torts definition of pure opinion: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." Buchholtz, 977 S.W.2d at 28).
189. Id. at 24.
190. Id. at 27.
191. Id. at 25.
192. Id. at 27.
193. Id. at 28.
194. Id. at 28.
195. See discussion on injury to plaintiff's reputation supra notes 126-56 and accompanying text.
196. Louisville Times Co. v. Lyttle, 77 S.W.2d 432, 436 (Ky. 1934) (stating the interests may be "in reference to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social...").
Most employers review their employees on a regular basis. In these reviews, employees are rated on their work performance. Often, negative performance evaluations are the subject of defamation suits. In *Caslin v. General Electric Co.*, a patent attorney sued his employer and supervisor for defamatory statements made in a written performance appraisal. Caslin had been employed by the defendant for twenty-four years and had been given performance evaluations most of that time. The court found that Caslin was aware that the evaluations were part of his employment and that the reports were communications necessary to the company's function. Following the reasoning in *Louisville and Nashville Railroad Co. v. Marshall*, where the court found consent in a similar situation, the *Caslin* court found that the reports were protected under a qualified privilege.

Subsequently, Kentucky courts have reasoned that employee evaluations are necessary communications, and therefore deserve protection under a qualified privilege. In *Wyant v. SCM Corp.*, Wyant, a manager of a paint store, brought a defamation action against his former employer based on an internal report which stated that Wyant used intimidation, sarcasm, and fear in managing his store. The court held the internal memorandum was the product of an audit of Wyant's store, and reports of this type fall under a qualified privilege since they are "necessary communications" for employers. Also, the court

199. It is argued that "[t]he United States Supreme Court repudiated, as First Amendment doctrine, the separate "pure" opinion doctrine, in *Milkovich v. Lorain Journal Co.*, [497 U.S. 1, 17-23 (1990)]." David Elder, *Kentucky Defamation and Privacy Law - The Last Decade*, 23 N. KY. L. REV. 231, 242-43 (1996). "Under this correct interpretation, whatever residuum of the opinion rule remains post *Milkovich* should not and does not apply to the purely private arena, e.g., to intra-employer defamation or to defamation by an employer to a new or prospective employer...." *Id.* at 244. "In such situations the common law rule allowing the imposition of defamation liability based on opinionative statements should remain untouched by First Amendment requirements."

200. *Caslin*, 608 S.W.2d at 69.

201. *Id.* at 70.

202. *Id.* (citing *Dossett v. New York Mining and Mfg., Co.*, 451 S.W.2d 843 (Ky. 1970)).

203. *Caslin*, 608 S.W.2d at 70 (stating that the court in *Louisville and Nashville Railroad Co. v. Marshall* had the Railroad Labor Act that rendered the privilege absolute. In *Caslin*, no such statute exists).

204. See *Caslin*, 608 S.W.2d at 70.


206. *Id.* at 816 (citing *Caslin*, 608 S.W.2d at 69).
could not find evidence that the report was published to any third party.\textsuperscript{207}

Qualified privilege, like absolute privilege, can arise by operation of law. In \textit{Holdaway Drugs, Inc. v. Braden}, Braden, the employee, was discharged based on suspicion of theft of drugs.\textsuperscript{208} Once terminated, Braden sought new employment with various life insurance companies, at least one of which hired a credit firm to investigate Braden.\textsuperscript{209} When the credit firm asked Braden's former employer about his reasons for leaving, the employer stated that Braden had been under suspicion for theft of narcotics.\textsuperscript{210} Braden subsequently brought a cause of action against his former employer for slanderous statements made to an agent of a prospective employer.\textsuperscript{211} Since Braden conceded that a qualified privilege existed,\textsuperscript{212} the court held that the employer, unless found to be motivated by actual malice, would not be responsible for any damages caused by his communication with the credit firm.\textsuperscript{213}

7. \textit{Summary and Observations}

Kentucky employers who review their employees' work performance should carefully handle their internal performance reports. Properly handled and distributed, evaluations will fall under a qualified privilege as necessary communications. The evaluations should be limited to the facts, be truthful, and when subjective opinions are required, they should be supported with specific examples of employee conduct. The employer should maintain these reports in a confidential manner, and limit employee access and distribution to those persons

\textsuperscript{207} \textit{Id.} It has been argued that, although the court correctly relied on the "necessary communications" reasoning, the court's analysis of publication was erroneous. David A. Elder, \textit{Kentucky Defamation and Privacy Law- The Last Decade}, 23 N. KY. L. REV. 231, 249-50 (1996). "If followed, it would effectively accord the defendant corporate employer a \textit{de facto} absolute privilege to nonconsensually defame at will an employee within the corporate context regardless of the harm done or the justifiability of dissemination. This view is inconsistent with Kentucky's strong protection of the individual's fundamental interest in an unsullied reputation." \textit{Id.}

\textsuperscript{208} \textit{Holdaway Drugs, Inc. v. Braden}, 582 S.W.2d 646, 648 (Ky. 1979).

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.} Braden also claimed that the employer made other statements to other third parties. \textit{Id.}

\textsuperscript{212} \textit{Id.} at 650 ("Braden conceded at oral argument that the communication from Holdaway to [the investigator] was conditionally privileged under federal statutory law and under Kentucky common law. 15 U.S.C.A § 1681h(e); Baskett v. Crossfield, 228 S.W. 673, 675 (Ky. 1920), Wolff v. Benovitz, 192 S.W.2d 730, 733 (Ky. 1946).")

\textsuperscript{213} \textit{Holdaway Drugs, Inc.}, 582 S.W.2d at 650.
who require the information in the report for their functions as employees within
the company. Even if privileged, limiting communication about former
employees to other employers will prevent unwanted litigation expenses
involved in establishing a privilege defense based on the disclosure. If an
employee can establish malice, then the employer will be liable for damages
sustained as a result of any defamatory statements.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Kentucky did not expressly recognize the tort of intentional infliction of
emotional distress until 1984.214 In recognizing this tort, the Supreme Court of
Kentucky accepted that a plaintiff may have a cause of action, regardless of
whether she suffers any bodily injury, from intentional and unlawful interference
with her rights.215 The court expressly adopted, in part, the Restatement (Second) of Torts, which provides: “One who by extreme and outrageous
conduct intentionally or recklessly causes severe emotional distress to another is
subject to liability for such emotional distress, and if bodily harm to the other
results from it, for such bodily harm.”216 In order to recover, the plaintiff must
show: (1) the wrongdoer acted intentionally or recklessly; (2) the conduct was
extreme and outrageous; (3) there is a causal connection between the conduct
and the emotional distress; and (4) the emotional distress is severe.217

1. Intentional or Reckless Conduct

The wrongdoer’s conduct is actionable if he has the specific purpose of
inflicting emotional distress, or his conduct is intentional and he knew or should
have known that the conduct would result in emotional distress.218 In Brewer v.

214. Craft v. Rice, 671 S.W.2d 247, 250 (Ky. 1984). Intentional infliction of emotional distress is also known as the tort of outrage in Kentucky.
215. Id. at 249; see also Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) (inhalation of asbestos fibers by an unwitting employee was sufficient to withstand an employer’s summary judgment for the tort of outrage when the employee’s physician could testify that the employee had a slight increased risk of developing asbestosis and a significantly increased risk of developing mesothelioma, and the employer failed to warn the employee about the presence of asbestos).
216. Id. at 251 (citing RESTATMENT (SECOND) OF TORTS § 46(1) (1977)).
218. Craft, 671 S.W.2d at 249.
Hillard, the court had little trouble finding intentional and reckless behavior.219 Brewer, a male supervising manager, sexually harassed Hillard, a male lower-level employee.220 Brewer’s actions included, among other things, grabbing Hillard’s buttocks, making lewd comments in front of other employees, and touching Hillard inappropriately.221 The court stated that even if Brewer’s intention was an attempt to be humorous, his conduct was at least reckless in light of other employees’ testimony that Brewer had a strong dislike of Hillard.222

2. Extreme and Outrageous Conduct

Extreme and outrageous conduct is that which “offends against the generally accepted standards of decency and morality.”223 The purpose of this element is to prevent frivolous suits resulting from bad manners or hurt feelings.224 In Brewer, Hillard not only was subject to frequent lewd remarks, but also was touched inappropriately and subjected to requests for homosexual sex.225 The court distinguished its finding from that of a Sixth Circuit case where the alleged conduct merely involved sexual jokes, comments and innuendoes.226 The Brewer court stated that “this case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”227

In Kroger Co. v. Willgruber, Willgruber, a sales manager for one of

220. Id.
221. Id. at *1.
222. Id. at *4.
223. Craft, 671 S.W.2d at 249.
224. Id.
226. Id. (distinguishing Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997), which found that the plaintiff failed to produce evidence to show that the conduct was truly outrageous).
227. Brewer, 1999 WL 606466, at *4 (citing, in part, RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977)). The Restatement also provides, in part: “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977); see also Bednarek v. United Food and Commercial Workers Intl. Union, Local Union 227, 780 S.W.2d 630, 632 (Ky. Ct. App. 1989).
Kroger's bakeries, was approached with an option to be fired or sign a letter of resignation, receive a severance package, and sign a release. Kroger attempted to coerce Willgruber into signing the release exonerating Kroger from any wrongful discharge actions, by falsely promising Willgruber that he would have a new position at a different bakery in South Carolina, when in fact no such position existed. Although Willgruber was told that he had twenty-one days to make a decision, the plant manager told co-workers that he had resigned, and three days later he was forced to clean out his desk.

Kroger knew that Willgruber was upset and sick as a result of these events, and that there was no open position at the South Carolina bakery, but sent him to South Carolina for an interview anyway. Following this interview, Kroger contacted the bakery and informed them that Willgruber was not interested in working there. Willgruber suffered severe disabling depression as a result, and attempted to collect disability. Kroger then contacted the disability insurance company in an attempt to prevent or delay payment of benefits to Willgruber. The court found Kroger's knowledge of Willgruber's poor emotional health gave rise to extreme and outrageous behavior, and refused to set aside the jury's factual finding that "Kroger's conduct was 'intentional,' 'outrageous,' 'intolerable,' and 'against the generally accepted standards of decency and morality.'" 

228. Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996). Willgruber had worked for Kroger for over 23 years, but in 1990 he had conflicts with a new marketing manager who ordered him to violate Kroger ethics and policies by obtaining price lists of competitors. Id. at 63. Willgruber eventually acquiesced. Id. Willgruber consistently received positive employment evaluations, but the plant manager secretly wrote fictitious reports that alleged poor performance. Id. These fictitious reports led to the presentation of the resignation letter and release form. Id. On appeal, Kroger only challenged the element of extreme and outrageous behavior. Id. at 63-64.

229. Id. at 65.

230. Id. at 63.

231. Id. at 66.

232. Id.

233. Id. at 63.

234. Id. at 66 (noting conversations with the insurance company included untruthful statements about Willgruber, including that he was very persuasive and faking his illness, he was employed but getting paid under the table, and other more personal and derogatory statements that the court refused to publish in its opinion).

235. Id. at 67 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1977)).

236. Id. The court stated: "The jury had a right to conclude that this was a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an
In contrast, a delay in worker's compensation payments, payments under a contract, or payments under a judgment, from an employer or third party, is not sufficient to establish outrageous and intolerable conduct, when those payments are being processed through proper judicial or administrative channels.\textsuperscript{237} Also, where an employee is yelled at by his supervisor for filing a worker's compensation claim because his injury would cost his employer a lot of money, such is insufficient by itself to establish a claim for emotional distress.\textsuperscript{238}

3. Causation

A causal connection must exist between the wrongful conduct and the emotional distress suffered.\textsuperscript{239} In Brewer, Hillard was hospitalized two days for heart palpitations, which his treating physician attributed to high caffeine intake and stress.\textsuperscript{240} After returning to work, Brewer's sexual harassment continued.\textsuperscript{241} Hillard became increasingly upset and felt that his job duties were suffering.\textsuperscript{242} Hillard sought the treatment of a second physician, who testified that Hillard complained of job-related stress and was nervous and upset.\textsuperscript{243} The physician diagnosed Hillard with severe depression secondary to job stress, prescribed medication, and advised him to stay off work for a few days.\textsuperscript{244} The court held the physicians' testimony sufficient to present the question of causation to the jury.\textsuperscript{245}

\footnotesize{\textsuperscript{237} Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340, 343 (Ky. 1986).
\textsuperscript{238} Clark v. Lexington-Fayette Urban County Gov't, No. 1998-CA-000892-MR, 1999 WL 525448, at *6 (Ky. Ct. App. July 16, 1999). The plaintiff had been under investigation for favoritism and racism in his treatment of other employees, had filed three workers' compensation claims, and was put on leave under the Family and Medical Leave Act. \textit{id.} at *1. His supervisor filed charges with the Civil Service Commission seeking his dismissal, but he resigned prior to any action, then filed suit. \textit{id.}
\textsuperscript{239} Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984).
\textsuperscript{241} \textit{id.}
\textsuperscript{242} \textit{id.}
\textsuperscript{243} \textit{id.}
\textsuperscript{244} \textit{id.}
\textsuperscript{245} \textit{id.} at *4.}
4. Severe Emotional Distress

Finally, the emotional distress suffered must be severe. In the Kroger Co. case, Willgruber experienced an emotional breakdown following his interview. His physician diagnosed him as suffering severe disabling depression. After filing for disability insurance, the insurance company's own physician found Willgruber in such severe depression that it was necessary for him to enter into a non-suicide pact. The insurance company approved his disability claim, despite Kroger's intervention. Based on this evidence, the court found that Willgruber had suffered severe emotional distress.

5. Summary and Observations

For an employee to be successful on a claim for intentional infliction of emotional distress, the conduct by the employer or supervisor must, as evidenced by the above examples, be extreme and outrageous. This is a heavy burden to meet, but an employer who is not careful about how he, or his supervisors, treats employees could find himself defending such a claim. Employers should be aware of inter-personnel activity, and curb any improper conduct, even if such conduct is cloaked in humor.

E. INVASION OF PRIVACY

Kentucky has recognized invasion of privacy as a tort since 1909. The tort is best described as the right of every person to be "let alone." "Private individuals have the right to live their lives without unwarranted interference by the public about matters with which the public is not necessarily concerned." To further develop the law of invasion of privacy, the Supreme Court of Kentucky in 1981 expressly adopted the privacy provisions of the Restatement (Second) of Torts. The result is the adoption of four distinct categories of the

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247. Kroger Co. v. Willgruber, 920 S.W.2d 61, 63 (Ky. 1996).
248. Id.
249. Id. at 66.
250. Id.
251. Id. at 67.
253. McCall, 623 S.W.2d at 887.
254. Id. (citing Brents v. Morgan, 299 S.W. 967, 970 (Ky. 1927)).
255. McCall, 623 S.W.2d at 887 (citing RESTATEMENT (SECOND) OF TORTS § 652A (1977)). The
privacy tort in Kentucky, which includes intrusion upon seclusion, appropriation of name or likeness, public disclosure of private facts, and false light.\(^{256}\)

1. **Intrusion upon Seclusion** \(^{257}\)

Intrusion upon seclusion requires: (1) an intentional intrusion; (2) into a private matter; (3) which is objectionable to the reasonable person.\(^{258}\) This type of invasion of privacy is generally associated with a physical invasion of a person's property, or with eavesdropping on another's conversation with or without wiretaps or other listening devices.\(^{259}\) An intrusion may occur by examining private matter, such as mail.\(^{260}\)

Private matters found in public records that are then published are generally not actionable.\(^{261}\) Exceptions to the privilege of publishing public records are

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Restatement provides in relevant part:

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another …; or

(b) appropriation of the other's name or likeness …; or

(c) unreasonable publicity given to the other's private life …; or

(d) publicity that unreasonably places the other in a false light before the public.


256. The tort of appropriation of name or likeness is not discussed in this article.


258. Stith v. Cosmos Broad., Inc., No. 96 Cl 00309, 1996 WL 784513, at *4 (Ky. Cir. Ct. Sept. 3, 1996); see also WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 20-3, 268 (Lawyers Co-op. 1988); RESTATEMENT (SECOND) OF TORTS § 652B (1977) (providing, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

259. See Rhodes v. Graham, 37 S.W.2d 46, 47 (Ky. 1937); WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 20-3, 270 (Lawyers Co-op. 1988); see also KY. REV. STAT. ANN. §§ 526.010 - 080 (Banks-Baldwin 1999).


provided in the Kentucky Open Records Act. Prior to public records being released, a determination must be made whether the information is of a personal nature. Then a determination is made as whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." For example, where an attorney requested workers' compensation records, the court held that the records requested contained such private information that it outweighed the public's interest to access the information.

Accurate reports pertaining to judicial or administrative proceedings are also generally not actionable. An example of an inaccurate account of a proceeding can be found in *Pearce v. Courier-Journal & Louisville Times Co.*, a slander action where a physician was under investigation by drug-enforcement officers for prescribing drugs illegally. The newspaper inaccurately reported that the plaintiff would be suspended indefinitely by the State Board of Medical Licensure as a result of an investigation into the unlawful issuing of prescriptions for controlled substances. The newspaper also incorrectly reported that an affidavit, which was sworn to a drug-enforcement officer, stated that the plaintiff "issued prescriptions for Demerol without trying to find out

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264. *Kentucky Bd. of Examiners of Psychologists*, 826 S.W.2d at 327; Zink v. Commonwealth of Kentucky, 902 S.W.2d 825, 828 (Ky. Ct. App. 1994). "This latter determination entails a comparative weighing of antagonistic interests in which the privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good." *Zink*, 902 S.W.2d at 828.

265. Zink v. Commonwealth of Kentucky, 902 S.W.2d 825, 827-30 (Ky. Ct. App. 1994). The forms contained information such as, marital status, number of dependants, wage rate, social security number, home address and telephone number, which the court determined are details society generally accepts as having some expectation of privacy. *Id.* at 828. The court found that even though most of the information is often publicly available through other sources, the information was, nonetheless, private. *Id.*

266. *Bell*, 402 S.W.2d at 84 (public records of delinquent taxes); Pearce v. Courier-Journal & Louisville Times Co., 683 S.W.2d 633 (Ky. 1985) (reporting on proceedings against a physician).


268. *Id.*
whether patients needed it." 269 The court found the statements made by the newspaper were inaccurate accounts of the judicial proceedings surrounding the investigation and the administrative proceedings of the medical board. 270 The court remanded the case for a determination as to whether a claim for invasion of privacy existed as a false light claim. 271

2. Public Disclosure of Private Facts

The tort of public disclosure of private facts is based on the belief that the general public does not possess a legitimate interest in knowing about a person’s private life. 272 The following elements are necessary: (1) a public disclosure; (2) of private facts; (3) which if made public would be offensive and objectionable to a reasonable person of ordinary sensibilities. 273

The United States Supreme Court has determined that the First and Fourteenth Amendments prohibit states from imposing sanctions “on the publication of truthful information contained in official court records open to public inspections.” 274 The Supreme Court of Kentucky has ruled that if the matter is of public interest, even if a person’s privacy is invaded, a claim for invasion of privacy will not stand. 275 Recovery is allowed for false light, though not for public disclosure, when there is a showing that the defendant has knowledge of the falsity of the statements or a reckless disregard for the truth. 276

Publication, within the context of invasion of privacy, is different than

269. Id. at 635.
270. Id. at 637.
271. Id. at 633.
273. Stith v. Cosmos Broad., Inc., No. 96 Cl 00309, 1996 WL 784513, at *5 (Ky. Cir. Ct. Sept. 3, 1996); see also RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”).
274. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); see also Time v. Hill, 385 U.S. 374 (1967) (observing that state laws providing for the protection of privacy cannot allow a recovery based upon falsity alone, when the publication concerns public interest).
276. McCall, 623 S.W.2d at 888; Yancey v. Hamilton, 786 S.W.2d 854, 860 (Ky. 1989).
publication within the context of defamation. In a defamation action, publication is met when disclosure is made to one person. However, for the element of “publicity” to be met in an action for false light or public disclosure, the disclosure must be made to a large segment of the public so as to become public knowledge. For example, in Brents v. Morgan, the defendant placed a large sign in the front window of a garage, which was located on a main street. The sign stated that the plaintiff owed the defendant money. The court found this disclosure to be sufficient for “publicity.”

The publicized facts must be offensive and objectionable to a reasonable person of ordinary sensibilities and not to supersensitiveness or agoraphobia. In Wheeler v. P. Sorensen Manufacturing Co., Inc., the employer published wage and hour information regarding Wheeler, an employee, in an attempt to prevent its employees from unionizing. The employer published the information in an attempt to show the employees that they did not need a union to be treated fairly and paid well by the employer. Although the information also allegedly fell into the hands of the public, the court held that the distribution of the information was not so “unreasonable or unwarranted.” The court found the information to be of interest to the employer and employees, since it showed an example of how good employees

277. WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 20-5, 276 (Lawyers Co-op. 1988).
278. See discussion on reckless or negligent communication to third person, supra notes 121-25 and accompanying text.
280. WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE § 20-5, 276 (Lawyers Co-op. 1988).
282. Id. The sign was five feet by eight feet and read: “Notice. Dr. W.R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.” Id.
283. Id. at 970.
285. Voneye v. Turner, 240 S.W.2d 558, 591 (Ky. 1951); see also RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977) (providing that whether the disclosed information is highly offensive is determined by how a person of reasonable sensibilities views the matter, not how the plaintiff views the matter).
287. Id.
288. Id.
WORKPLACE INVESTIGATIONS

are treated by the employer. Moreover, the court found that the publication did not contain threats, ridicule or disgrace, but was evidence that Wheeler was a praiseworthy employee, and given wage increases without union representation.

3. False Light

The tort of false light is very similar to the tort of defamation. The primary distinction is more theoretical than practical. Defamation is a remedy for the damage to reputation caused by inaccurate speech, while false light is a remedy for the mental anguish caused by the widespread publication of false speech. To sustain an action for false light, the plaintiff must show: "(1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed." While a plaintiff may bring both causes of action as a result of a single publication, double recovery is not permitted. In the employment context, internal memoranda are insufficient to establish a cause of action for false light, unless they are made public. In a defamation suit, if the internal memoranda

289. Id.

290. Id.


293. Id.

294. McCall, 623 S.W.2d at 888 (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

295. Id. at n.9.

are not protected as a necessary communication under a qualified privilege, then all that is required is that the memoranda be distributed to a third person, not the public.297

In *Yancey v. Hamilton*, the plaintiff brought a tortious action for false light against a newspaper and the interviewee, who knew the plaintiff’s family.298 The interview was prompted by the plaintiff’s arrest for a double murder.299 The defendant interviewee stated that he had known the plaintiff’s family for years, and that the plaintiff was a “con artist.”300 The Supreme Court of Kentucky held that, because the matter was of public interest, the plaintiff would have to show that the defendants knew of the falsity of the statement or acted with disregard as to its falsity.301 This “actual malice standard” is applied regardless of the plaintiff’s private or public status as an individual.302

4. Summary and Observations

Employers often receive sensitive information regarding their employees, and this information should be kept accurate and in restricted areas. Access to these records should be limited to those employees who have a necessary function that requires access. Any release of the information may open the employer to liability for an invasion of privacy, or at least the costs associated with the defense of such an action. Good practice dictates that employers protect their economic interests and maintain employee information in a confidential manner.

III. EMPLOYER PRACTICES

Employers use various methods of investigating employees and the workplace, including background checks and credit reports, questioning employees, workplace searches, interception or search of postal and electronic mail, surveillance and monitoring, drug and alcohol tests, polygraph tests, and publication of employee misconduct. However, statutory law or common law affects each of these practices, and the employer therefore must limit
investigations to conform to the applicable law. This section discusses ways in which an employer is permitted to investigate employees and the workplace, and the consequences involved when an employer uses illegal investigatory practices.

A. BACKGROUND CHECKS AND CREDIT REPORTS

Although most employment investigations are initiated in response to a report of employee wrongdoing, many are proactive, and are designed to screen out high-risk applicants. Employers are well advised, for example, to obtain driving and criminal background records for applicants who will be driving company vehicles or who will be exposed to a great deal of contact with the public. An employer who fails to conduct such background checks is exposed to liability for negligently hiring employees who have a history of violence toward others. For example, the Kentucky Court of Appeals recently remanded a case for the jury to determine if an employer was liable to a third party who was raped by an employee, where the employer knew of the employee’s extensive criminal record. An Illinois appellate court affirmed the trial court's denial of summary judgment to an employer when the employer failed to verify the criminal record of an over-the-road driver who sexually assaulted a hitchhiker in the sleeping compartment of the company truck. A subsequent background check revealed that the driver had a history of sexual assault convictions.

On the other hand, an employer should not adopt a blanket policy of refusing to hire any applicant with a criminal record. Some courts have held the practice

303. An estimated twenty-percent of job applicants falsify or omit some information on job applications, from lying about a job title to not revealing a criminal record. 12 EMPLOYEE REL. Wkly. (BNA) 331 (Mar. 28, 1994).
304. Id. at 332.
305. An employer can be held liable for failure to exercise ordinary care in hiring or retaining an employee when its failure creates a foreseeable risk of harm to a third person. Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky. Ct. App. 1998). The question is whether the employer knew or should have known that (1) the employee was unfit for the job for which he was employed, and (2) whether his placement or retention in that job created an unreasonable risk of harm to the plaintiff. Id.
308. Id.
of refusing to consider for employment any person convicted of a crime other than a minor traffic offense violates Title VII because of its disparate impact of disqualifying African-Americans at a substantially higher rate than whites. Employers, therefore, should require applicants for security-sensitive or public-access jobs to disclose convictions and to sign a background check authorization. However, this authorization should include a disclaimer such as the following:

IMPORTANT: A conviction does not automatically mean you will not be offered a job. The crime (if any) of which you were convicted, the circumstances surrounding the conviction, and how long ago the conviction occurred are important. Give all the facts so the Company can make an informed decision.

Another type of pre-employment background investigation, which most


311. See Cross v. United States Postal Serv., 483 F. Supp. 1050, 1052 (E.D. Mo. 1979), rev'd on other grounds, 639 F.2d 409 (8th Cir. 1981); see also Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971) (holding that an employer may take adverse employment action based on an individual's criminal convictions where the action is tailored to the nature and gravity of the offence, the length of time since the conviction, and the nature of the job in question), aff'd mem., 468 F.2d 951 (5th Cir. 1972); State Div. Of Human Rights v. Xerox Corp., 370 N.Y.S.2d 962, 963 (N.Y. App. Div. 1975), aff'd, 352 N.E.2d 139 (N.Y. 1976) (holding that an employer's suspension of an arrested employee was permissible where it was shown that the suspension was not automatic but was made on a case-by-case basis after inquiry triggered by the arrest).
frequently is used to screen applicants for financial positions, is a credit check. Federal law, which regulates when a credit reporting agency may furnish a consumer report, permits such an agency to issue a report to a person or company who "intends to use the information for employment purposes[...]."312 However, an employer who rejects an applicant because of a bad credit

312. 15 U.S.C.A. § 1681b(a)(3)(B) (West 1999). A consumer reporting agency may furnish a consumer report only under the following circumstances:

(1) in response to a court order;
(2) in accordance with written instructions of the consumer to whom it relates; or
(3) to a person who it has reason to believe
   (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review, or collection of an account of, the consumer; or
   (B) intends to use the information for employment purposes; or
   (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
   (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
   (E) intends to use the information, as a potential investor or service, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or
   (F) otherwise has a legitimate business need for the information
      (i) in connection with a business transaction that is initiated by the consumer; or
      (ii) to review an account to determine whether the consumer continues to meet the terms of the account.


Section (b) provides for the conditions under which consumer reports can be used for employment purposes:

(1) A consumer reporting agency may furnish a consumer report for employment purposes only if

   (A) the person who obtains such report from the agency certifies to the agency that
      (i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer paragraph (3) becomes applicable; and
      (ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation;
report is required to provide to the applicant a copy of the report, and a
description of the applicant's rights. Also, an employer may be required to
inform the applicant of the reason she was denied employment and the name and
address of the credit reporting agency which furnished the credit report. An
employer who obtains an employee's credit report out of mere curiosity could be
liable for the employee's resulting emotional damages. Perhaps most

and

(B) the consumer reporting agency provides with the report, or has previously
provided, a summary of the consumer's rights under this subchapter, as prescribed
by the Federal Trade Commission under section 1681g(c)(3) of this title.

(2) Disclosure to consumer

(A) In general, except as provided in subparagraph (B), a person may not procure a
consumer report, or cause a consumer report to be procured, for employment
purposes with respect to any consumer, unless

(i) a clear and conspicuous disclosure has been made in writing to the
consumer at any time before the report is procured or caused to be procured,
in a document that consists solely of the disclosure, that a consumer report
may be obtained from employment purposes; and
(ii) the consumer has authorized in writing (which authorization may be made
on the document referred to in clause (i) the procurement of the report by that
person.

(3) Conditions on use for adverse actions

(A) in general, except as provided in subparagraph (B), in using a consumer report
for employment purposes, before taking any adverse action based in whole or in
part on the report, the person intending to take such adverse action shall provide to
the consumer to whom the report relates

(i) a copy of the report; and
(ii) a description in writing of the rights of the consumer under this title, as
prescribed by the Federal Trade Commission under section 1681g(c)(3) of this
title.

26,823 (FTC 1991), approved, 56 Fed. Reg. 26,823 (FTC 1991); see also "FTC Settles Charges
That Marshall Fields Failed to Tell Applicants of Credit Reports," Daily Labor Report, May 18,
1993, at A-8 (citing other settlements of this kind).
significantly, an employer cannot obtain the credit report of an employee suspected of wrongdoing if that employee already has resigned or been discharged. 316

B. QUESTIONING EMPLOYEES

Although an employer has the right to question an employee about matters pertaining to employment, 317 an employer does not have the right to beat an employee until the employee confesses to a crime she did not commit. 318 The legitimacy of the employer's inquiry will depend on the reasons for the inquiry, the methods used, and the sensitivity of the topic which is being investigated. Intrusive questioning or unreasonable tactics may result in liability for a variety of torts, including false imprisonment, 319 assault, 320 intentional infliction of emotional distress, 321 and intrusion upon seclusion. 322

Whenever an employer detains an employee for questioning, even during working hours, a claim for false imprisonment may arise. 323 To avoid claims of false imprisonment, an employer who wishes to question an employee should do so in a large, well-lit and well-ventilated area from which the employee may leave freely; should avoid using physical force or threats to restrain the employee; should maintain a civil tone of voice throughout the interrogation; and should avoid making unsubstantiated allegations. 324

An employer's unreasonable interrogation techniques also can give rise to claims for intentional infliction of emotional distress. For example, claims for emotional distress have been upheld for making knowingly false accusations in

317. See discussion on lack of authority to restrain, supra notes 39-61 and accompanying text.
318. See generally discussion on assault, supra notes 62-91 and accompanying text.
319. For a general discussion on this tort, see supra notes 4-61 and accompanying text.
320. For a general discussion on this tort, see supra notes 62-91 and accompanying text.
321. For a general discussion on this tort, see supra notes 214-251 and accompanying text.
322. For a general discussion on this tort, see supra notes 257-271 and accompanying text.
order to induce confession,\textsuperscript{325} displaying a gun to a person who was being questioned,\textsuperscript{326} firing employees in alphabetical order until one admitted to employee theft,\textsuperscript{327} not permitting an employee to take medication for a personality disorder during an interrogation,\textsuperscript{328} and questioning an employee in a windowless room for three hours while threatening that the questioning would continue all night or until the employee confessed.\textsuperscript{329}

Even if an employer’s investigatory techniques are reasonable, the employer may be liable in tort if the content of the questions asked is highly offensive.\textsuperscript{330} The Eleventh Circuit has held that an employer who questioned an employee concerning her sexual activities and asked her to engage in sexual relations with him tortiously intruded into her private affairs.\textsuperscript{331} An employer therefore should be prepared to show a legitimate business need for the information, which is the subject of inquiry.

In \textit{Madsen v. Erwin}, officials of the Christian Science Church questioned an employee after they received allegations that she was homosexual.\textsuperscript{332} The Supreme Judicial Court of Massachusetts held that the questions did not unduly invade the employee’s privacy because the questions were relevant to whether the employee was upholding the church’s teaching that homosexuality was immoral.\textsuperscript{333}

\section*{C. WORKPLACE SEARCHES}

Employers have a variety of different reasons for conducting workplace searches, such as investigating employee theft,\textsuperscript{334} maintaining workplace

\begin{itemize}
\item \textsuperscript{325} Hall v. May Dep't Stores Co., 637 P.2d 126, 131 (Or. 1981).
\item \textsuperscript{328} Tandy Corp. v. Bone, 678 S.W.2d 312, 315 (Ark. 1984).
\item \textsuperscript{330} See Texas State Employees Union v. Department of Mental Health and Mental Retardation, 746 S.W.2d 203, 206 (Tex. 1987) (striking down a state agency polygraph policy as violative of privacy rights protected by the Texas Constitution, in part because of the invasive use of control questions).
\item \textsuperscript{331} Phillips v. Smalley Maintenance Serv., Inc., 711 F.2d 1524, 1529 (11th Cir. 1983).
\item \textsuperscript{332} Madsen v. Erwin, 481 N.E.2d 1160, 1163 (Mass. 1985).
\item \textsuperscript{333} \textit{Id}.
\item \textsuperscript{334} See KY. REV. STAT. ANN. § 433.236 (Banks-Baldwin 1999); \textit{see also supra} note 40 and accompanying text.
\end{itemize}
security, and locating misplaced files and documents. Employees, however, also have a reasonable right not to be subjected to unreasonably intrusive searches, and an employer who transgresses this line may be exposed to liability for the tort of intrusion. The reasonableness of a private workplace search depends on a variety of factors, including the intrusiveness of the search, the purpose of the search, the degree of employer suspicion, and whether the employee was notified of, or consented to, the search. The intrusiveness of the search depends on the manner in which the search is conducted and the person conducting the search. Perhaps the most important factor, however, is whether the employee had a reasonable expectation of privacy in the subject of the search.

An example is the Texas case of K-Mart Corp. Store 7441 v. Trotti, where an employee alleged that her employer had intruded upon her privacy by searching her locker and purse. K-Mart provided lockers to employees, permitted employees to supply their own locks, and did not require the employees to furnish K-Mart with the combination or key. Based on the suspicion that another unidentified employee had stolen a watch and that price-marking guns were missing, K-Mart searched both the plaintiff's locker and her purse, which was located inside the locker. The court held that plaintiff,
by placing a lock on the locker, at her own expense, with K-Mart’s consent, “demonstrated a legitimate expectation to a right of privacy in both the locker itself and the personal effects within it,”\footnote{346} and therefore, had successfully stated a claim for the tort of intrusion.\footnote{347} However, the court stated that if an employer provides the lock and maintains the combination or a master key, that employer has “manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches.”\footnote{348}

Searches of an employee’s person are even more likely to invite tort liability. For example, in the Oregon case of \textit{Bodewig v. K-Mart, Inc.}, a customer accused an employee of theft.\footnote{349} After concluding that the employee had not taken the customer’s money, the manager required the employee to submit to a strip search in a restroom in the presence of a co-worker and the customer.\footnote{350} The court held that the employee had successfully stated a claim for intentional infliction of emotional distress.\footnote{351}

\textbf{D. INTERCEPTION OR SEARCH OF POSTAL AND ELECTRONIC MAIL}

Federal law prohibits any person from taking mail addressed to another before it has been delivered with the intent “to obstruct the correspondence, or pry into the business or secrets of another[.]”\footnote{352} This law applies to every obstruction occurring before mail is “physically delivered to the addressee or the authorized agent of the addressee,”\footnote{353} but does not apply to obstructions of letters that were unmailed or that had already been received by the addressee or her agent.\footnote{354}

At this time, no case has discussed the circumstances under which an employer may become the authorized agent of its employee or whether mail received in an employee’s official capacity differs from mail marked personal.

However, in Vernars v. Young, a corporate officer opened mail, marked personal, which was addressed to an employee and delivered to the corporate office. The Third Circuit held that the corporate officer was liable under state tort law for intrusion upon the employee’s private affairs.

Electronic mail is a method of communicating via a computer network. Because the technology is relatively new, there are no clear tort rules governing whether and to what extent employees have legitimate expectation of privacy in their electronic mail. It is possible that the unauthorized interception of electronic mail could be subject to federal and state wiretapping statutes, which are discussed in the next section. Additionally, at least one commentator has argued that electronic mail should receive the same statutory and common law protection as postal mail. There are, however, several fundamental differences between electronic and postal mail. Postal mail is delivered by a branch of the United States government, while electronic mail is communicated via a computer network that is typically owned by the

The employer has the technical means to retrieve messages without the employees' passwords, and the information gathered generally is not regarded as private. Even if the interception of electronic mail is regarded as intrusive, an employee trying to prove a tort case must show that the intrusion is highly offensive to a reasonable person. Factors which courts are likely to consider include: the type of computer system involved; the degree of security the system provides; the ownership of the system; the degree of employer access; and the extent to which the employer has provided notice, whether through precedent or general announcement, that employees have no legitimate expectation of privacy in their electronic mail and that it is subject to search.

E. SURVEILLANCE AND MONITORING

Traditional visual surveillance by front-line supervisors has given way to modern, high-tech surveillance techniques that allow employers to watch employees and monitor their performance in ways never before possible. This section examines three broad categories of surveillance: visual surveillance by video cameras; wiretapping, eavesdropping, and monitoring of telephone conversations; and electronic performance monitoring.

361. Id. at 546.
362. Id.
363. Id. at 546-49 (1992).
364. For a general discussion of the tort of intrusion, see supra notes 257-71 and accompanying text.
366. Richard M. Howe, Minding Your Business: Employer Liability for Invasion of Privacy, 7 LAB. LAW. 315 (1991) (noting the proliferation of such devices as fisheye camera lenses implanted in ceilings, long-distance video cameras, and computer systems that allow employers to monitor an employee's computer keystrokes).
367. The American Management Association has determined that forty-five percent of major U.S. firms record and review employee communication and activities on the job, including their phone calls, e-mail, and computer files. The figure is a slight increase from the 1998 finding of 43% but significantly higher than the 1997 finding of 35%. Increases have been particularly high in monitoring electronic mail, a reflection of the growth of e-mail communications over the past two years.
1. **Visual Surveillance**

Employers have always used front-line supervisors to perform employee surveillance as a means of managing employees and protecting the workplace. From this point, it is a relatively small step to the installation of video cameras in public places to facilitate the surveillance. For example, one court held that an employer did not intrude upon sanitation workers' privacy rights when it photographed the workers and showed the photographs to witnesses who claimed some employees were collecting waste from commercial enterprises for their own benefit. Employers are likely to be held liable for intrusion, however, when surveillance intrudes into private places where employees engage in primarily personal activities, such as locker rooms and lounges, and where the employer is unable to articulate a legitimate and

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371. For a general discussion of this tort, see *supra* notes 257-71 and accompanying text.

significant business reason for the surveillance.  

2. Wiretapping, Eavesdropping, and Monitoring of Telephone Conversations

Title III of the Omnibus Crime Control and Safe Streets Act (Title III) prescribes (1) the intentional interception by any person of any wire, oral, or electronic communication; and (2) the intentional use of any mechanical or other device to intercept any oral communications. Although Congress' focus was on law enforcement's battle against organized crime, the effect of the statute is to prohibit most electronic surveillance by private persons.

Employees can bring private suits under the federal wiretapping statute to recover actual or liquidated damages of the higher of $100 per day or $10,000, plus punitive damages and attorney's fees. As a general rule, the statute only prohibits a third party from recording a conversation between two or more parties, when none of the parties to the conversation are aware that the conversation is being tapped. In other words, it is generally permissible for a person to record a conversation in which she is a participant. However, some state statutes make it impermissible to record a conversation unless all parties to that conversation know and assented to the recording.

15 U. Puget Sound L. Rev. 131, 144 (1990) (explaining that an employer risks liability when an employer does not give an employee notice of the monitoring, when the monitored activity is personal rather than business in nature, and when the monitoring is unreasonably intrusive).

373. Frank J. Cavico, Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects, 30 Hous. L. Rev. 1263, 1286 (1993); Hudson v. S.D. Warren Co., 608 F. Supp. 477, 480 (D. Me. 1985) (concluding that a disclosure was not actionable because it was not public and the employer had a legitimate interest in the information).


380. E.g., Conn. Gen. Stat. § 57-570d (West 1999); cf. Ky. Rev. Stat. Ann. § 526.010 (Baldwin 1999) (which defines eavesdrop as "means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device.") (emphasis added); see also Carrier v. Commonwealth, 607 S.W.2d 115 (Ky. Ct. App. 1980) (holding that in a trial for bribing a witness,
An exception to the federal statute exists when the interceptor is an employer and the interception is over a telephone extension used by the employer in the ordinary course of its business.\textsuperscript{381} In \textit{Briggs v. American Air Filter Co.}, a supervisor suspected that a sales employee was disclosing confidential information to a former co-worker who ran a competing business, so he listened on an extension and recorded a telephone conversation between the two.\textsuperscript{382} The Fifth Circuit found this to be within the "ordinary course of business" exception:

[W]hen an employee's supervisor has particular suspicions about confidential information being disclosed to a business competitor, has warned the employee not to disclose such information, has reason to believe that the employee is continuing to disclose the information, and knows that a particular phone call is with an agent of the competitor, it is within the ordinary course of business to listen in on an extension phone for at least as long as the call involves the type of information he fears is being disclosed.\textsuperscript{383}

The court warned, however, that it is hard to see how use of an extension telephone to intercept a call involving non-business matters could be "in the ordinary course of business," since such activity is unlikely to further any legitimate business interest.\textsuperscript{384} However, interception of calls reasonably suspected to involve non-business matters might be justifiable if an employer has difficulty controlling personal use of business equipment through warnings.\textsuperscript{385}

Three years after \textit{Briggs}, the Eleventh Circuit reversed summary judgment for an employer who had monitored an employee's incoming call during lunch, when the employee had spoken with a friend about an interview for another job.\textsuperscript{386} The court recognized that the employer had a business interest in learning that an employee might quit, but declared that "[t]he phrase 'in the

the use of tape recordings of conversations between the accused and a witness did not violate the accused's rights under federal and state constitutions because the witness consented to the electronic surveillance by government agents).

\textsuperscript{381} 18 U.S.C.A. § 2510(5)(b) (West 1999). Kentucky provides an exception for a person who "\textit{f} inadvertently overears the communication through a regularly installed telephone party line or on a telephone extension but does not divulge it . . . ." KY. REV. STAT. ANN. § 526.070 (Banks-Baldwin 1999) (emphasis added).

\textsuperscript{382} Briggs v. American Air Filter Co., 630 F.2d 414, 416 (5th Cir. 1980).

\textsuperscript{383} \textit{Id.} at 420.

\textsuperscript{384} \textit{Id.}

\textsuperscript{385} \textit{Id.} at 416 n.8.

\textsuperscript{386} Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983).
ordinary course of business' cannot be expanded to mean anything that interests the company."\(^{387}\) The court held:

[A] personal call may not be intercepted in the ordinary course of business under the exemption in section 2510(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not. In other words, a personal call may be intercepted in the ordinary course of business to determine its nature but never its contents.\(^{388}\)

In *United States v. Murdock*, the Sixth Circuit followed the narrow interpretations of these cases.\(^{389}\) *Murdock* involved a wife and husband who operated a funeral business that was located next to their house.\(^{390}\) The couple had installed two business extensions from the funeral home in their house.\(^{391}\) The wife, fearful of her husband's possible infidelities and suspicious of his business conduct, attached recording equipment to the business extensions in the house, and recorded conversations systematically for about three months.\(^{392}\) The court held that the wife's indiscriminate recording of both incoming and outgoing calls was not conduct within the ordinary course of business, and therefore did not fall under the exception.\(^{393}\)

Similarly, in *Abel v. Bonfanti*, an employer installed a tape recorder on business lines for later review.\(^{394}\) The District Court for the Southern District of New York ruled that the “ordinary course of business” exception does not allow

\(^{387}\) *Id.* at 583.

\(^{388}\) *Id.*; accord *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986) (holding that an intercepted call was not personal but did relate to the business of the employer and was thus intercepted in the ordinary course of the hospital's business).

\(^{389}\) *United States v. Murdock*, 63 F.3d 1391, 1392 (6th Cir. 1995).

\(^{390}\) *Id.*. The Sixth Circuit followed the Fifth Circuit's reasoning in *Briggs v. American Air Filter Co.* as to the phrase “ordinary course of business,” but declined to follow the Fifth Circuit's reasoning in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974) as to the issue of inter-spousal exemption with respect to wiretapping in the home. *Id.* at 1396-97. The court relied on *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), which rejected the *Simpson* case as far as proclaiming a broadly-based inter-spousal exemption for wiretapping. *Id.* at 1397.

\(^{391}\) *Murdock*, 63 F.3d at 1392.

\(^{392}\) *Id.*. The couple had been separated and the wife was living alone in the house at the time the recordings were made. *Id.* at 1392, n2.

\(^{393}\) *Id.* at 1397. The court also relied on *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992), which held that the indiscriminate recording of 22 hours of calls and subsequently listening to them was beyond the ordinary course of business.

a company to intercept all calls, including personal ones. However, the Second Circuit recently has ruled that, under some circumstances, blanket recording of employee’s telephone conversations can fall within the “ordinary course of business” exception. In Arias v. Mutual Central Alarm Service, the employer was a provider of central station alarm services, whereby it monitored the burglar and fire alarms of its customers and notified the police, fire, and other emergency services when it received a signal that an alarm had been activated. Mutual had a practice of recording all of its employees’ telephone conversations. The court held that this fell within the “ordinary course of business” exception for two reasons. First, employees of Mutual had access to extremely sensitive information, such as information that would facilitate access to their customers’ homes. Mutual, therefore, had an interest in making certain that their employees were not divulging this information unnecessarily. Second, Mutual had an interest in ensuring that its employees promptly and accurately reported information to the various emergency services.

The Fifth Circuit has held that Title III does not prohibit the indiscriminate monitoring of cordless telephone communications. Employers should always be mindful of the possible tort implications of telephone monitoring.

395. Id. at 270; see also Deal v. Spears, 980 F.2d 1153, 1158 (8th Cir. 1992) (holding that a liquor store owner violated Title III by using a recording device on a store telephone to monitor calls in an attempt to discover whether an employee had participated in the theft of $16,000). The court found that the extensive recording of calls, many involving sexually explicit conversations, was more intrusive than necessary to serve the employer’s legitimate business purpose. Deal, 980 F.2d at 1158.


397. Id. at *6.

398. Id. at *6-7.

399. Id. at *20.

400. Id.

401. Id.

402. Id.


404. See, e.g., Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 6 (Tex. App. Corpus Christi 1991, no writ) (noting that the tort of intrusion into a plaintiff’s seclusion, solitude, or private affairs generally involves, among other things, “eavesdropping...with the aid of wiretaps, microphones,
The extent to which Title III proscribes private employers from bugging employees’ offices is unclear. One court has held that a person cannot be held liable under the Act unless the bugging affects interstate commerce or constitutes state action since Congress has no power to enact legislation affecting wholly private intrastate acts.\(^{405}\) However, at least two courts have held that Congress has the power and intent to prevent private actors from conducting private surveillance with a solely intrastate nexus.\(^{406}\) For example, in Dorris v. Absher, the supervisor secretly recorded conversations among four of his employees with a tape recorder placed in their common office.\(^{407}\) Despite the supervisor’s contention that the employees did not have a legitimate expectation of privacy, the Sixth Circuit found that the employees had a reasonable subjective and objective expectation.\(^{408}\) The court reasoned that the employees obviously had a subjective expectation because no reasonable employee would harshly criticize their supervisor if she knew the supervisor was listening.\(^{409}\) The court also reasoned that the employees had an objective expectation of privacy because the conversations only took place when no one else was present, and would cease when someone entered the driveway of the


\(^{407}\) Dorris v. Absher, 179 F.3d 420, 423 (6th Cir. 1999).

\(^{408}\) Id. at 424-25.

\(^{409}\) Id. at 425.
The employees took steps to ensure that their conversations remained private. Regardless of whether bugging is proscribed by Title III, it may cause an employer to incur liability for the tort of intrusion.

3. Electronic Performance Monitoring

Computers can record when employees turn their computers on and off, count the number of keystrokes entered for a given period of time, and track the number of keystroke mistakes. Such monitoring is an extremely useful tool for evaluating an employee’s performance. It enables employers to obtain an exact measurement of an employee’s performance, while avoiding the potential biases and prejudices of subjective evaluations by supervisors. The data accumulated by electronic monitoring allow an employer to pace an employee’s work, improve efficiency, deter shirking, reduce costs, establish quality and

410. Id.
411. Id. (distinguishing a case where the employees, who worked in a single room, were found to have had no reasonable expectation of privacy, because that single room was part of a larger office complex, and others could easily overhear their conversations, whereas in the case at hand, the entire office consisted of a single room that could not be accessed without the employees’ knowledge).
412. See Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Ct. App. 1985) (holding that evidence that the employer probably placed a surveillance device on the door of the employee’s motel room was sufficient to prevent summary judgment in favor of the employer on the employee’s claim of intrusion). Damages for violating Title III can be expensive. The Sixth Circuit determined that damages are to be awarded as follows:

1. First determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if any. See 18 U.S.C. § 2520(c)(2)(A).
2. Ascertain the number of days that the statute was violated, and multiply by $100. See 18 U.S.C. § 2520(c)(2)(B) (1999).
3. Tentatively award the plaintiff the greater of the above two amounts, unless each is less than $10,000, in which case $10,000 is to be the presumed award. See 18 U.S.C. § 2520(c)(2)(B) (1999).
4. The court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it. See 18 U.S.C. § 2520(c)(2) (1999).

Dorris, 179 F.3d at 430.
414. Id. at 1299.
productivity standards, and increase profits. Employers prefer the monitoring to be secret because they believe that monitoring is more effective when employees are unaware they are being monitored.

Employees, on the other hand, complain that electronic monitoring is intrusive and places great stress on employees:

Some workers complain that electronic monitoring is intrusive because it is making a constant minute-by-minute record, creating a feeling of "being watched" all the time. This, they say, is quite different from having a human supervisor occasionally checking their work. Privacy can also refer to exercising one's own autonomy; even in routine work, there is some personal variation in work style. Some people work fast for short periods but take lots of breaks, others work fast in the morning and slow in the afternoon. These individual work styles may not matter when the basic unit evaluation is long—say a day or a week. People with differing styles might accomplish the same amount of work in a day. However, continuous monitoring offers management more detailed information. If the employer uses the information gathered through monitoring to change the pace or style of work—regulating the number of breaks or requiring people to accomplish as much in the afternoon as in the morning—then the employee loses a certain amount of control over his or her own job.

Two major objections to electronic monitoring of individual performance are allegations that it contributes to employee stress and stress-related illnesses and that it contributes to an atmosphere of distrust in the workplace. While there has been only limited direct research on the stress effects of electronic monitoring, there does seem to be some evidence that it can contribute to stress.

One commentator, however, dismisses the complaints about electronic supervision by analogizing them to the controversy over radar detectors:

Indeed, some might claim that objections to the supervisory omnipresence permitted by monitoring devices smack of the controversy over automobile

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418. Office of Technology Assessment, The Electronic Supervisor: New Technology, New Tensions 5, 8 (1987); see also Hearings on S. 984 Before Senate Subcommittee on Employment (June 15, 1993) (testimony of Barbara J. Easterling, Secretary-Treasurer of the Communication Workers of America) (characterizing secret electronic monitoring as "the merciless whip that drives the rapid pace for workers in the service sector of the economy.").
radar detectors. Drivers are supposed to obey the speed limits at all times, not just when they know a police officer is near. Therefore, good citizens have no legitimate interest in owning or using radar detectors. Similarly, “working time is for work.” Good employees have no need to know when they are being monitored. Therefore, they have no reason to object to continuous monitoring.419

As a general matter, employees will have a difficult time persuading courts that electronic monitoring is a tortious invasion of privacy. As Professor Cavico points out: “[o]ffice computers and related equipment are the employer’s property, the tasks the employees perform using the computers are [the employees’] job functions, and the employer may have justifiable business reasons for the monitoring.”420

F. DRUG AND ALCOHOL TESTS 421

Random drug testing is becoming increasingly prevalent as employers realize the impact employee drug use can have on safety, productivity, and health insurance premiums.422 Employees, however, often argue that drug testing is an intrusive invasion of their privacy.423 The Third Circuit has explained:

We can envision at least two ways in which an employer’s urinalysis program might intrude upon an employee’s seclusion. First, the particular manner in

423. Id. at 1315.
which the program is conducted might constitute an intrusion upon seclusion...
In addition, many urinalysis programs monitor the collection of the urine specimen to ensure that the employee does not adulterate it or substitute a sample from another person. Monitoring collection of the urine sample appears to fall within the definition of an intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another. Second, urinalysis 'can reveal a host of private medical facts about an employee....' A reasonable person might well conclude that submitting urine samples... constitutes a substantial and highly offensive intrusion upon seclusion.424

In Kentucky, drug and alcohol tests conducted by public-sector employers are recognized as searches under the Fourth Amendment, but only those searches that are unreasonable are proscribed.425 For example, the government's interest in ensuring the safety of school children is balanced against the privacy interests of public employee bus drivers.426 In such circumstances, the public employer has a need to discover hidden drug or alcohol use, and such interests are sufficiently compelling to justify the intrusion of privacy of the individual employee resulting from conducting a drug test.427

Private employers may institute drug testing when notice is given to their employees.428 Proper notice is given through postings in the workplace, or by presentation of pledge cards to employees.429 A terminable-at-will employee's failure of a test, or refusal to take a test, subjects that employee to termination.430 The resulting termination leaves the employee without rights to unemployment compensation.431

To prevent potential defamation and privacy tort claims, employers should

424. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992) (citations omitted) (holding that plaintiff, who was discharged for refusing to sign a form by which she would have consented to urinalysis drug testing, had a cause of action for tortuous intrusion).
426. Id. (relying on Skinner v. Railway Executives Assn., 489 U.S. 602 (1982), stating that the government has an overriding interest in regulating the conduct of the people it employs, and in insuring the safety of the public).
427. Id. (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989)).
429. Id.
430. Id.
431. Id. Employees in Kentucky that are discharged for misconduct are not entitled to unemployment compensation. See KY. REV. STAT. ANN. § 341.370(1)(b) (Banks-Baldwin 1999).
exercise great caution in the maintenance and disclosure of testing reports. Only a few select individuals should be given access to the reports. The reports should not be maintained in personnel files, but rather should be kept in a separate and secure storage area. Copies should be given only to tested employees who submit a written request for a copy of their own results; under no circumstances should the results of a drug test be disclosed to any other individual in the absence of a written consent signed by the employee.

G. POLYGRAPH TESTS

Next to drug tests, polygraph examinations have received the most legal attention in recent years. Criticism of polygraphs has centered on their intrusiveness. One commentator explains:

The exam is physically intrusive because it measures physiological responses

432. See discussion on defamation, supra notes 92-213 and accompanying text.
including heart rate, respiratory rate, and perspiration. The exam is psychologically intrusive because it is designed to read a person’s inner thoughts, and an examinee cannot refuse to respond because physiological responses are measured even when the examinee remains silent. 435

Maintenance and disclosure of the results of an examination present a further threat to an employee’s privacy.

The Federal Employee Polygraph Protection Act436 (the Act) bans the use of polygraphs in most private employment settings.437 No employee waiver of protection under the Act is permitted except as part of a written settlement of a pending court action.438

The Act has four basic exceptions to the prohibition on testing: public employees; job applicants to drug manufacturers; job applicants to security firms; and cases where an employer is investigating a financial loss and has reasonable suspicion that a specific employee was involved.439 With regard to the latter exception, an employer in these settings may request an employee to take a lie detector test in connection with an ongoing investigation involving economic loss or injury to its business440 if the employee had access to the property that is the subject of the investigation.441 The employer must have reasonable suspicion the employee was involved in the loss442 and must give the employee notice.443

Notice must meet several criteria in order to be sufficient. First, notice must be given to the employee at least 48 hours before the examination is scheduled.444 Second, notice must include the time, date, and location of the exam, the right of the employee to obtain and consult with legal counsel or an employer representative before the test, and the nature and characteristic of the tests and instruments involved, such as whether a two-way mirror or recording device will be used.445 Third, notice must state the specific economic loss to the employer’s business, indicate that the employee had access to the property that is

435. Id. at 361-62.
444. 29 C.F.R. § 801.23(a)(1) (1988).
subject to the investigation, and describe the basis of the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation. 446 Fourth, notice must also assure the employee that: the employee has the right to terminate the test at any time; 447 the employee cannot be required to take the test as a condition of employment; 448 the employee has the right to see the questions in advance; 449 the employee may not be asked questions regarding religious or political beliefs, racial matters, sexual behavior, or activities involving union or labor organizations; 450 distribution of the results of the exam are restricted; and any statement made during the test may constitute additional supporting evidence for purposes of adverse employment action. 451 Finally, the notice must be read to the employee, who must sign a copy of the notice before the test can begin. 452

Pursuant to the Department of Labor Regulations’ interpretation of the Act, the following criteria must be followed:

The investigation must be of a specific incident of activity. 453 For example, it may not be used to determine whether a theft occurred, or to investigate continuous problems such as missing inventory. 454

The economic loss of injury required by the Act generally is interpreted very broadly. 455 However, theft committed by one employee against another employee does not justify testing because it does not constitute “economic loss to the employer’s business.” 456 Similarly, an employee’s theft of property belonging to a client, such as when a cleaning contractor’s employee steals property from the client’s building, does not justify testing. 457 Economic losses or injuries which are the result of unintentional or lawful conduct cannot support a polygraph examination. 458 For example, an employer may not test an

453. 29 C.F.R. § 801.12(b) (1988).
454. 29 C.F.R. § 801.12(b) (1988).
455. 29 C.F.R. § 801.12(c) (1988).
employee involved in an industrial accident to determine what happened.\textsuperscript{459}

Access to property means more than direct or physical contact during the course of employment.\textsuperscript{460} It includes any employee who had access to a warehouse where a theft occurred; or someone, such as a bookkeeper, who removed an item from the inventory records in order to cover theft by another employee.\textsuperscript{461}

Reasonable suspicion refers to an observable, articulable basis in fact which indicates a particular employee was involved.\textsuperscript{462} Information from a co-worker, an employee's behavior or demeanor, or inconsistencies between facts, claims, or statements that surface during an investigation can serve as sufficient basis for reasonable suspicion.\textsuperscript{463} While simple access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of the circumstances surrounding the access may constitute a factor in determining whether there is reasonable suspicion.\textsuperscript{464}

The Act makes it unlawful to use an employee's refusal to take the test or the results of a test as the sole basis for adverse employment action.\textsuperscript{465} Further, no type of adverse employment action may be taken until the employer

\begin{itemize}
\item \textsuperscript{459} 29 C.F.R. § 801.12(c)(2) (1988).
\item \textsuperscript{460} 29 C.F.R. § 801.12(e)(1) (1988).
\item \textsuperscript{461} 29 C.F.R. § 801.12(e)(1) (1988).
\item \textsuperscript{462} 29 C.F.R. § 801.12(f)(1) (1988). For example, one employer was found to have reasonable suspicion of various employees where the employer grounded his suspicion of each employee on one or more of the following observations: (1) display of anti-company attitude; (2) ownership of material possessions that could not be afforded on that employee's wages alone; (3) unsupervised working conditions; (4) frequent visits by friends that indicated employee might be ringing up sales for less than the marked price of merchandise; (5) possession of keys and security code; (6) re-entry of store after locking it; (7) exceptionally accurate cash accounting records; and (8) admitted history of theft and drug use. \textit{In re} Rapid Robert's, Inc., 7 Indiv. Empl. Rts. (BNA) 946 (U.S. D.O.L. 1992).
\item \textsuperscript{463} 29 C.F.R. § 801.12(f)(1) (1988).
\item \textsuperscript{464} 29 C.F.R. § 801.12(f)(1) (1988).
\item \textsuperscript{465} 29 U.S.C.A. § 207(a)(1) (West 1999). However, an employer will not be held liable under the Act if she can show the adverse employment action was based on the employee's gross violation of a legitimate company policy, such as a check acceptance policy. \textit{In re} Rapid Roberts, Inc., 7 Indiv. Empl. Rts. (BNA) 946 (U.S. D.O.L. 1992). An employer was likewise found not to have discharged an employee solely on the basis of polygraph test results where an employee worked alone when large cash shortages occurred, and the employee had a work history of large cash shortages. \textit{In re} Scrivener Oil Co., 7 Indiv. Empl. Rts (BNA) 962 (1992) (U.S.D.L., Arb.).
\end{itemize}
WORKPLACE INVESTIGATIONS

interviews the examinee concerning the test results. The employer must provide the examinee with a written copy of any opinion or conclusions rendered as a result of the test, and a copy of the questions asked during the test, along with the corresponding charted responses.

The Act also requires employers to maintain a variety of records for a minimum of three years from the date the polygraph exam is conducted, or from the date the exam is requested, if no exam is conducted. Records to be retained by the employer include the following:

A copy of the statement that sets forth the specific incident of activity under investigation and the basis for testing a particular employee;

Records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation;

A copy of the written statement that sets forth the time and place of the examination and the employee's right to consult with counsel;

The notice required of employers identifying in writing to the examiner all persons to be examined; and

Copies of all opinion, reports, or other records furnished to the employer by the examiner relating to any polygraph examinations.

An employer may disclose information acquired from a polygraph test only to the tested employee to any person designated in writing by that employee, to a court or government agency pursuant to a court order, or a government agency, but only insofar as the disclosed information is an

468. 29 C.F.R. § 801.30(a) (1988).
admission of criminal conduct. 477

The Act does not prohibit a state from imposing more severe restrictions on the use of polygraph examinations than those imposed by the Federal Act. However, Kentucky has no such statute. 478

H. HONESTY AND PERSONALITY TESTS

The use of written honesty tests, also known as paper and pencil tests or integrity tests, is not prohibited by the Employee Polygraph Protection Act because the Act defines “lie detector” to include polygraphs, voice stress analyzers, 479 and other “similar device[s], whether mechanical or electrical.” 480 Although the tests themselves are legal, 481 many states restrict the types of questions that may be asked. For example, in Soroka v. Dayton Hudson Corp., a California court enjoined an employer from asking applicants questions about their religious beliefs and sexual orientation. 482

I. PUBLICIZING THE EMPLOYER RESPONSE

Once an employer has discovered employee misconduct and has taken the appropriate disciplinary action, it must consider whether and how it will announce the results to supervisors, employees, and third parties. Employers have two legitimate reasons for internally publicizing such information. First, it can assist employers in teaching other employees how to perform their jobs in a

479. See Veazey v. Communications & Cable of Chicago, Inc., 194 F.3d 850 (7th Cir. 1999) (noting that an employer’s requirement that the employee provide a recorded voice sample, which could be used in conjunction with a voice stress analyzer, may violate the EPPA).
482. Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 81 (Cal. Ct. App. 1991); see also Cort v. Bristol-Meyers Co., 431 N.E.2d 908, 912 (Mass. 1982) (noting that an invasion of privacy may occur when an employee is discharged for refusing to answer questions which unreasonably interfere with his or her privacy).
more appropriate manner. Second, publicizing the employer’s response to employee misconduct is an effective method of warning employees that the employer will not tolerate such misconduct.

This publicity may, however, give rise to an employee’s claim for defamation. Ordinarily, a qualified privilege will protect communications made in good faith without malice concerning a subject matter in which the author has an interest or duty, to another person with a corresponding interest or duty. Accusations against an employee by her employer, which are communicated to a person having a common interest in the subject of the communication, are protected by the qualified privilege. Cases commonly arise when an employer announces its response to employee misconduct to supervisors, employees, and other prospective employers. An employer who publicizes its response to employee misconduct only to its own supervisors is unlikely to create a defamation claim, because it is fairly easy to show that the employer and its supervisors have a common interest in preventing employee misconduct.

An employer also has a common interest with its employees regarding communicating the reason for disciplinary action. An employer has a legitimate interest in enforcing workplace rules and preventing morale problems, which may develop if employees are summarily disciplined or discharged without an explanation being given to fellow workers. Conversely, employees have a legitimate interest in knowing how workplace rules are enforced and the reasons why fellow workers are disciplined or discharged. Consequently, communications made by an employer to its employees regarding the employer’s response to employee misconduct usually will be entitled to a qualified privilege. Similarly, an employer is entitled to announce that an

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483. See discussion on privilege and defenses, supra notes 174-213 and accompanying text.


485. For a general discussion of defamation, see supra notes 92-213 and accompanying text.

486. Louisville Times Co. v. Lyttle, 77 S.W.2d 432, 436 (Ky. 1934).


488. See, e.g., Esmark Apparel, Inc. v. James, 10 F.3d 1156, 1159 (5th Cir. 1994).

489. Id.


491. Id.

492. Jose v. Northwest Bank, 599 N.W.2d 293, 299 (N.D. 1999) (holding that the communication from Northwest to its employees regarding termination of plaintiff constituted a conversation of common interest and thus a qualified privilege); Zinda, 440 N.W.2d at 554 (holding that an employer’s publication in a plant newsletter that an employee had been discharged for falsifying
employee is on leave pending the results of an investigation. However, if the communications are made outside the workplace to persons who have no need to know, it becomes increasingly likely that the employer will be held liable for defamation.

A qualified privilege also extends to communications made by a former employer to prospective employers. The purpose of this privilege is to combat a free-rider problem: the risk that a candidly negative reference will be found defamatory falls on the former employer, while all benefits of the reference accrue to the prospective employer. A related issue is whether an employer's disclosure to a prospective employer of grounds for discharge constitutes "publication" for purposes of a defamation suit by the employee against his former employer. Some courts, adopting the "compelled self-publication doctrine," have held that it does, while other courts have

his employment application was qualified privilege); Meeserly v. Asamera Minerals (U.S.) Inc., 780 P.2d 1327, 1331-32 (Wash. Ct. App. 1989) (holding that an employer's distribution to all employees of a memorandum stating that certain employees had been discharged for on-the-job drug use was qualified privilege because the employer and its employees had a common interest in safety and deterring illegal drug use).

494. See id.
495. Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646 (Ky. 1979); see discussion on qualified privilege, supra notes 195-213 and accompanying text.
497. See generally Markita D. Cooper, Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication, 72 NOTRE DAME L. REV. 373 (1997); Louis B. Eble, Self-
disagreed. Kentucky courts have not ruled on this issue.

In sum, an employer can publicize its response to employee misconduct if it can show a legitimate business purpose for the communication. However, an employer who has failed to conduct a thorough investigation of the alleged misconduct may be liable for defamation if it turns out that the alleged misconduct never occurred.

IV. INVESTIGATION STRATEGIES

Employers need to be cognizant of the discoverability of their investigations. This section discusses strategies that an employer can utilize to preserve an investigation as a privileged product, to the extent possible. If an employer cannot keep investigations privileged, the employee may be able use the information obtained against the employer in court. As such, this section also alerts employee counsel as to the discoverability of products of investigations. This section concludes with a discussion of the implications of employer investigations that are coordinated with governmental agencies and the impact of the Fourth Amendment. This is important if an employer wants to prosecute an employee for some criminal wrong doing.

A. MAINTAINING PRIVILEGES

Investigations of employee misconduct often uncover facts, which are embarrassing to the employer, or which potentially could result in the employer's liability to third parties. Often, therefore, the employer will wish to keep the results of internal investigations confidential. If the subject of the investigation ultimately leads to litigation, the question arises whether the employer who now is probably the defendant in the lawsuit must disclose the documents and communications generated in the course of the investigation. Both federal and state laws create privileges and exemptions from discovery.
and these exemptions are discussed below.

1. **Attorney-Client Privilege**

A client has a privilege to refuse to disclose and prevent any other person from disclosing: (1) confidential; (2) communications; (3) between or among the client, or prospective client, or the client’s representatives; and (4) an attorney, or her agents; (5) made for the purpose of obtaining legal services or legal advice.\(^{503}\)

Communications are confidential if they are “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of communication.”\(^{504}\) A determination of confidentiality involves a two-part test: (1) whether the client intended the communication to be confidential; and (2) whether the client maintained the confidentiality.\(^{505}\) For example, communications knowingly made in the

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503. See KY. R. EVID. 503(b).

504. KY. R. EVID. 503(s).

presence of or subsequently disclosed to third parties are not confidential. However, communications inadvertently disclosed to third parties generally retain their confidentiality for purposes of this rule.

Another prerequisite for the attorney-client privilege is that the communication must be between or among the client or the client's representatives and the lawyer or the lawyer's representatives. An issue which often arises is whether an employee is a "client or representative of the client" for purposes of this rule. If the employee is not, then no privilege attaches to communications between the employee and the lawyer. However, for lower level or former employees, Kentucky is similar to federal courts, which have adopted a more expansive attorney-client privilege for employer defendants, which focuses on the subject of the communication rather than on the status of the communicator. The trial courts are responsible for

506. See Sanborn v. Commonwealth, 892 S.W.2d 542 (Ky. 1994); Ratcliff v. Commonwealth, 21 S.W.2d 441 (Ky. 1929).

507. Some courts have held that where there has been a disclosure of privileged communications to third parties, the privilege is lost, even if the disclosure is unintentional or inadvertent. In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). Most courts, while recognizing that inadvertent disclosure may result in a waiver of the privilege, have eschewed a per se approach and have opted instead for an approach which takes into account the facts surrounding the particular disclosure. See Transamerica Computer Co. v. International Bus. Machines Corp., 573 F.2d 646, 650-52 (9th Cir. 1978) (privilege waived only if privilege holder voluntarily discloses communication); Georgetown Manor, Inc. v. Ethan Allen, 753 F. Supp. 936, 938-39 (S.D. Fla. 1991) (inadvertent production by attorney does not waive client's privilege); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50-52 (M.D. N.C. 1987) (limited inadvertent disclosure will not necessarily result in waiver); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D 323, 329 (N.D. Cal. 1985) (inadvertent disclosure may constitute waiver).


509. See Meenach v. General Motors Corp., 891 S.W.2d 398 (Ky. 1995). Kentucky specifically prohibits a lawyer from communicating with persons having managerial responsibility on behalf of an employer about matters concerning the representation. Shoney's, Inc. v. Lewis, 875 S.W.2d 514, 515 (Ky. 1994); see KY. R. EVID. § 503(a)(2)(B); accord THE KENTUCKY BAR ASSOCIATION, FORMAL ETHICAL OPINIONS, E-65 ("A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel ... but should deal only with his counsel.").

510. Upjohn v. United States, 449 U.S. 383, 394-95 (1981). The privilege applies in federal courts when the party asserting the privilege can show: (1) the communication involves information needed for the attorney to provide the corporation with legal representation; (2) the
differentiating "between legitimate claims of privilege and withholding information simply because it is or may lead to incriminating information which should be discoverable."511

Because the privilege protects only communications, it does not prevent the disclosure of underlying facts.512 The mere transfer of otherwise discoverable documents from a client to an attorney, without more, does not cause the privilege to attach.513 Similarly, the privilege does not protect preexisting documents that were not prepared for the purpose of obtaining legal advice.514 Further, the identity and location of witnesses and potential parties are never protected by privilege.515

A company wishing to maintain the confidentiality of the products of an employment investigation should institute the following procedures. First, the person in charge of the investigation should ideally be an attorney. If that person is not an attorney, then it should be clearly documented that the person is, for purposes of the investigation, taking direction from and reporting directly to an attorney. Second, all communications related to the investigation should explicitly acknowledge that the investigation is necessary for the purpose of giving legal advice. For example, when the legal department initiates an investigation, this request should contain language such as: "In order to give appropriate legal advice to the company, I first need to know the following . . . ." Conversely, when the legal department concludes the investigation by writing a

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communication relates to a matter within the employee’s scope of employment; (3) the employee was aware, at the time the communication was made, that the information being given to the attorney so the attorney could provide the company with legal services or advice; and (4) the company intended the employee's communications to remain confidential. Id. See generally Meenach, 891 S.W.2d at 398.

511. Meenach, 891 S.W.2d at 402 ("Factual information appropriately discoverable from a party through deposing an employee or former employee must be differentiated from mental impressions and advice protected by the attorney-client privilege, trial preparation materials protected by the work-product rule . . . , and trade secrets.").

512. Upjohn, 449 U.S. at 395; In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992) (holding that although communications between an attorney and client regarding an internal investigation were privileged, the underlying information contained in the communication, including the quantitative results of the investigation, was not shielded from discovery).

513. See Shobe v. EPI Corp., 815 S.W.2d 395 (Ky. 1991) (holding that the trial court must determine if great injustice and irreparable injury would result from the discovery of disputed documents proffered to be protected by the attorney-client privilege).


515. See Ky. R. Civ. P. 26.02, 26.05.
report summarizing the results, the report should contain language such as: "Our investigation has revealed the following . . . . These are the company’s legal options. . . ."

2. Attorney Work Product 516

The work product doctrine protects from discovery the documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories prepared by an attorney in anticipation of litigation or for trial.517 The purpose of the doctrine is to allow the attorney to analyze and prepare her client’s case without undue and needless interference.518 Like the attorney-client privilege, the work product doctrine does not prevent disclosure of factual information learned in preparation of the lawsuit, even if a lawyer’s work resulted in the identification of the facts.519

The federal work product doctrine is partially codified in Federal Rule of Civil Procedure 26(b)(3).520 This rule maintains the distinction between “ordinary” work product, which is discoverable upon a showing of “substantial need” and “undue hardship,” and an attorney’s “mental impressions, conclusions, opinions, or legal theories,” which as “core” work product are discoverable, if at all, only upon a much higher showing.521 As such, the


517. FED. R. CIV. P. 26(b)(3); KY. R. CIV. P. 26.02(3)(a); Hickman v. Taylor, 329 U.S. 495, 511 (1947); Morrow v. Brown, Todd & Heyburn, 957 S.W.2d 722, 724 (Ky. 1997) (noting the rule does not use the term “work product,” and thus explicitly sets forth the anticipation of litigation requirements).


519. See Transit Auth. of River City v. Vinson, 703 S.W.2d 482, 486 (Ky. Ct. App. 1985) ("'[W]ork product immunity protects only the documents themselves and not the underlying facts.'").


521. In re Murphy, 560 F.2d 326, 329 n.1 (8th Cir. 1977); Jeff A. Anderson et al., Special Project, The Work Product Doctrine, 68 CORNELL L. REV. 760, 817-20 (1983). Some courts have held that no showing can overcome the protection of an attorney’s mental impressions. See In re
doctrine represents a qualified, rather than an absolute, immunity. The
Kentucky work product doctrine is codified in Kentucky Rule of Civil Procedure
26.02(3)(a), and is nearly identical to the federal rule. In its interpretation of the
Kentucky rule, the Supreme Court of Kentucky looks to federal cases
interpreting the federal rule.522

We similarly interpret [Ky. R. Civ. P. 26.02(3)(a)] not as an absolute protection,
but rather a requirement that the party seeking discovery show that it has a more
substantial need to review opinion work product than would be required to
review non-opinion work product. We are of the view that the opinion work
product sought to be discovered must be directed to the pivotal issue in the ...
litigation and the need for the material must be compelling.523

A company wishing to maintain the confidentiality of products of an internal
investigation by use of the work product doctrine is best protected when the
investigator is an attorney. While this is often a prudent practice when preparing
for trial (e.g., when questioning a plaintiff’s former co-workers in order to
ascertain the events precipitating the litigation and to evaluate the co-workers as
potential witnesses), this seldom makes good economic sense when an employer
merely wants to find out whether employee misconduct has occurred. Lawyers
are simply too expensive. As a result, employee-plaintiff attorneys should be
able to discover such internal investigation products, or at least the facts
discovered in such investigations.

B. MINIMIZING STATE ACTION

The Fourth Amendment of the United States Constitution prohibits
warrantless searches by government officials.524 The Fourth Amendment

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523. Id. at 726.
524. The Fourth Amendment provides:
The right of persons to be secure in their persons, houses, papers, and effects, against
unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,
but upon probable cause, supported by Oath or affirmation and particularly describing
the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
imposes restrictions on the types of searches that may be conducted,\textsuperscript{525} and evidence obtained in a search that violates the Fourth Amendment is not admissible in a subsequent criminal trial.\textsuperscript{526} Therefore, if an employer investigating criminal activity wants to preserve the admissibility of the evidence in a subsequent criminal prosecution, the employer should conduct the investigation in a way that minimizes the impact of the Fourth Amendment.

Although investigations by private employers normally lack the state action required to establish a constitutional violation,\textsuperscript{527} the Fourth Amendment can be violated by a search conducted by a private employer acting as an agent or instrument of the government.\textsuperscript{528} The Sixth Circuit has adopted the Ninth Circuit’s two-pronged test for determining whether a private party has acted as an agent of the government.\textsuperscript{529} The first prong asks whether the government knew of and acquiesced in the search.\textsuperscript{530} The fact that a government official knew of the investigation generally and that the investigation had uncovered evidence of criminal activity does not automatically change the investigation’s private nature.\textsuperscript{531} A prime example can be found in the Fifth Circuit case of United States v. Clegg, where an investigator for a telephone company, who suspected that a customer was illegally using a device enabling him to place long-distance telephone calls without paying for them, attached a recorder to the customer’s telephone line and recorded several calls.\textsuperscript{532} Before he attached the recording device, the employer informed the FBI that he was investigating the

\textsuperscript{525} See, e.g., O’Connor v. Ortega, 480 U.S. 709, 714-19 (1987) (holding that a state employee had a reasonable expectation of privacy in the desk and file cabinets located in his office, and that the Fourth Amendment consequently forbade a search of same); see also American Postal Workers Union, Columbus Area Local AFL-CIO v. United States Postal Serv., 871 F.2d 556 (6th Cir. 1989) (holding that government postal employees who signed a notice and waiver expressly waiving any Fourth Amendment rights to assigned lockers, and giving authorized postal personnel right to inspect lockers, did not have a reasonable expectation of privacy).

\textsuperscript{526} See generally Mapp v. Ohio 367 U.S. 643 (1961); U.S. v. Wright, 16 F. 3d 1429 (6th Cir. 1994).

\textsuperscript{527} See generally United States v. Howard, 752 F.2d 220, 227 (6th Cir. 1985); In re Providence Journal Co., 820 F.2d 1342, 1350 (1st Cir. 1986).

\textsuperscript{528} Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Howard, 752 F.2d at 227.

\textsuperscript{529} Howard, 752 F.2d at 227, (citing United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981)); see also United States v. Pierce, 893 F.2d 669, 673 (5th Cir. 1990); Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989); United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987).

\textsuperscript{530} Howard, 752 F.2d at 227.

\textsuperscript{531} United States v. Clegg, 509 F.2d 605, 609 (5th Cir. 1975).

\textsuperscript{532} Id. at 608.
employee's possible use of the device, but did not tell the FBI that he intended to record customer calls. The Fifth Circuit held that there had not been sufficient governmental involvement to implicate the Fourth Amendment, and that the recordings therefore were properly used as evidence in the customer's subsequent criminal trial.

The second prong of the test for determining whether a private party has acted as an agent of the government asks whether the party performing the search intended to assist law enforcement efforts, or instead acted merely to further her own ends. If it is the latter, the Fourth Amendment is not implicated. In *United States v. Morgan*, an airline employee opened a suitcase that she felt was shipped suspiciously. After finding that the suitcase contained bottles of the controlled substances Talwin and Dilaudid, she alerted the DEA. Prior to the arrival of the DEA agents, the airline employee had repackaged the suitcase as she found it. Once the DEA agents arrived, while she explained to them what she had discovered, she re-opened the suitcase in their presence. The Sixth Circuit held that, as to the initial opening and search of the suitcase, the airline employee was not acting as an agent of the government, and therefore, her actions were private actions that did not attach Fourth Amendment requirements. The court also held that the subsequent re-opening of the suitcase in the presence of the DEA agents was a private action as well, since if she had left the suitcase open and the DEA agents had seen the bottles in the open suitcase, it would have been a private action. The

533. *Id.* at 608-09.
534. *Id.* at 609-10; see also *United States v. Manning*, 542 F.2d 685 (6th Cir. 1976) (the defendant was also using a “blue-box” to circumvent long-distance billing equipment, however, the phone company performed its investigation without any police knowledge). The Sixth Circuit relied on *Clegg* in holding that the telephone company was not acting as an instrument or agent of the federal government. *Manning*, 542 F.2d. at 686.
535. *Howard*, 752 F.2d at 227.
536. *Id.*
537. *United States v. Morgan*, 744 F.2d 1215, 1217 (6th Cir. 1985). The defendant had sent a similar package a few days earlier, and in both cases requested the suitcases be sent air express and claimed that the contents were clothing. *Id.* The employee felt that it was unusual to ship a suitcase of clothing by air express due to the expense involved. *Id.*
538. *Id.*
539. *Id.*
540. *Id.* at 1218.
541. *Id.*
542. *Id.* The court observed:
evidence was therefore admissible in the criminal trial. 543

An employer who initiates an internal investigation of employee misconduct will almost always be able to show that the investigation was intended primarily to further the employer’s ends. Investigations initiated by government law enforcement officials, in which the officials ask for the employer’s help in conducting an investigation, are far more likely to fail this part of the test. 544 The employer generally should avoid involving government law enforcement officials any more than is necessary into the employer’s internal investigations of misconduct in order to avoid implicating the Fourth Amendment. An employer should also realize that, although private employer searches not involving government officials will not implicate the Fourth Amendment, they may give rise to state law tort claims. 545

V. CONCLUSION

An employer has a legitimate interest in investigating employee misconduct so that the employer can protect its workplace investment, promote productivity, and provide for the safety of its employees. Recent technological developments have expanded the employer’s investigatory capabilities. At the same time, however, statutory and common law developments have restricted the scope of

once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-non-private information: “[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed to him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.”

Id. at 1220 (citing United States v. Miller, 425 U.S. 435, 443 (1976)). The Sixth Circuit Court completed its analysis of the admissibility of the evidence under the plain view doctrine: the court found that the defendants “had no reasonable expectation of privacy protected under the Fourth Amendment, especially after it was opened by [the airline employee. The court found] that the warrant-less seizure of the suitcase was justified by exigent circumstances.” Id. at 1221.

543. Morgan, 744 F.2d at 1224; see also United States v. Bell, 770 F.2d 167 (6th Cir. 1985) (unreported) (similar fact pattern, same result).

544. See, e.g., United States v. Klopfenstine, 673 F. Supp. 356, 359-60 (W.D. Mo. 1987) (holding that although landlord’s initial entry into an apartment was for private purposes, the Fourth Amendment was violated when the landlord reentered the apartment at the direction of the police department in order to obtain other evidence).

545. See generally discussion on workplace searches, supra notes 334-51 and accompanying text.
permissible investigations, the equipment and techniques that can be utilized, and the extent to which an employer subsequently can publicize the results of these investigations. An employer who suspects that an employee has acted improperly or illegally must conduct its investigations carefully, or an educated employee-plaintiff attorney will ensure the employer pays the consequences of any malfeasance.
ALTERNATIVE SANCTIONS AND THE GOVERNOR'S CRIME BILL OF 1998 (HB 455): ANOTHER ATTEMPT AT PROVIDING A FRAMEWORK FOR EFFICIENT AND EFFECTIVE SENTENCING

by Judge Gregory M. Bartlett

In 1974, the Kentucky General Assembly revised, organized and updated the substantive criminal law of Kentucky by enacting the Kentucky Penal Code. This new code brought clarity, consistency and fairness to the criminal law, first by defining offenses, and then by classifying them on a rational, equitable basis. In addition, the sentencing provisions of the new code were intended to give judges a flexible array of sanctions which were to be utilized by judges to achieve the goals of the criminal justice system: punishment, deterrence, neutralization and rehabilitation.

Twenty-four years after the adoption of the Kentucky Penal Code, the General Assembly, in its 1998 session, again considered Kentucky's criminal statutes and made a number of significant changes, particularly with regard to sentencing. These statutory amendments and additions were set forth in House Bill 455 (hereafter HB 455), commonly known as the Governor's Crime Bill. By enacting this legislation, it was the General Assembly's clear intent to require longer terms of incarceration for violent offenders, while requiring judges to consider alternatives to incarceration for non-violent offenders who constitute the majority of individuals being sentenced by our criminal courts. This article will examine the more significant sentencing provisions of HB 455. In particular, this article will examine those sentencing provisions authorizing alternative sanctions, and will discuss how these laws should be used by prosecutors, courts, and corrections officials to create more effective and efficient handling of criminal offenders.

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3. See KY. CRIME COMM'N, LEGISLATIVE RESEARCH COMM'N, KY. PENAL CODE §§ 3405-3625 commentary (Final Draft 1971) (the term "flexibility" is used repeatedly by the drafters in describing the significance of the various sections of the Penal Code).
Before reviewing this recent legislation, it is beneficial to reflect on the state of Kentucky's penal system over the past twenty-five years, and to ask why changes were deemed necessary. Some rather alarming statistics, which will be examined later in this article, reveal a tremendous increase in the number of inmates in Kentucky's state institutions over this time period, with a corresponding rise in the cost of operating the penal system. During this same period, there was also dramatic growth in the number of individuals under the supervision of the Kentucky Department of Probation and Parole. These facts pose some interesting questions. Why are there now so many more individuals within the criminal justice system compared to the early seventies? Did the penal code fail to provide the courts, prosecutors and corrections officials with the tools necessary to deal with criminal offenders in an effective manner? Did the state provide the resources, such as programs and personnel, with which these tools could be employed? Did judges and prosecutors fail to take full advantage of the alternative sanctions at their disposal? Were there other factors at work which could explain the apparent failure of the sentencing policies espoused by the drafters of the 1974 Penal Code?

THE PROBLEMS OF OUR PENAL SYSTEM PRIOR TO 1974

In 1972, the General Assembly adopted a resolution directing the Legislative Research Commission (hereafter LRC) to conduct an exhaustive study of the Kentucky Department of Corrections. In its report, submitted in April of 1973, the LRC set out a number of facts and observations that are relevant to the consideration of current problems in the Kentucky penal system. For example, in 1972 there were approximately 3000 inmates housed in five facilities operated by the Department of Corrections. At the same time, there were about 3500 offenders under the supervision of less than 100 probation and parole officers. While these numbers seem modest by comparison to today's statistics, the two main penal institutions at Eddyville and LaGrange were well above capacity at that time. The overcrowding in the institutions and the heavy caseload of the

5. See KY. LEGISLATIVE RESEARCH COMM’N, RESEARCH REPORT NO. 102, KY. CORRECTIONS: THE CASE FOR REFORM i (April 1973) (stating "the 1972 General Assembly adopted House Resolution 282 directing the Legislative Research Commission to make an exhaustive study of the Department.").
6. Id. at 1.
7. Id. at 1, 135.
8. Id. at 10.
probation and parole officers were not merely security and workload problems, they were counterproductive to sound corrections policy.

The LRC found that the prison system was not effective in protecting society, preventing crime, or rehabilitating offenders. Although the stated goal of the Department of Corrections was to rehabilitate the offender, the LRC candidly observed that there was little treatment or rehabilitation occurring in the state's prisons.\textsuperscript{9} The institutions were described as brutal, inhumane environments, where staff was too few in number and insufficiently trained.\textsuperscript{10} As a result, proper security was lacking and treatment programs were inadequate.\textsuperscript{11} Without adequate rehabilitation in prison, many offenders were committing new crimes upon their release into society.\textsuperscript{12}

Moreover, there were far too many individuals sentenced to terms of imprisonment who should have been granted probation. The LRC observed that probation was "not widely or adequately used in Kentucky."\textsuperscript{13} In fact, in 1970 only 32% of all persons convicted were placed on probation, although nationwide the number granted probation was in excess of 50%.\textsuperscript{14} Even more troubling was the fact that so many inmates were first-time offenders. In 1966, over 50% of all inmates were serving time for their first felony conviction and over 28% had no record whatsoever.\textsuperscript{15}

This under-utilization of probation, as an alternative to incarceration, was not only inconsistent with good corrections policy, but was also bad economics. In 1972, over two-thirds of the Department of Corrections' budget was spent on its institutions, with most of those funds going to custody and maintenance.\textsuperscript{16} Only a small percentage of the money given to the institutions was used for inmate treatment programs.\textsuperscript{17} Overall, the annual cost to house an inmate was approximately $2300 compared to an average cost of less than $400 per year to

\begin{itemize}
\item \textsuperscript{9} ld. at 7, 12-13.
\item \textsuperscript{10} ld. at 3.
\item \textsuperscript{11} ld. at 7, 12-13.
\item \textsuperscript{12} ld. at 3.
\item \textsuperscript{13} ld. at 138.
\item \textsuperscript{14} ld. at 137-38.
\item \textsuperscript{15} ld. at 139.
\item \textsuperscript{16} ld. at 13.
\item \textsuperscript{17} ld. By comparison, the Department of Corrections currently offers prison inmates a variety of rehabilitative options including academic, vocational and job training programs. See KY. STATE CORRECTIONS COMM'N, SIX YEAR PLAN 1996-2002 13-32 (1999 Update).
\end{itemize}
supervise an offender on probation or parole. In addition, the overcrowding of Kentucky's facilities, caused in part by the failure to implement alternatives to imprisonment, forced the state to confront the need to build more penal institutions at staggering capital costs, even in 1972 dollars. In short, the taxpayers were paying a heavy price to incarcerate offenders who could have been more economically and effectively handled on probation.

The LRC report contained several recommendations for improving the penal system. One suggestion was the development of community-based correctional facilities. Use of such facilities would allow for probation supervision in the offender's own community, and would promote positive entry into that community by requiring the individual either to have employment, or to be in school as a condition of probation. Indeed, the LRC cited meaningful employment of the offender as a key objective of such programs. The report also included a recommendation to use volunteers from the community to assist overburdened probation and parole officers in providing supervision and rehabilitative support to offenders. Such "Volunteers in Corrections" programs have been successful in other states, tapping the resources of citizens from within the community to help fight a community problem.

CORRECTIONAL REFORMS IN THE 1972 LEGISLATURE

The need to change the way in which Kentucky was dealing with convicted offenders was not ignored by the legislature. In fact, while the LRC report was still in preparation, the 1972 Kentucky General Assembly passed several laws...
pertaining to probation and parole.\(^{24}\) One act authorized the establishment of community residential correctional centers.\(^{25}\) The stated purpose of this legislation was to facilitate the rehabilitation of the prisoner\(^{26}\) by allowing the individual to participate in educational training programs in the community,\(^{27}\) to receive treatment,\(^{28}\) and to work at paid employment.\(^{29}\) Although the provision for allowing felons to be hired by private employers has been ruled unconstitutional,\(^{30}\) this act led to the establishment of halfway houses and community-based treatment centers throughout the state.

Another law passed by the 1972 General Assembly created a program for the conditional release of felons who had served their sentences.\(^{31}\) Under this program, a felon would remain under the guidance of the Department of Corrections for the length of time equal to the accumulated "good time,"\(^{32}\) which had allowed the prisoner to be released prior to serving the full term of the sentence. The rationale behind this law was the belief that a prisoner, though having served a sentence, should not be returned to the community without some supervision. By comparison, a parolee is released before serving out a sentence, but is placed under the control of a parole officer.

This conditional release program was officially abandoned by amendment to

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\(^{30}\) Commonwealth v. Holmes, 509 S.W.2d 258 (Ky. 1974). The Court held that Section 253 of the Kentucky Constitution prohibited private employment of felony prisoners outside of the institutions. \textit{Id.} at 260-61. However, felons housed in county jails under the Class D felony program pursuant to KRS 532.100 can perform labor on public works projects. \textit{Id.} at 260.


\(^{32}\) \textit{Id.}
the enabling statute in the 1980 session of the General Assembly. One of the problems with conditional release was that it added to the supervision caseloads of the parole officers. Additionally, the law allowed for the return to the already crowded penal institutions of individuals who, having served their time, would otherwise have been beyond the power of the Department of Corrections. Nevertheless, the concept of imposing a period of supervision upon a felon who has completed a sentence has been revived, with respect to sex offenders, as part of the 1998 Crime Bill.

A sentencing device, originally adopted in 1972, which remains a viable option to the courts today, is "shock probation." As enacted, this law allows a defendant who has served a minimum of thirty but no more than 180 days in the custody of the Department of Corrections to request the sentencing court to place him or her on probation. The significance of this procedure is that the sentencing judge retains jurisdiction over the offender and can grant probation after the individual has been "shocked" by a short period of commitment to the state penal system. Although shock probation certainly continues to be appropriate in certain cases, the number of persons placed on shock probation is relatively few. The development of other sentencing alternatives, particularly the "split sentence," has lessened the utility of this procedure.

36. Id. § 439.265(1).
37. According to recent statistics from the Kentucky Department of Corrections, 830 individuals were discharged from custody under an order of shock probation during the period from July 1, 1998 until June 30, 1999. By comparison, there were over 10,500 people on felony probation and over 4300 on parole during the same time period. KY. DEP'T OF CORRECTIONS, INFORMATION AND TECHNOLOGY BRANCH, INTERNAL REPORT (January 1999).
THE KENTUCKY PENAL CODE OF 1974

The momentum for reform of the corrections system in Kentucky was carried over to the 1974 session of the General Assembly. The revision of the criminal law, by the adoption of the Kentucky Penal Code of 1974, included the statutory authority for and the endorsement of alternative sanctions.

The drafters of the Penal Code expressed a preference for the use of alternatives to incarceration, such as probation, as a means to rehabilitate the criminal offender. Rehabilitation was considered a more effective and economical approach to reducing crime in society. However, it was recognized that rehabilitation of offenders was not occurring, especially within the prison system. The state was spending too much money merely to confine individuals, many of whom should have been placed on probation and supervised in their own community. In furtherance of a more enlightened approach to criminal sentencing, the Penal Code of 1974, as enacted, gave trial judges the ability to impose alternative sanctions in lieu of imprisonment.

The Penal Code expressly elevated probation and conditional discharge to the level of incarceration as an authorized disposition of the felony offender. Indeed, the Code provided that, before imposing a sentence of imprisonment, the court “shall” consider the possibility of probation and conditional discharge. Towards this end, presentence procedures were amended to require the court to order and give due consideration to a written report prepared by a probation officer. This presentence report was required to include, among other things, the defendant's history of criminality or delinquency, physical and mental

38. KY. CRIME COMM’N, LEGISLATIVE RESEARCH COMM’N, KY. PENAL CODE § 3505, commentary (Final Draft 1971); KY. REV. STAT. ANN. § 533.010, Commentary (Banks-Baldwin 1995).
39. Id.
40. KY. PENAL CODE § 3510.
41. Id.; 1974 Ky. Acts, ch. 406, § 285(2) (codified at KY. REV. STAT. ANN. § 533.010(2) (Michie Supp. 1999); see Wyatt v. Ropke, 407 S.W.2d 410, 411 (Ky. 1966) (where a Writ of Prohibition was entered removing the trial judge in light of his announced refusal even to consider probation in that case under any circumstances. The appellate court noted that the judge's conduct was arbitrary and contrary to his obligation under his oath of office); see also Jordan v. Commonwealth, 371 S.W.2d 632, 635 (Ky. 1963) (where the appellate court suggested that the trial court reconsider its refusal to grant probation).
42. KY. PENAL CODE § 3425(2); 1974 Ky. Acts ch. 406 § 277(2).
condition, family background and ties, education and occupation. Finally, the policy in favor of alternative sanctions was clearly evident in the code section which provided that, after considering the nature and circumstances of the crime, and the defendant's history, character and condition, the court “should” grant probation or conditional discharge.\footnote{Ky. Penal Code § 3505(2); 1974 Ky. Acts ch. 406 § 285(2).} The denial of probation was appropriate only when the court believed incarceration of the defendant was necessary for the protection of the public because there was a “substantial risk” that the defendant would commit another crime,\footnote{Ky. Penal Code § 3505(2); 1974 Ky. Acts ch. 406 § 285(2)(a).} the defendant was “in need of” treatment in a correctional facility,\footnote{Ky. Penal Code § 3505(2); 1974 Ky. Acts ch. 406 § 285(2)(b).} or the granting of probation would “unduly depreciate the seriousness” of the crime.\footnote{Ky. Penal Code § 3505(2); 1974 Ky. Acts ch. 406 § 285(2)(c).}

The conditions that could be imposed on a defendant while on probation were not substantially different under the Penal Code than under pre-existing law. The court continued to be able to customize the demands and restrictions of the probation program to suit the rehabilitative needs of the defendant.\footnote{Ky. Penal Code § 3515; see 1974 Ky. Acts, ch. 406, § 287(2) (stating, before listing twelve specific conditions in § 287, “when imposing a sentence of probation or conditional discharge, the court may, in addition to any other reasonable condition, require the defendant ....”).} The list set forth in the statute was not intended to be exhaustive, and specifically included the right of the court, among other things, to require the defendant to work at suitable employment,\footnote{Ky. Penal Code § 3515; 1974 Ky. Acts, ch. 406, § 287(2)(c).} to support dependents,\footnote{Ky. Penal Code § 3515; 1974 Ky. Acts, ch. 406, § 287(2)(g).} and to make restitution to the victim.\footnote{Ky. Penal Code § 3515; 1974 Ky. Acts, ch. 406, § 287(2)(d).} One express condition added by the Penal Code allowed the sentencing court to compel the offender to submit to medical or psychiatric treatment.\footnote{Ky. Penal Code § 3515(2)(e).} Clearly, this is an important option in light of the large number of defendants who are drug or alcohol abusers.

One very important sentencing device, which was made part of the sentencing statutes by the enactment of the Penal Code, is the “split sentence.” The split sentence enables a judge to sentence a defendant to a period of incarceration in the county jail as an additional condition of probation.\footnote{Ky. Penal Code § 3515(2).} When the Penal Code was adopted, the maximum period of incarceration under this
The Crime Bill of 1998 has increased this maximum to twelve months. By imposing a split sentence, the court can mete out some punishment or, like shock probation, give the offender a taste of the reality of incarceration, without relinquishing jurisdiction and control to the Department of Corrections. Moreover, the judge has considerable flexibility in the length and method of service of this limited term in jail. For example, an individual who is gainfully employed could be ordered to serve a determinate number of weekends or could be granted work release. Because it provides the court with the ability to combine a degree of punishment with a community-based probation program, the split sentence is a valuable tool in the hands of the judge when determining an appropriate, individualized sanction.

Legislation passed by the General Assembly in 1972 and 1974 was intended to reduce crime in Kentucky by reforming the methods used to treat offenders. It was hoped that, by reducing the number of inmates in the state institutions and by establishing community-based correctional facilities, more effective rehabilitative treatment could be provided. The risk that the individual would recidivate would be reduced. There was also an expectation that, with fewer prisoners in state institutions and with a lower crime rate, there would be a corresponding decrease in the cost of operating the penal system. Unfortunately, recent statistics suggest that this legislation has not produced the anticipated results, at least not yet.

According to data compiled by the Department of Corrections, there were 14,305 inmates in Kentucky prison facilities in January of 1998. In addition, as of November 1999, there were over 12,000 individuals on felony probation and nearly 5000 on parole. Compare these numbers to those of 1972, when the prison population was about 3000 and the probation and parole caseload approximately 3500, and it becomes clear that the legislative efforts to reform the penal system did not prevent a population explosion in the state's

56. Dep't of Corrections, Community Services & Local Facilities, Division of Probation and Parole, Active Caseload Report (Ky. Nov. 1999). The total caseload of the Division of Probation and Parole was over 19,000 when misdemeanants are included.
57. See supra text accompanying notes 6, 7.
correctional system. Moreover, added to these ominous statistics, the Department of Corrections projected that there would be 16,829 felony prisoners by the end of the year 2000.58

The inmate population boom is probably due to a combination of factors at work within our society, in general, and within our criminal justice system, in particular. It is certain that the increase in the number of felony convicts is not due simply to a parallel increase in the number of Kentuckians. The population of Kentucky rose from approximately 3.2 million in 1970 to around 3.9 million in 1998.59 Thus, while the state's population has grown by about 22% in the last three decades, the number of felons has multiplied by over 400%. A plausible explanation for the greater number of felony convictions is the more vigorous enforcement of existing laws, especially those pertaining to controlled substances, and the passage of new laws which create new felony offenses out of what formerly had been misdemeanors. Examples of these new felony offenses include the flagrant non-support statutes60 and felony DUI statutes. 61 Similarly,

58. KY. STATE CORRECTIONS COMM’N, SIX YEAR PLAN 1996-2002 44 (1999 Update). However, it should be noted that recent data from the Kentucky Department of Corrections reveals that the number of new commitments to the state correctional facilities decreased in 1999 for the first time in many years. On the other hand, the number of individuals under the supervision of the Division of Probation and Parole has continued to rise. It would appear that the sentencing alternatives called for by the Governor's Crime Bill may be taking effect as far as reducing the population in our prison system. However, the greater number of persons released on supervision has increased the workload of the Division of Probation and Parole. Thus, while the reduced prison population is a sign of progress towards correctional reform, to complete the process the Legislature will have to provide for adequate community-based programs. KY. DEP’T OF CORRECTIONS, INFORMATION & TECHNOLOGY BRANCH, FREQUENCY OF INCOMING ACTIONS (Frankfort, Ky.).


laws meting out harsher penalties and denying probation and parole eligibility for violent offenders, sex offenders, and persistent felony offenders, combined with lower parole rates, have resulted in the serving of longer

62. Kentucky Revised Statute Section 439.3401 was first enacted in 1986. It required a “violent offender” to serve a minimum of 50% of the sentence imposed before becoming eligible for parole. The statute was amended most recently in 1998 and now requires a “violent offender” to serve 85% of any sentence. 1998 Ky. Rev. Stat. & R. Serv., ch. 606, § 77 (codified at Ky. Rev. Stat. Ann. § 439.3401 (Michie Supp. 1999)). See Ky. Rev. Stat. Ann. § 533.060 (Michie Supp. 1999) (prohibiting probation for persons convicted of Class A, B or C felonies when a weapon is used, or when the offense was committed while the defendant is on parole, probation or conditional discharge). In addition, the sentence for a crime committed while awaiting trial shall run consecutive to any sentence imposed for the pending charge. This law became effective in 1976.


64. Kentucky Revised Statute Section 532.080, the persistent felony sentencing law, was part of the 1974 Penal Code. 1974 Ky. Acts, ch. 406, § 280. In 1976, the statute was amended to deny probation to persistent felons in the first or second degree, and to require persistent felons in the first degree to serve a minimum of ten years before being eligible for parole. 1976 Ky. Acts ch. 180. In 1994, the statute was amended to allow “first degree” persistent felons to be probated if their current charge was a Class D felony. 1994 Ky. Acts, ch. 396, § 11 (codified at Ky. Rev. Stat. Ann. § 532.080(7) (Michie Supp. 1999)). Ironically, a “second degree” persistent felon was still ineligible for probation, until the amendment of this statute by the 1998 Crime Bill. 1998 Ky. Rev. Stat. & R. Serv., ch. 606, § 76 (Banks-Baldwin).

65. According to statistics from the Kentucky Parole Board, the percentage of inmates granted parole steadily declined from 39% in 1993-94 to 26% in 1997-98. The percentage of deferments rose during the same time period from 34% to 41%, and the percentage of inmates ordered to serve out their sentences increased from 27% to 33%. In fiscal year 1998-99, this trend showed signs of reversal, with a 31% rate of parole and a 35% rate for deferments. Serve outs were 34% in this period. The Advocate 10 (March 1998); Ky. Parole Board, Biennial Review 1994-96; Ky.
sentences. Finally, the reluctance or refusal of some prosecutors and judges to use alternative sanctions must be cited as part of the cause for prison overpopulation.66

Few, if any, would argue that violent offenders and sexual predators should not serve substantial terms of imprisonment in secure institutions. The high and ever-increasing cost of maintaining these individuals in prison must be considered a necessary cost to society to protect its citizens. On the other hand, the expense to society of incarcerating non-violent offenders in state facilities is open to debate. There are alternatives available, at a substantially lower outlay of taxpayers' money, that may be more effective. To illustrate the point, in 1998, it cost more than $18,000 per year to keep a prisoner in a maximum security institution and $9600 per year to maintain a minimum security risk offender in the Class D program.67 The average cost to the Department of Corrections to incarcerate a felon was $14,691.68 The cost to supervise an offender on probation or parole was less than $1200.69 These figures do not include the capital cost of building new prisons or expanding existing facilities.

The Department of Corrections has recently estimated that at least one medium security prison will need to be constructed to meet the expected growth in prison population over the next several years.70 It has been estimated that, at an average of $65,000 per bed, it would cost $130,000,000 to construct a new prison to house 2000 inmates.71 In addition, a significant amount of money will be needed to maintain the aging physical plants at the existing prison sites.72 The economic analysis of the problem is straightforward. Huge amounts of taxpayer money can be spent on new prison construction, or alternative sanctions, at much less expense, can be utilized, reserving the secured cells of the state institutions for the violent or incorrigible offenders.

Recent statistics indicate that a significant percentage of the inmate

67. KY. DEP'T OF CORRECTIONS, COST TO INCARCERATE, COST COMPARISONS, FISCAL YEAR 1998.
68. Id.
69. Id.
71. GOVERNOR'S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 41 (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
72. Id. at 44.
GOVERNOR'S CRIME BILL OF 1998 (HB 455)

The population in Kentucky's prisons is serving time for non-violent offenses. Overall, only 50% of all state prisoners were convicted of violent, sexual, or weapons charges, while 21% were sentenced for drug crimes and 24% for property offenses. A more compelling statistic, in support of the need to examine the type of offender being committed to the state prison system, is that the percentage of inmates serving time on drug charges has jumped 214% since 1989. Many of these individuals have been convicted of trafficking in controlled substances, a crime which does merit punitive measures. A convincing argument can be made, though, that most of the inmates who are incarcerated for drug possession or other non-violent drug or alcohol related offenses should be receiving rehabilitative treatment in the community under supervision of a probation officer.

GOVERNOR PATTON'S CRIMINAL JUSTICE RESPONSE TEAM

In July of 1997, Governor Paul E. Patton appointed thirty individuals with diverse and extensive experience in the field of criminal justice to serve as the Governor's Criminal Justice Response Team. The creation of this Response Team was said to be an acknowledgment that crime in Kentucky was exacting an unacceptable toll both in taxpayer dollars and in human suffering. Governor Patton requested this team to review Kentucky's criminal justice system and recommend changes which would promote greater public safety, increase public confidence in the system, reduce crime and the rate of recidivism, and improve victim's rights.

The Criminal Justice Response Team presented its final report and recommendations to Governor Patton on December 1, 1997. This report, over eighty pages in length, contained over 100 specific recommendations in ten different areas of the criminal justice system. The first recommendation called

74. Id.
75. Ky. Dep't of Corrections, Percentages Increase in New Felon Commitments by Crime Type, From FY 1989 to 1998.
76. Governor's Criminal Justice Response Team, Final Report and Recommendations viii (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
77. Id. at 1.
78. Id.
79. See id. (listing, in the Table of Contents, more than 100 recommendations and the corresponding pages in the text).
for the Governor to appoint a Kentucky Criminal Justice Council.80 The primary task of this Council would be to provide leadership and coordination for criminal justice concerns at the state level.81 Specifically, it was envisioned that the Council would administer and evaluate programs funded by federal grants, promote the development of new and innovative programs, provide technical assistance to local communities on criminal justice matters, and analyze the potential effect of proposed legislation.82 Other recommendations made by the Response Team covered a variety of areas within the field of criminal justice, including victim's rights and remedies, crime prevention programs, automation and technology, and law enforcement training and coordination.83

With specific regard to corrections, the Response Team acknowledged the need for the construction of additional prison beds, but also urged the expansion of community-based confinement programs.84 Recognizing the importance of treatment to reduce the rate of recidivism for both drug offenders and sex offenders, it proposed legislation requiring participation in treatment programs as a prerequisite for earning good time credit while in prison.85 In addition, prisoners released prior to serving their maximum sentences, due to good time credit, would remain under supervision and be required to enter aftercare treatment as a condition of their early release.86 This proposal is similar to the conditional release program passed by the 1972 Legislature, and then later repealed.87

For purposes of this article, the most interesting proposals and comments from the report of the Criminal Response Team were those related to the Penal Code and sentencing. In calling for a comprehensive review of sentencing in Kentucky, the Team noted that the Penal Code's provisions on sentencing have “aged” enormously due mostly to changes in sentencing philosophy.88 As a result, inequities and inconsistencies in the treatment of offenders have become

80. *Id.* at 7-10.
81. *Id.* at 9.
82. *Id.* at 7-10.
83. See *id.* (as listed in the Table of Contents and corresponding text).
84. *Id.* at 40-42.
85. *Id.* at 43-44.
86. *Id.*
87. See *supra* notes 33, 34.
88. GOVERNOR’S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 76 (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
The first recommendation, which directly addressed criminal sentencing, sought to replace "jury sentencing" with judge sentencing in accordance with a structured sentencing plan. The alleged problem with jury sentencing (Kentucky is only one of five states that allows the jury to fix punishment) is that it results in disparate penalties for the same crime. To resolve such inequities, the Team advocated the development of Structured Sentencing or Limited Sentencing Guidelines, which would make sentencing rational, truthful and consistent, and would set priorities for the limited penal resources. Toward this end, and with the goal of reforming current practices, it was recommended that a Sentencing Commission be established to conduct a full review of Kentucky's sentencing structure.

The Response Team advanced other specific proposals for legislation, such as adopting the penalty of life imprisonment without the possibility of parole and the creation of additional aggravating circumstances for which the death penalty could be sought. These circumstances would be: (1) "the murder of a witness in a criminal or civil proceeding," (2) "the murder of a child under the age of 12," and, (3) "a murder which is premeditated or planned." To provide greater protection to the public, an amendment to the parole eligibility statutes was offered by which violent offenders would be required to serve at least 85% of their sentences. On the other hand, for appropriate non-violent offenders, alternatives to incarceration were suggested.

In calling for reform and the establishment of a Sentencing Commission, the Criminal Response Team noted that significant changes had occurred in Kentucky’s sentencing philosophy since the adoption of the Kentucky Penal Code in 1974. Deterrence and incapacitation have replaced rehabilitation as the primary objective of sentencing. This change in philosophy, along with an

89. See infra note 94 and accompanying text.
90. GOVERNOR’S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 73-75 (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
91. Id. at 73.
92. Id. at 74.
93. Id. at 73, 76, 79.
94. Id. at 75-76.
95. Id. at 75.
96. Id. at 76.
97. Id.
98. Id. at 77.
increase in the use of enhanced penalties and more restrictions on the availability of alternatives, has almost certainly resulted in the current population explosion in the prison system, and with it, the increased cost of operating the correctional system. The Criminal Response Team recommended that a sentencing commission consider reforms to the sentencing statutes as a necessary response to the problems created by recent sentencing practices.

THE GOVERNOR'S CRIME BILL OF 1998 - HB 455

In April 1998, several months after the Criminal Response Team filed its final report, the Kentucky Legislature enacted HB 455, commonly referred to as the Governor's Crime Bill. A number, but not all, of the Response Team's recommendations were included in this legislation. For example, a Crime Victim Bill of Rights was adopted, as well as laws making full restitution an express condition of parole, probation, conditional discharge, or pre-trial diversion. The Crime Bill also established the Criminal Justice Council to advise and recommend to the Governor and the General Assembly policies and direction for long-range planning regarding all elements of the criminal justice system. This Council, composed of representatives from all areas within the field of criminal law, is required to submit its report to the Governor and the Legislative Research commission at least six months prior to every regular session of the General Assembly.

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99. Id. at 77-78.
100. Id. at 79-80.
102. For example, the Legislature did not enact the three additional aggravating factors which would allow the imposition of the death penalty. See supra note 95 and accompanying text. Likewise, the Crime Bill did not include provisions for the establishment of sentencing guidelines or for judge sentencing. GOVERNOR'S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 73-80 (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
104. Id. at ch. 606, § 45-49 (codified at KY. REV. STAT. ANN. § 532.032-.033 (Michie Supp. 1999)).
105. Id. at ch. 606, §§ 26-27 (codified as amended at KY. REV. STAT. ANN. §§ 15A.030-.040 (Michie Supp. 1999)).
106. Id.
The Legislature also adopted revisions to the Juvenile Code and passed laws combating criminal gang activity and hate crimes. It established procedures for assessing and classifying convicted sex offenders according to their risk to reoffend. The level of risk assigned determines the extent and duration of the person's duty to register as a sex offender. The Crime Bill also authorized mandatory testing for the use of controlled substances and alcohol as a condition of pretrial release for persons who have a history of substance or alcohol abuse. While these specific pieces of legislation are important, the amendments to the laws pertaining to sentencing and sentencing alternatives should have the greatest impact on the criminal justice system.

It is readily apparent that the General Assembly was implementing a policy of longer sentences for violent offenders and sex offenders, while seeking other more effective and less costly ways of handling the non-violent criminal. However, implicit in the success of this dual approach to criminal sanctions is the willingness of judges and prosecutors to utilize alternative programs for those offenders who do not pose a threat to the safety of the community. Unless the citizens of Kentucky are willing to suffer continued and increased overcrowding of the prisons, and unless they are content to bear the ever-rising cost of operating the penal system, the longer mandatory sentences called for in HB 455 must be balanced with the use of appropriate alternative sanctions for the minimum risk offender.

The definition of "violent offender" was not changed by HB 455, but the consequences of being designated as a "violent offender" were made more severe. For example, violent offenders, as defined in the statutes, though not ineligible for probation, are not entitled to the same consideration for probation.

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107. *Id.* at ch. 606, §§ 1-23.
108. *Id.* at ch. 606, §§ 82-84 (codified at KY. REV. STAT. ANN. §§ 506.130-150 (Michie Supp. 1999)).
109. *Id.* at ch. 606, § 51 (codified at KY. REV. STAT. ANN. § 532.031 (Michie Supp. 1999)).
110. *Id.* at ch. 606, §§ 138-154 (codified at KY. REV. STAT. ANN. §§ 17.500-991 (Michie Supp. 1999)).
111. *Id.* at ch. 606, § 32 (codified as amended at KY. REV. STAT. ANN. § 431.520 (Michie Supp. 1999)).
112. See 1998 Ky. Rev. Stat. & R. Serv., ch. 606, § 77 (Banks-Baldwin) (codified as amended at KY. REV. STAT. ANN. § 431.3401(1) (Michie Supp. 1999)) (defining "violent offender" as "any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim.").
as other eligible offenders. Additionally, after sentencing, violent offenders must serve much more time before being eligible for parole. For violent crimes committed after July 15, 1998, an offender who has received a life sentence must now serve a minimum of twenty years. Previously, a person serving a life sentence was eligible for parole after twelve years. Likewise, when a violent offender has been sentenced to a term of years, he or she must serve at least 85% of the sentence before being considered for parole. Moreover, violent offenders are no longer eligible for "good time" credit, but may receive credit for education or meritorious service, provided that such credit does not reduce the offender's term of imprisonment below 85% of the sentence.

The Legislature also amended the statutes which govern the maximum penalties for capital offenses and Class A felonies. As a result, the authorized sentence for a Class A felony is a term of not less than twenty years, nor more than fifty years, or a sentence of life imprisonment. Likewise, the maximum sentence for a person found to be a persistent felony offender in the first degree, where the underlying charge is a Class A or Class B felony, is life imprisonment or a term not to exceed fifty years. When multiple sentences are ordered to

113. 1998 Ky. Rev Stat. & R. Serv., ch. 606, § 73 (Banks-Baldwin) (codified as amended at KY. REV. STAT. ANN. § 533.010 (Michie Supp. 1999)). As amended, KRS 533.010(2) provides that, except for violent felons as defined in KRS 439.3401 and for those offenders for whom probation is statutorily prohibited, the sentencing court shall consider and grant probation, conditional discharge, or probation with alternative sentencing plan unless imprisonment is necessary for the protection of the public. See KY. REV. STAT. ANN. § 533.010(2) (Michie Supp. 1999)). Thus, although many violent offenders will be ineligible for probation under specific statutes such as KRS 533.060 and KRS 533.045, violent felons, as defined by statute, are not otherwise prohibited from consideration for probation. The amendment to KRS 533.010 merely denies violent felons the right to have probation as the preferred sentence.

114. Id. at ch. 606, § 77 (codified as amended at KY. REV. STAT. ANN. § 439.3401(2) (Michie Supp. 1999)).

115. Id. at ch. 606, § 77 (codified as amended at KY. REV. STAT. ANN. § 439.3401(3) (Michie Supp. 1999)).

116. Id. at ch. 606, § 77 (codified as amended at KY. REV. STAT. ANN. § 439.3401(4) (Michie Supp. 1999)).

117. See id. at ch. 606, § 70 (codified as amended at KY. REV. STAT. ANN. § 532.060(2) (Michie Supp. 1999)) (amending the statute by introducing the new language of "nor more the 50 years" between the old language "not less than 20 years" and "or life imprisonment").

118. See id. at ch. 606, § 76 (codified as amended at KY. REV. STAT. ANN. § 532.080(6) (Michie Supp. 1999)) (amending by adding the language "nor more than 50 years" between "not less than
run consecutively, the maximum aggregate term that can be imposed is seventy years. For a capital offense, the sentence may be death; life imprisonment without benefit of probation or parole; life imprisonment without probation or parole eligibility for twenty-five years; life imprisonment; or a term not less than twenty years and not to exceed fifty years. The inclusion in the Crime Bill of the sentence of life without the possibility of probation or parole was the result of lobbying by victim's groups urging another alternative to the death penalty.

The amendment of the statutes which increased the minimum term that a violent offender must serve before parole eligibility has created an anomalous situation. For instance, a person convicted of a violent Class A felony and sentenced to serve fifty years would not, under the 85% rule, be eligible for parole until having served at least 42.5 years. Likewise, one who is sentenced to consecutive sentences totaling seventy years for violent offenses would have to serve 59.5 years before being considered for parole. On the other hand, a violent offender sentenced to a term of life imprisonment can be paroled after twenty years. Indeed, a person sentenced to life imprisonment without parole for twenty-five years upon conviction for aggravated murder would be eligible for parole before a person sentenced to fifty years for a violent crime.

Although the length of sentences for sex offenders was not increased on the front end, HB 455 included provisions which demonstrate the Legislature's intent to place greater restrictions on defendants who are convicted of sex crimes. Rather than receiving longer sentences, sexual offenders are required to complete a sex offender treatment program before being credited with good time.
A sex offender who fails to complete the sex offender treatment program must serve out the sentence without benefit of good time credit.

As a further means to extend control over those convicted of sex crimes, the Legislature enacted a new statute which requires sex offenders to be sentenced to an additional three-year period of conditional discharge following release from incarceration or completion of parole. During the period of conditional discharge, the defendant is subject to supervision by the Division of Probation and Parole. As with the former conditional release program, a person who commits a violation can be ordered to serve the balance of time remaining on the period of conditional discharge. This law has stirred considerable controversy since, in effect, it adds three years to every applicable sentence. Thus, a Class D felony sentence of five years becomes an eight year sanction. Furthermore, it is not clear whether this period of conditional discharge can or must be added to a sentence that is probated, since the statute calls for the imposition of conditional discharge only upon release from incarceration or completion of parole. However, it seems that the better view would be that the three-year period of conditional discharge must be added to each sentence, regardless of whether probation is granted. A sentence that is probated is, nevertheless, a sentence, and must be served if probation is revoked.

ALTERNATIVE SANCTIONS FOR THE NON-VIOLENT OFFENDER

The legislative will to remove violent offenders from society and to keep a tight rein on sexual offenders is obvious from a review of HB 455. It is also clear that the Crime Bill directs those who are charged with the responsibility of recommending and imposing sentences to consider alternatives to incarceration whenever appropriate. Whether they were motivated by the need to contain the


125. Id. at ch. 606, § 25 (codified at KY. REV. STAT. ANN. § 532.043 (Michie Supp. 1999)).

126. Id. (codified at KY. REV. STAT. ANN. § 532.043(4) (Michie Supp. 1999)).

127. Id. (codified at KY. REV. STAT. ANN. § 532.043(5) (Michie Supp. 1999)).
costs of the penal system or by the belief that other sanctions are more effective in combating crime, the members of the General Assembly have provided prosecutors and judges with a variety of sentencing alternatives. HB 455 emphasized the need to utilize programs that have been in the Penal Code and added some new procedures.

Probation, including shock probation, has been a sentencing option for judges for many years, predating the adoption of the penal code in 1974.\footnote{128. The statute authorizing shock probation was enacted in 1972. 1972 Ky. Acts., ch. 169 (codified at KY. REV. STAT. ANN. § 439.265 (Michie Supp. 1999)). The Penal Code of 1974 repealed and replaced the former probation statute, KRS 439.270, which had been in effect since 1956.} It remains the primary alternative sanction for judges today, although legislation over the past fifteen years has limited its availability for a number of specific offenses. When the Kentucky Penal Code was enacted twenty-five years ago, probation or conditional discharge was permitted in all cases, except where the death penalty was imposed. Since then, probation has been precluded for crimes involving the use of a deadly weapon,\footnote{129. 1976 Ky. Acts., ch. 180 (codified at KY. REV. STAT. ANN. § 533.060(I) (Michie Supp. 1999)).} for sex offenses against minors,\footnote{130. 1984 Ky. Acts., ch. 382 (codified at KY. REV. STAT. ANN. § 532.045 (Michie Supp. 1999)).} and for crimes committed while the offender is on parole, probation, shock probation or conditional discharge.\footnote{131. 1976 Ky. Acts., ch. 180 (codified at KY. REV. STAT. ANN. § 533.060(2) (Michie Supp. 1999)).} The 1998 Crime Bill limited the consideration of probation for any violent felon, as defined in KRS 439.3401,\footnote{132. 1998 Ky. Rev. Stat. & R. Serv., ch. 606, § 73 (Banks-Baldwin) (codified as amended at KY. REV. STAT. ANN. § 533.010(2) (Michie Supp. 1999)). \textit{See supra} note 113.} and added the prohibition against probation in any case where the defendant was wearing body armor while in possession of a firearm.\footnote{133. \textit{Id.} § 183 (codified as amended at KY. REV. STAT. ANN. § 533.065 (Michie Supp. 1999)).}

On the other hand, HB 455 authorized the consideration of probation for both first degree and second degree persistent felony offenders when the crimes for which the defendants currently stand charged are non-violent Class D felonies.\footnote{134. \textit{Id.} § 76 (codified as amended at KY. REV. STAT. ANN. § 532.080(5), (7) (Michie Supp. 1999)).} This corrected an inconsistency that previously existed -- a person sentenced as a persistent felon in the first degree, upon conviction of a non-violent crime, was eligible for probation, but a person sentenced as a second
degree persistent offender was ineligible. Furthermore, the Crime Bill provided that no violation of Kentucky Revised Statute (hereafter KRS) 218A.500, the drug paraphernalia law, could be used as a conviction for purposes of the persistent felony offender statute.\footnote{Id. § 76 (codified as amended at KY. REV. STAT. ANN. § 532.080(8) (Michie Supp. 1999)).}

In light of the clear intent of the lawmakers to incarcerate violent offenders for longer periods, and given the legislative narrowing of the availability of probation in recent years, the importance of the amendment to the probation statute in the Crime Bill can hardly be overstated. Simply put, if all those offenders who deserve to be confined in secure facilities are incarcerated, other methods of dealing with the non-violent offenders must be implemented. This is sound corrections policy and sound economics. It reserves expensive prison cells for the dangerous offenders, while attempting to reform or rehabilitate the non-violent offender in supervised, community-based programs.\footnote{The value of such community based programs was recognized by the 1992 Legislature when it enacted KRS 196.700-.735, providing for the creation of community corrections programs under the administration of the Kentucky State Corrections Commission. The stated purpose of this legislation was to promote community-based sanctions as an alternative to incarceration for certain felony offenders. KY. REV. STAT. ANN. § 196.705(2) (Michie Supp. 1999). The statute cites the need to reduce prison overcrowding while providing a more effective and efficient method of meeting the needs of victims, the community and the offender. Id. The General Assembly further provided for the award of financial grants to local community corrections boards for the implementation of alternative correctional programs. Id. § 196.710.}

The revision of KRS 533.010 was lengthy. The significance of the changes is seen the most in the attitude or approach to probation and other sentencing alternatives that courts are required to take. Prior to passage of HB 455, the statute provided that “the court shall consider the possibility” of probation, probation with an alternative sentencing plan, or conditional discharge. Then, after due consideration of the circumstances of the crime and the history and character of the defendant, the court “should” sentence the defendant to such a program unless imprisonment is necessary for protection of the public.\footnote{For the original language of the statute prior to the 1998 Amendment, see KY. REV. STAT. ANN. § 533.010(2) (Banks-Baldwin 1995).}

Following the amendment by the Crime Bill, KRS 533.010 now states that the court “shall consider” (not just consider the “possibility of”) probation and “shall” (rather than “should”) grant probation or conditional discharge, unless imprisonment is deemed to be necessary.\footnote{See Ky. Rev. Stat. & R. Serv. ch. 606 § 73 (Banks-Baldwin) (codified at KY. REV. STAT.}}
wording of the statute demonstrate a commitment from the General Assembly that alternative sanctions must be an integral part of the sentencing process.

The structure of the probation statute, as amended, also promotes the use of sentencing alternatives. Before a defendant, who is otherwise eligible for probation, can be sentenced to a term of imprisonment, the court must make several determinations. First, the judge “shall” grant probation or conditional discharge to a person who is not otherwise precluded by law from consideration, unless the court finds that imprisonment is necessary to protect the public. In order to find that the public needs to be protected from any particular defendant, the court must determine that there is a substantial risk that the defendant will commit another crime, that the defendant is in need of treatment in a correctional facility, or that probation will unduly depreciate the seriousness of the defendant’s crime.

In the event that, after considering the nature and circumstances of the crime and the history and character of the defendant, the court deems probation to be inappropriate, it cannot simply sentence the defendant to prison. Rather, the court “shall” consider granting probation with an alternative sentencing plan “unless the court is of the opinion that imprisonment is necessary for the protection of the public.” Under this section of the statute, the need to protect the public from the defendant must be based on a finding that: 1) there is a “likelihood” that the defendant will commit a Class C or Class D felony or there is a “substantial risk” that the defendant will commit a Class B or Class A felony, 2) the defendant is in need of treatment in a correctional institution, or 3) probation will unduly depreciate the seriousness of the defendant’s crime.

In order to emphasize the obligation of the court to consider probation in any sentencing procedure where probation is available to the defendant, the statute requires the court to enter into the record written findings of fact and conclusions

ANN. § 533.010(2) (Michie Supp. 1999)) (incorporating the new language of the 1998 Amendment).

139. Id.
140. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(2)(a) (Michie Supp. 1999)).
141. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(2)(b) (Michie Supp. 1999)).
142. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(2)(c) (Michie Supp. 1999)).
143. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(3) (Michie Supp. 1999)).
144. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(3)(a) (Michie Supp. 1999)).
145. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(3)(b) (Michie Supp. 1999)).
146. Id. (codified as amended at KY. REV. STAT. ANN. § 533.010(3)(c) (Michie Supp. 1999)).
Thus, a judge must be able to articulate a basis for finding that there is a "likelihood" or "substantial risk" that the defendant will commit a felony while on probation. In addition, to assure that there is a basis for finding a "likelihood" to commit a Class C or Class D felony, the statute prohibits such a finding where the defendant has never been convicted of a felony in the past, has successfully completed probation more than ten years prior to the commission of the current crime, or has been released from incarceration for a prior offense more than ten years prior to the current offense. Nevertheless, the court may determine that the greater weight of the evidence indicates a likelihood that the defendant will commit a Class C or Class D felony.

While these provisions are intended to underscore the importance of giving due consideration to probation, ultimately the appropriate utilization of probation depends on the willingness of the judge to give serious consideration to sentencing alternatives. Because the trial courts are given considerable discretion in such matters, it would be relatively easy for judges to deny probation on the rather vague grounds that it would "unduly depreciate the seriousness of the defendant's crime." It is hoped that this will not happen and that this important sentencing tool will be properly employed.

PROBATION WITH ALTERNATIVE SENTENCING

Probation with alternative sentencing plan was added to the criminal code in 1990. Although the statute did not specify the components of such a plan, it appears that community service was intended to be a possible element, since the legislation establishing this probation program also authorized community service as an alternative to prison for felons. Otherwise, the statute simply

152. See Turner v. Commonwealth, 914 S.W.2d 343, 347-48 (Ky. 1996) (stating that the determination to grant probation is left to the discretion of the trial court).
155. Id. at ch. 459, §§ 1, 2.
offered probation with alternative sentencing as another option for the court when imprisonment was not warranted, but probation alone was not considered to be a sufficient sanction. The Crime Bill provides more specific elements for inclusion in an alternative sentencing program.

At the time of initial sentencing, or upon modification or revocation of previously granted probation, the court may order the defendant to be placed on probation and to serve a sentence not to exceed twelve months in jail, in a halfway house, or on home incarceration. If sentenced to home incarceration, the defendant may be granted work release. If sentenced to a jail term, the defendant may be given work release or ordered to perform community service. In lieu of confinement, the court may order the defendant to a residential treatment program for alcohol or drug abuse or to other counseling, treatment, or rehabilitation. Since this last option does not specify that treatment must be as an in-patient, it would appear that confinement is not always required as part of an alternative sentencing plan.

The authorization of work release and home incarceration for felons constitutes a change in the law, because prior to the enactment of the Crime Bill, only misdemeanants were eligible for these programs. Although home incarceration has been allowed as a form of pre-trial release since 1996, the

160. Id.
statutes now permit the sentencing judge the option to order that a term of imprisonment in the county jail be served on home incarceration, or to grant the prisoner the privilege of work release.\textsuperscript{166} These options only apply to felons serving time in the county jail under an alternative sentencing plan, since a defendant who is sentenced to prison is committed to the Department of Corrections and is beyond the jurisdiction of the circuit court. However, in one particular instance, the trial judge retains the power to grant work release to a convicted felon who has not been sentenced to probation. During the period in which a defendant may file a motion for shock probation, the sentencing court may order the defendant held in the county jail and may allow work release.\textsuperscript{167}

The statute also requires the court to impose additional conditions upon the defendant when granting probation with alternative sentencing.\textsuperscript{168} The conditions vary depending upon the type of sentencing plan ordered. A defendant sentenced to a halfway house must be working, pursuing an education, or enrolled in a full-time treatment program.\textsuperscript{169} A person placed on home incarceration shall be employed, enter treatment if appropriate, and pay all or a part of the cost of home confinement.\textsuperscript{170} When sentenced to a residential treatment program for drug or alcohol abuse, the defendant must undergo drug screening, participate in aftercare, and be on active, supervised probation for five years.\textsuperscript{171} All offenders sentenced under an alternative plan must pay restitution and have no contact with their victims.\textsuperscript{172}

\textit{The Split Sentence}

A probated sentence, combined with an order requiring the defendant to serve a period of incarceration in a county detention facility, is commonly referred to as a “split sentence.” It has been part of the sentencing laws since the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{167} KY. REV. STAT. ANN. § 439.265(3)(a) (Michie Supp. 1999).
\item \textsuperscript{169} Id. at ch. 606, § 73(8)(a)(1).
\item \textsuperscript{170} Id. at ch. 606, § 73(8)(b).
\item \textsuperscript{171} Id. at ch. 606, § 73(8)(c).
\item \textsuperscript{172} See generally id. at ch. 606 § 73(8).
\end{enumerate}
\end{footnotesize}
adoption of the penal code in 1974.\footnote{173} The Crime Bill of 1998 increased, from six months to twelve months, the maximum sentence which can be imposed as a condition of probation.\footnote{174} This gives the trial court additional flexibility in sentencing and should be an incentive to consider a plan of probation for those offenders who deserve a substantial punishment in addition to treatment or rehabilitation.

The "split sentence" allows the sentencing court to maintain control over the defendant, while not adding to the overcrowded prison population. However, opting to sentence offenders to long terms in local facilities could shift the problem of overcrowding to the county jails. As a means of compensating the counties for undertaking the burden of housing these prisoners, HB 455 included a provision which requires the Department of Corrections to reimburse the counties for the cost of incarceration.\footnote{175} Previously, defendants who were serving a "split sentence" were considered county prisoners. That economic reality led some judges to forego probation at sentencing, preferring to commit the defendant to the custody and cost of the Department of Corrections, with the intention of granting a motion for shock probation at a later date. Although the state will now be responsible for the cost of incarcerating these defendants, judges must be aware of the potential burden on local jails when using the "split sentence." This sentencing alternative is still a probation plan with incarceration as only one element, not the primary component.

\subsection*{Shock Probation}

Shock probation, which was first enacted in 1972,\footnote{176} was included in the Penal Code of 1974 and continues to be a viable sentencing device. The Crime Bill of 1998 made no changes to this statutory procedure. Pursuant to the statute, a defendant, who has been incarcerated for not less than thirty days nor

\begin{footnotes}
\end{footnotes}
more than 180 days, may file a motion with the circuit court requesting probation.\textsuperscript{177} Defendants who are ineligible for probation at sentencing are likewise precluded from consideration for shock probation.\textsuperscript{178}

The theory behind shock probation is that the defendant may benefit from being “shocked” by a short stay in prison. Ideally, shock probation should be reserved for the offender with a minimal criminal history, who has committed an offense which, nevertheless, is serious enough to warrant commitment to a state penal institution. Since most Class D felons are housed in county jails, shock probation is more suitable for Class C felons who must be transferred to state correctional facilities. With the ability to impose a split sentence of up to twelve months as a condition of probation, it is reasonable to expect that more judges will choose to probate defendants at the time of sentencing, rather than opting to consider shock probation at a later date. On the other hand, it can be argued that there is no substitute for the therapeutic effect of exposing a defendant to the inside of a state penal institution, even if only for a few months.

\textit{Pre-Release Probation}

HB 455 added a completely new program for potential use by circuit court judges. This program, designated as pre-release probation, extends the sentencing court’s power to release a convicted felon during the entire length of his or her sentence.\textsuperscript{179} Before this law was passed, the circuit court lost jurisdiction to the Department of Corrections after sentencing an offender to prison, except for retaining the ability to grant a motion for shock probation, filed within six months of the final judgment. It remains to be seen whether this expansion of the court’s authority over state prisoners will be upheld as constitutional.\textsuperscript{180}

\textsuperscript{177} KY. REV. STAT. ANN. § 439.265(3)(a) (Michie Supp. 1999).
\textsuperscript{178} Id. §§ 439.265(4), 533.060(1), 532.045.
\textsuperscript{180} See Commonwealth v. Williamson, 492 S.W.2d 874 (Ky. 1973) (The Kentucky Court of Appeals rejected the argument that shock probation was an unconstitutional invasion or encroachment upon the executive power. In its opinion, the court observed that the shock probation statute established the period of time, “not unreasonably long, during which the trial court retains a limited control over its judgments in criminal cases.”). Id. at 875. Since pre-release probation extends the authority of the trial court to grant release of a prisoner beyond the period of shock probation, and potentially for the entire length of the person’s sentence, it could be argued
In order to be eligible for pre-release probation, the inmate must meet certain criteria established by administrative regulations promulgated by the Department of Corrections. An inmate is excluded from consideration if he or she has committed a crime in which a life was taken or a victim suffered serious physical injury, has an outstanding felony detainer, has been convicted of a sex crime as defined in KRS 17.500(4), or has a major violation in the institution. If otherwise eligible, the prisoner must then receive a favorable recommendation from the Department. The favorable recommendation is based, in part, upon a low score on Pre-Release Risk Assessment Scale designed to predict the likelihood of the person's success if probated. In addition to receiving a low risk score on the assessment, the inmate must be eligible for probation and have a home placement within the state.

When a motion for pre-release probation is filed, the sentencing court may request that the Department of Corrections complete the risk assessment. However, it appears that the court has the discretion to overrule the motion without ordering an assessment, since it retains the discretion to deny pre-release probation regardless of the Department's recommendation. Certainly, the court would not have to order an assessment if the inmate would be ineligible under that this statute goes beyond the constitutional limits approved in the Williamson case. Indeed, the Kentucky Court of Appeals, in a decision rendered on December 23, 1999, ruled that the pre-release probation statute is unconstitutional as impermissibly giving the courts parole power, a power which is reserved to the Executive Branch. Prater v. Commonwealth, 47 KLS 1, 9 (Ky. Ct. App. Jan. 28, 2000) (the opinion in this case is not final and is not to be cited as authority as of the date this article goes to publication).

181. 1998 Ky. Rev. Stat. Ann. & R. Serv., ch. 606, § 119(2) (Banks-Baldwin) (codified at KY. REV. STAT. ANN. § 439.575(2) (Michie Supp. 1999)); see also KY. DEP'T OF CORRECTIONS, POLICIES AND PROCEDURES I., No. 27-11-02 (effective June 1999) (stating "[t]his policy is issued in accordance with KRS 439.575 which institutes a program of prerelease probation; and KRS 439.470 which authorizes the Commissioner of the Department of Corrections (Corrections) to make rules regarding probationers and parolees.").

182. DEP'T OF CORRECTIONS, POLICIES AND PROCEDURES VI.A.1.a., No. 27-11-02 (effective June 1999).

183. Id. at VI.A.1.c.

184. Id. at VI.A.1.b.

185. Id. at VI.A.1.d.

186. Id. at VI.A.2.

187. Id.
the regulations.

If the court orders a pre-release assessment, it must be completed within sixty days of the order.\textsuperscript{188} The assessment is then forwarded to the District Supervisor for the Division of Probation and Parole, if the inmate is in the Class D program, or to the Deputy Warden, if the inmate is in a penal institution.\textsuperscript{189} In order to make a recommendation to the court, the Deputy Warden or District Supervisor must review the assessment and the inmate’s pre-sentence report.\textsuperscript{190} A recommendation must be sent to the sentencing court within thirty days after completion of the assessment.\textsuperscript{191}

Upon receipt of a favorable recommendation from the Department, the court may place the inmate on probation with such conditions and terms as it deems necessary,\textsuperscript{192} including an order that the inmate remain in a halfway house.\textsuperscript{193} Once pre-release probation is granted, the inmate is no longer considered a state prisoner, but is treated as a defendant on probation subject to the orders of the sentencing court and the supervision of the Division of Probation and Parole.\textsuperscript{194}

\textit{Pre-Trial Diversion}

Pre-Trial diversion programs have been operated by the Kentucky Administrative Office of the Courts for many years.\textsuperscript{195} Such programs are an important method of handling first-time misdemeanants in district court. In addition, a number of circuit courts have established felony diversion plans with the approval of the Kentucky Supreme Court.\textsuperscript{196} HB 455 requires each judicial

\textsuperscript{188} Id. at VI.B.2., 3.
\textsuperscript{189} Id. at VI.B.4.
\textsuperscript{190} Id. at VI.C.
\textsuperscript{191} Id.
\textsuperscript{193} Id. at ch. 606, § 119(4) (codified at KY. REV. STAT. ANN. § 439.575(4) (Michie Supp. 1999)).
\textsuperscript{194} Id. at ch. 606, § 119(5) (codified at KY. REV. STAT. ANN. § 439.575(5) (Michie Supp. 1999)).
\textsuperscript{195} For example, in 1979, the Supreme Court approved local rules establishing diversion programs in Campbell and Kenton Counties. See \textit{Supreme Court of Kentucky, In Re: Approval of Local Rules} (May 31, 1979).
\textsuperscript{196} Felony diversion has been authorized in the Campbell Circuit Court since at least 1995. See \textit{Supreme Court of Kentucky, In Re: Order Approving Amended Local Rules, Felony
circuit to submit a plan for a pre-trial diversion program to the Supreme Court by December 1, 1999.197

The statute prescribes the mandatory elements for each diversion program. In addition, Kentucky Rule of Criminal Procedure 8.04 governs the procedure for the implementation and termination of diversion agreements.198 A defendant who is charged with a Class D felony is eligible to participate provided that, within the ten years immediately preceding the current offense, he or she: has not committed a felony, has not been on probation or parole, or has not been released from serving a felony sentence.199 Furthermore, the defendant must not be charged with an offense for which probation, parole or conditional discharge would be prohibited under KRS 532.045.200 Although not specifically mentioned in the statute, a person charged with a felony offense involving driving under the influence would also be ineligible for diversion, since a statutory minimum sentence must be served upon conviction of those crimes.201 Finally, no person can be eligible for pre-trial diversion more than once in any five-year period.202

An eligible defendant may make written application to the trial court and the Commonwealth's attorney for entry into the pre-trial diversion program.203 Upon receipt of the application, the Commonwealth's attorney must check the defendant's criminal record to assure that the person is eligible. The Commonwealth's attorney also must conduct any other investigation that may be necessary to set proper conditions of diversion, or to make a decision whether to

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**Diversion Local Program Local Rules, 17th Judicial Circuit, Campbell County (Jan. 20, 1995).**


198. KY. R. CRIM. P. 8.04.


200. Id. § 86(1)(b) (codified at KY. REV. STAT. ANN. § 533.250(1)(b) (Michie Supp. 1999)).

Kentucky Revised Statute Sect. 532.045 is entitled “Person prohibited from probation or conditional discharge – Procedure when probation or conditional discharge not prohibited.” See KY. REV. STAT. ANN. § 532.045 (Michie Supp. 1999).


202. Id. § 86(1)(c) (codified at KY. REV. STAT. ANN. § 533.250(1)(c) (Michie Supp. 1999)).

203. Id. § 86(1)(d) (codified at KY. REV. STAT. ANN. § 533.250(1)(d) (Michie Supp. 1999)).
recommend the defendant's participation. The Commonwealth's attorney also must interview the victim or the victim's family, and explain to them the diversion program and the proposed conditions. The results of this interview may be presented to the court for its consideration. Since the victim is entitled to be present when the court rules on the application for diversion, it is the duty of the Commonwealth's attorney to notify the victim of the time and date of the hearing.

The Commonwealth's attorney is required by statute to make a recommendation, favorable or unfavorable, on each application for diversion. The statute and the rule further provide that the court may either approve or disapprove the diversion. One version of the Crime Bill debated in the General Assembly would have made approval by the prosecutor a prerequisite to every grant of pre-trial diversion. The law, as enacted, does not give veto power to the Commonwealth's attorney. However, some have expressed concern that, by allowing the court to grant diversion over the prosecutor's objection, the law is unconstitutional as a violation of the separation-of-powers doctrine.

If pre-trial diversion is granted, the defendant must enter a guilty plea or an Alford plea. The defendant will be ordered to complete a diversion plan under the supervision of the Division of Probation and Parole. The terms and

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204. See id. § 87 (codified at KY. REV. STAT. ANN. § 533.252 (Michie Supp. 1999)).
205. Id. at § 87(2) (codified at KY. REV. STAT. ANN. § 533.252(2) (Michie Supp. 1999)).
206. Id.
207. Id.
208. Id. § 86(2) (codified at KY. REV. STAT. ANN. § 533.250(2) (Michie Supp. 1999)).
209. Id.; KY. R. CRIM. P. 8.04(1).
211. A committee composed of judges, prosecutors, and representatives of the defense bar, the Department of Corrections, and the Administrative Office of the Courts was appointed by the Supreme Court of Kentucky in October of 1998 to study pre-trial diversion. That committee proposed a protocol which could be used as a model by the circuit courts. The committee stated its belief that diversion absent approval of the prosecutor would be unconstitutional. See MEMO FROM CHIEF JUSTICE JOSEPH E. LAMBERT, SUPREME COURT OF KENTUCKY, TO CHIEF CIRCUIT JUSTICES, RE: PRETRIAL DIVERSION FOR CLASS D FELONS (Feb. 4, 1999).
213. Id. § 88(1) (codified at KY. REV. STAT. ANN. § 533.254(1) (Michie Supp. 1999)). Prior diversion programs were administered by the Pre-Trial Services Division of the Administrative
conditions for probation shall be applicable to diversion, including the defendant's obligation to make restitution.\textsuperscript{214} If the defendant successfully completes the pre-trial diversion program, the charges will be dismissed with prejudice, and will not be considered as a criminal conviction.\textsuperscript{215} If the defendant fails to comply with the diversion agreement, the Commonwealth's attorney may apply to the court to have the diversion voided.\textsuperscript{216} The defendant has the right to a hearing on any motion to void the pre-trial diversion agreement, and the court shall use the same criteria as for revocation of probation in determining whether the diversion should be terminated.\textsuperscript{217} If it finds that the defendant has violated the terms of the agreement, the court must notify the prosecutor, who then decides whether to proceed on the defendant's guilty plea.\textsuperscript{218}

\textbf{DRUG COURTS}

Although not specifically mentioned in the Penal Code, drug court programs exemplify the community-based treatment alternatives envisioned by those who have called for reform in our criminal justice system. In fact, the Governor's Criminal Response Team recommended that the use of drug courts should be expanded in the Commonwealth.\textsuperscript{219} The statistics showing that drug offenses have increased by over 200\% in the last ten years should be proof enough that Kentucky must focus on the abuse of controlled substances if it is going to reduce the crime rate in Kentucky.\textsuperscript{220} Drug courts offer a direct approach to combating drug-related crime by addressing the cause of the criminal activity: the offender's addiction.

As of May 1998, there were 275 drug courts in operation in forty-eight states, with another 155 programs in the planning stages.\textsuperscript{221} In Kentucky, there

\begin{footnotesize}
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\item \textsuperscript{214} Id. § 88(2) (codified at KY. REV. STAT. ANN. § 533.254(2) (Michie Supp. 1999)).
\item \textsuperscript{215} KY. REV. STAT. ANN. § 533.258 (Michie Supp. 1999); KY. R. CRIM. P. 8.04(5).
\item \textsuperscript{216} Id. § 89(1) (codified at KY. REV. STAT. ANN. § 533.256(1) (Michie Supp. 1999)).
\item \textsuperscript{217} Id. § 89(2) (codified at KY. REV. STAT. ANN. § 533.256(2) (Michie Supp. 1999)).
\item \textsuperscript{218} Id. § 89(4) (codified at KY. REV. STAT. ANN. § 533.256(4) (Michie Supp. 1999)).
\item \textsuperscript{219} GOVERNOR'S CRIMINAL JUSTICE RESPONSE TEAM, FINAL REPORT AND RECOMMENDATIONS 12 (submitted to Paul E. Patton, Governor, Commonwealth of Kentucky, on Dec. 1, 1997).
\item \textsuperscript{220} See supra note 74 and accompanying text.
\item \textsuperscript{221} U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS PROGRAM OFFICE, LOOKING AT A DECADE OF DRUG COURTS: DRUG COURT ACTIVITY: SUMMARY INFORMATION 1 (May
\end{itemize}
\end{footnotesize}
are currently six adult drug courts conducting sessions, and at least eight more circuits are scheduled to begin operation in the near future.\textsuperscript{222} In addition, there are five juvenile drug courts in existence in the state.\textsuperscript{223} All of these drug court programs are operating under the auspices and support of the Administrative Office of the Courts.

Drug court can be defined as a court-supervised intensive drug treatment program.\textsuperscript{224} One of the key components of all drug court programs is the ongoing interaction of the judge with the participants.\textsuperscript{225} Indeed, participants must report directly to the judge on a regular basis, as often as once a week at first. Other components include intensive drug treatment,\textsuperscript{226} frequent drug screens,\textsuperscript{227} and graduated rewards or sanctions dispensed by the court.\textsuperscript{228}

Within these general parameters, drug courts can vary from jurisdiction to jurisdiction. Except for certain restrictions imposed by federal law as a condition to receipt of federal funds, local drug courts can develop their own rules regarding eligibility. In some drug courts, participation is a condition of probation after sentencing. In others, drug court can be part of a diversion plan. In any event, drug court programs are generally designed to require the participants to report and be under varying degrees of supervision for approximately eighteen to twenty-four months. Along with intensive treatment, participants are expected to maintain suitable employment, complete their education or job training, support their dependents, and pay any court-ordered fines, costs and restitution.

CONCLUSION

Twenty-five years ago, this author reviewed the sentencing provisions of the new Penal Code, and commented that the General Assembly had provided the

\textsuperscript{1998 & Supp. June 1998).}

\textsuperscript{222. \textit{KY. ADMINISTRATIVE OFFICE OF THE COURTS, DRUG COURTS PROGRAM} (information supplied by Commonwealth of Kentucky, Administrative Office of the Courts, two unpaginated, undated sheets).}

\textsuperscript{223. \textit{Id}.}


\textsuperscript{225. \textit{Id}. 23-25.}

\textsuperscript{226. \textit{Id}. 15-17.}

\textsuperscript{227. \textit{Id}. 21-22.}

\textsuperscript{228. \textit{Id}. 23-25.}
tools to achieve a more just and effective system of criminal sentencing.\textsuperscript{229} It was said further that it was the responsibility of the Bar and the courts to use these sentencing tools skillfully and in the progressive spirit in which they were adopted. The drafters of the Kentucky Penal Code had hoped that by giving judges, prosecutors and corrections officials a range of flexible alternatives, effective and efficient sentencing of offenders could be achieved. Their goal was two-fold: to reduce crime by offering rehabilitative treatment to those for whom incarceration was not indicated and to manage wisely the limited resources of the penal system.

As has been seen, the objectives of Kentucky’s lawmakers in 1974 were not attained. There are over four times the number of inmates in penal institutions, when compared to twenty-five years ago. Instead of five correctional facilities, the state now operates fifteen. There are approximately 15,000 felony offenders under the supervision of the Division of Probation and Parole, compared to about 3500 in 1972. Not surprisingly, the cost of keeping so many offenders in prison or under supervision has risen commensurately. The cause of the inmate population explosion may be due to the creation of new felony offenses, the enactment of laws prohibiting or restructuring probation and parole, the increase in the use of illegal drugs, or the failure to utilize available sentencing alternatives. Regardless of the cause for this inmate population explosion, the need to review and reform the sentencing portions of The Penal Code became evident by 1998. The Governor’s Crime Bill is the latest attempt by the Legislature to improve the manner in which Kentucky deals with criminal offenses.

The alternative sanctions contained in the Penal Code, as amended by the Crime Bill, allow judges and prosecutors to consider a varied array of sentences that can be tailored to the circumstances of each crime and the character of each offender. The substance and spirit of HB 455 clearly expressed the mandate of the Legislature: those who are charged with administering the criminal justice system must consider and use alternatives to incarceration where appropriate. However, the statutes are not self-executing. If the goal of effective and efficient sentencing of offenders is to be reached, judges and prosecutors must use alternative sanctions and treatment programs. Moreover, the Legislature

must fulfill its expressed commitment to the reform of the criminal justice system by providing the funds and personnel necessary for these programs to be successful. In order to accomplish the ultimate objective of reducing crime, the money saved by the utilization of alternative sanctions must be re-invested in community-based correctional programs.
HEALTH CARE REFORM IN KENTUCKY - SETTING THE STAGE FOR THE TWENTY-FIRST CENTURY?

by Vickie Yates Brown, Barbara Reid Hartung, Andrew J. Murray & Tate M. Bombard

INTRODUCTION

In the past decade, health care reform has become a governmental priority as the costs of delivering health care have outpaced the ability of many to pay for needed services. Kentucky is not unique in discovering that its efforts to resolve this problem have not achieved its intended results.

The possibilities for medical science appear virtually unlimited, yet a growing number of Americans do not have access to necessary primary and preventive health care because they cannot afford it.

As the problem of the uninsured grows, an increasing portion of the cost of patient care has gradually shifted from the private sector to the public sector. In 1998 government met nearly half of the nation’s health care expenditures.

Thus, the challenge of expanding access is growing more complex and difficult to solve.

This article will trace the history and impact of Kentucky health care reform during the 1990s, track the public and governmental response to these reforms, and determine their impact upon the health insurance market. Second, it will examine the increasing state and federal regulation of both the health insurance market, specifically, and the health care delivery system in general. Finally, it will attempt to make some sense out of the present system and predict where the American health care delivery system appears to be headed as we enter the twenty-first century.

1. All of the authors are resident in the Louisville, Kentucky office of Greenebaum Doll & McDonald PLLC, and they are members of the firm’s Health Law and Insurance Practice Group. Vickie Yates Brown, a member of the firm, is the Chair of the Health Law and Insurance Practice Group. Barbara Reid Hartung is also a member of the firm, and is the principal author of this article. Andrew J. Murray and Tate M. Bombard are associated with the firm.

REFORM INITIATIVES OF THE EARLY 1990S

A. The Health Security Act of 1994

In 1993, during his first week in office, President Clinton appointed the White House Task Force on Health Reform [hereinafter "the Task Force"], chaired by First Lady Hillary Rodham Clinton. The Task Force spent eight months analyzing data and meeting with over 1,100 persons and organizations involved in health care decision-making, including providers, insurance company executives, and business owners, to assess the problems facing the American health care system. In September 1993, based upon the recommendations of the Task Force, President Clinton proposed the Health Security Act of 1994. Despite the urging of the White House, particularly the First Lady, the 103rd Congress failed to pass this total reorganization of the American health care delivery system. In fact, the proposal died without a floor vote in either house of Congress.

The Act had envisioned broad changes to the current system, including provisions aimed at controlling the ever-increasing cost of health care in our economy. The following overview of the Act, as originally proposed by President Clinton, demonstrates the comprehensive nature of this initiative.

The Clinton Plan was grounded on six fundamental principles: security, simplicity, savings, choice, quality, and responsibility. It provided security by guaranteeing universal, comprehensive, and life-long health care coverage for

4. The Act was formally introduced on November 20, 1993 in both houses of Congress, as House Bill 3600 and Senate Bill 1757 [hereinafter "the Act"]). A Bill summary and status for the 103rd Congress can be found on the Thomas Legislative site, (visited 1/4/2000)
   <http://thomas.loc.gov/cgi-bin/bdquery>.
5. ld.
6. ld.
8. Transmittal Letter from President Clinton to the Congressional leadership (October 27, 1993) (regarding H.R. 3600, 103rd Cong. (1993)) [hereinafter "Transmittal Letter"].
HEALTH CARE REFORM IN KENTUCKY

every American. It claimed to foster simplicity by reducing both bureaucracy and paperwork, and by creating one standardized claim form. The plan also anticipated savings from patient access to reports detailing health plan performance, and from authorizing the federal government to regulate fee increases by providers. Further, it protected choice by allowing patients to select between different types of plans. Finally, it emphasized patient responsibility by requiring everyone to pay something, either premiums or copayments, toward health care costs.

The Clinton Plan differed from national health care programs in other western countries because it attempted to maintain the private health insurance system and it extended employer-based coverage. A new federal agency, the National Health Board, would have been granted broad oversight responsibility for the nation’s health care delivery system. While the states would have been responsible for certifying and monitoring compliance by health plans and providers with national standards, federal funding would have been contingent on National Health Board approval of each state’s program.

Every citizen and legal resident, regardless of health or employment status, would have received a plastic “health security card,” which would have entitled that person to comprehensive health benefits. One of the most notable structural changes would have involved the creation of giant purchasing cooperatives called “alliances,” in which most Americans, but not individuals enrolled in most federal health benefit programs, would have enrolled as members. These alliances would have negotiated with health insurance companies to obtain the best possible rates for their members. "Universal

9. Id.
10. Id.
11. Id.
12. Id.
14. Transmittal Letter, supra note 8, at 3.
15. Id.
16. Baker, supra note 7, at 290 (“The National Health Board would consist of seven members appointed by the President with advice and consent of the Senate.”); see also Transmittal Letter, supra note 8, at 3.
17. H.R. 3600, 103rd Cong., § 1001(b) (1993). The health care alliance or other entity that offered an individual’s health plan would issue the card to that individual. Id.
18. Baker, supra note 7, at 289-90 (stating that “[b]ecause each alliance would be a virtual monopoly in its area, it would have been able to obtain excellent insurance rates.”). The Plan
coverage would be achieved through shared responsibility: a requirement that individuals purchase health insurance, employers contribute to the cost for their employees and their dependents, and the government provide subsidies for low income families who cannot afford health insurance on their own.”

Under the Clinton Plan, premiums paid to the health alliance by employers and individuals would have constituted the primary funding for health care. Funding also would have come from the expected savings in federal employee health care programs, Medicare and Medicaid, and from corporate alliance surcharges. Additional funding would have come from a seventy-five cent per pack increase in the tax on cigarettes, and a one percent payroll tax on large corporations which had their own health alliances.

Immediately after the President unveiled the Act, close to sixty percent of the public supported the legislation. One year later, only thirty-nine percent of Americans supported Clinton’s approach to reform, and nearly fifty percent outright opposed his plan. Given this change in public opinion, it is not surprising that the Act and comprehensive health care reform died in Congress. However, before this turn of events became apparent, the 1994 Kentucky General Assembly passed House Bill 250, a measure remarkably similar to Clinton’s 1993 Health Security Act.

B. Kentucky’s Response to the Proposed Federal Legislation

One of the keystones of Governor Brereton Jones’ legislative agenda was the passage of a comprehensive health care reform package. Although the legislation which ultimately effected some of the Governor’s desired reforms was introduced during the 1994 Kentucky General Assembly, this was not Governor Jones’ first effort at health care reform.

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proposed both regional and corporate alliances to be created by state governments on a local or statewide basis, depending on the needs of the state, to provide health insurance coverage to the self-employed and the unemployed. Corporations with more than 5,000 domestic employees could form corporate alliances, provided that coverage and pricing was comparable to that of the regional alliances. H.R. 3600, 103rd Cong., §§ 1300-97 (1993).


In 1992, Governor Jones created a forty-eight member task force to review Kentucky's health care system and to propose how best to reform it. Additionally, the Governor established a twenty-eight member Commission on Health Care Reform to draft health care reform legislation. When it failed to act, the Governor developed his own legislation and called a Special Session of the General Assembly on May 10, 1993 to discuss health care reform.

On May 13, 1993, Governor Jones' proposal was privately unveiled to members of the House Majority Caucus in what was described as "an informal session for legislators on health care reform legislation." There were two bills debated during this special session, but only one of these was enacted by the General Assembly.

[The 1993 Bill] created the Kentucky Health Care Data Commission; replaced certain Medicaid provider taxes with a new health care provider tax effective July 1, 1993; and imposed a tax on hospital gross revenues to partly finance a disproportionate share program for hospitals participating in the Medicaid program and providing indigent care.

The 1993 Bill also created a joint executive and legislative branch commission to further analyze health care reform issues. Based upon the commission's analysis, and prior to the 1994 legislative session, the Legislative Research Commission identified the options available to Kentucky: (1) to wait for federal action before undertaking major health care reform; (2) to adopt cost containment measures before trying to finance coverage for the uninsured; (3) to adopt health insurance reforms, including state-wide community rating, portability and guaranteed issue; (4) to focus on controlling costs by restricting provider self-referrals, placing limits on the volume of health services, requiring cost-sharing by consumers and developing treatment protocols; (5) to establish voluntary arbitration of health insurance disputes or tort reform; (6) to establish mandated rates for hospitals and other health care providers; and (7) to create

25. 93 S.B. 1 [hereinafter "the 1993 Bill"].
27. In community rating, one rate is applied to all persons seeking insurance, regardless of their individual characteristics. Modified community rating allows some rate differentials based upon factors such as age, sex, geographical location, occupation or health status.
Many of these concepts were included in 1994's House Bill 250, which reflected Governor Jones' desire to create a health care delivery system that would provide a uniform comprehensive health benefits package for all Kentuckians. Thus, the proposed legislation included:

- universal coverage;
- government-sponsored statewide purchasing alliance with mandatory participation by all government employees;
- a new and powerful government agency, the Kentucky Health Policy Board;
- government standardized health care policies; and
- increased emphasis upon the use of managed care techniques to control costs.

The Governor's proposal also sought to improve access to health care by providing both more graduates from family practice programs and by placing caps on specialty programs at Kentucky's two medical schools, as well as an aggressive minority recruitment and scholarship program.29

House Bill 250 would have complemented the systematic changes proposed by the President in his Health Security Act. However, the sheer breadth of House Bill 250 caused concern among legislators when it was introduced during the 1994 General Assembly:

The legislative history of House Bill 250 is rather complex and confusing. . . . House Committee Substitute #2 and sixteen . . . floor amendments were passed fifty-eight to forty-one by the House of Representatives and sent to the Senate. . . Appropriations & Revenue Committee . . circulated another substitute. . . [E]ighty-nine floor amendments were filed. . . . Twenty-five of these amendments were included in the version of House Bill 250 that passed as the Senate Committee Substitute #2 on March 22, 1994.

The bill came back to the House on March twenty-third . . . [and was] . . . assigned to . . . a free conference committee. The committee reported out an amended bill to the Senate, which passed it with a vote of twenty to sixteen.

The House initially rejected the report but... on the last day of the legislative session, Friday, April 15th... adopt[ed] House Bill 250.30

As passed, House Bill 250 contained many of the Governor's original proposals but eliminated others, including his proposal for universal coverage.31 Still, the landscape of health care delivery in Kentucky was dramatically changed by the passage of House Bill 250. Although there has been retrenchment since, many of the far-reaching changes of Governor Jones' proposals have remained. One major aspect which almost immediately met with resistance, and which was ultimately among the first to be repealed, was the Kentucky Health Policy Board. It is fair to say that most Kentuckians were simply not ready to accept a governmental agency with the power and responsibility to regulate and restructure all aspects of Kentucky's health care delivery system.

1. The Kentucky Health Policy Board and the Kentucky Health Purchasing Alliance

The Kentucky Health Policy Board was comprised of five full-time members. A number of duties and responsibilities which were previously vested in the Cabinet for Human Resources or the Department of Insurance were transferred to this Board.32

The Board has a truly awesome array of duties, ranging from the development of demonstration projects to the establishment of a purchasing cooperative, the Kentucky Health Purchasing Alliance.... [T]he Board is required to analyze the costs and benefits of specific health care interventions and to develop recommendations to the 1996 session for implementation and funding of a universal access plan. Other mandatory functions include developing

Grady states as follows:
While House Bill 250 does not provide universal coverage, the HPB authority is moving Kentucky toward universal coverage.... According to the reform timetable, the HPB must devise a plan for implementing and funding 'a universal access plan for all Kentuckians,' and recommend this plan to the 1996 Regular Session of the General Assembly.
Id.
32. Costich & Helton, supra note 30 [hereinafter "the Board"].
standardized claim forms; approving certificate of need applications...compiling fee lists. . . . The Board will not manage the day-to-day operations of the Kentucky Medical Assistance Program, but it will have oversight responsibility for cost containment. . . . The Board is to work with various licensure boards (medical, dental, nursing, etc.) to develop and recommend clinical practice parameters. . . . The Board . . . [will collect] data . . . [and disseminate] . . . information on the cost, quality and outcome of health services provided by health facilities and providers . . . to determine the total cost per insured group per month. . . .

Almost from the outset, the powers granted to the Board were the subject of much public discussion and comment. As one commentator noted, regarding the Board’s data collection functions, “[u]sing this data, they [the members of the Board] dictate policy and regulations, thus shaping the direction of health care reform in this state.”34 Cost containment measures, such as practice parameters and listing of provider fee schedules, were the subject of mixed emotions among members of Kentucky’s medical community. While practice parameters were intended to establish a legal standard of care, House Bill 250 did not include any tort reform measures. Thus, these parameters were seen as a measure of control, not protection. The Board viewed provider fee disclosure as a method to “encourage competitive pricing . . . and . . . improve the quality of care,” while some providers expressed concern that “this would lead health maintenance organizations to include only those physicians who provide the least expensive services.”35

One report and analysis of House Bill 250 noted that the Board would enjoy unprecedented power over health care delivery,36 and it expressed concern over the Board’s rate-setting authority, noting that price controls “are inherently inconsistent with free market cost discipline which could lead to providers and plans deciding to exit the market, leaving fewer choices for consumers.”37 These words, written in 1994, proved to be prophetic.

In addition to creating the Board, House Bill 250 established the Kentucky Health Purchasing Alliance, a state entity responsible for purchasing health care

33. Id.
34. Grady, supra note 31, at 42.
35. Id.
37. Id. at 3; see generally Managed Competition, supra note 26.
benefits coverage for its members. All state and local government employees were required to obtain their health benefits coverage through the Alliance. Voluntary Alliance members included individuals, employers, and associations of one hundred persons or less.

The Coopers & Lybrand Report suggested that a “voluntary alliance may attract a disproportionate number of high cost individuals” and “could be overwhelmed by the addition of a higher risk population.” This prediction was solidified by other studies which indicate that states having similar alliances “have yet to succeed in attracting large numbers of enrollees from the business sector or in negotiating significantly lower health insurance premiums.”

Another problem noted by the Coopers & Lybrand Report was that of cost-shifting. Prior to House Bill 250, cost was distributed among all medical consumers in the state, including Employee Retirement Income Security Act consumers. However, under House Bill 250, much of that cost would fall squarely on Alliance members, which would strike an expensive blow to individuals and small employers.


Under House Bill 250, a number of insurance-specific reforms were mandated, but compliance with these provisions was not required until July 15, 1995. After that date, insurers and managed care organizations were required, whether operating inside or outside of the Alliance, to use only state-developed standard health benefit plans, and to guarantee renewability of all policies except for nonpayment of premiums, breach of contract, or if the insurer ceased doing business in Kentucky. Kentucky residents were guaranteed access to health

38. H.B. 250, supra note 29 [hereinafter “the Alliance”].
39. See KY. REV. STAT. ANN. § 304.17A-070 (Michie 1999); KY. REV. STAT. ANN. § 304.17A-010(17), (23) (Michie 1999) (as enacted by House Bill 250). Section 17 of House Bill 250 also contemplated that the KHPB would make Medicaid recipients mandatory alliance members once the Federal Health Care Financing Administration granted Kentucky a waiver to do so.
40. Managed Competition, supra note 26, at 6.
42. H.B. 250, supra note 29, at § 59 (codified at KY. REV. STAT. ANN. § 304.17A-160 (use of standard plans)), § 55 (codified at KY. REV. STAT. ANN. § 304.17A-120 (use of modified community rating)).
43. Kentucky Department of Insurance, Kentucky’s Market Report on Health Insurance at 10-3
benefits coverage, and pre-existing condition exclusions were limited to six months or eliminated completely if the person had carried other health coverage within the last sixty days. Insurers and managed care organizations were required to use a modified community rating system to be developed by the Kentucky Health Policy Board, and were prohibited from excluding any eligible person or dependent from a group because of actual or expected health condition.

House Bill 250 regulated all aspects of the health care delivery system. A number of provisions related to providers, including (1) disclosure of fees and insurance reimbursements, (2) self-referral prohibitions and anti-kickback provisions, (3) changes in the certificate of need process, (4) the provider tax, (5) regulations involving access to medical records, (6) limitations on


44. H.B. 250, supra note 29, at § 54 (codified at KY. REV. STAT. ANN. § 304.17A-110).

45. Managed Competition, supra note 26, at 6; DOI Market Report, supra note 43, at iv (“When the federal proposal did not pass, Kentucky was one of only seven states at the time to require both guaranteed issue and MCR [modified community rating] year-round in the individual market.”)

46. Providers must post their highest fee for specified medical services and were prohibited from charging more than that amount. See Legislative Research Commission, A CITIZEN’S HANDBOOK, KENTUCKY’S HEALTH CARE REFORM (May 1994) at 8 [hereinafter Citizen’s Handbook].

47. Id. at 9. Providers were prohibited from knowingly receiving or offering remuneration for medical assistance benefits in return for purchasing or ordering services or items and from receiving payments or rebates for referring a patient to another provider.

48. It is beyond the scope of this article to detail the history of the certificate of need (“CON”) program in Kentucky. A number of studies, however, have found that CON programs are ineffectual in controlling costs and may adversely impact the quality of health care services. See e.g., William Custer, Certificate of Need Regulations and the Health Care Delivery System, Research Report No. 97-1, Georgia State University Center for Risk Management & Insurance Research (1997); see also Kentucky Cabinet for Health Services, A Report on Certificate of Need in Kentucky, Health Policy & Analysis Research Branch, Certificate of Need Office (June 12, 1997).

49. This tax was imposed on gross revenues of providers – hospitals at the rate of 2.5%, prescriptions at 25 cents each, and other providers at 2%. See WHAT NEXT, supra note 2, at p.18.

The Provider tax was one of the more controversial provisions in House Bill 250. This statute imposed taxes on health care providers to increase the pool of funds available for the state matching share of Medicaid...[O]pposition to the provider taxes led to several lawsuits and ultimately to their repeal.
restrictive covenants,51 and (7) an “Any Willing Provider” law requiring insurers and managed care organizations to accept any provider willing to meet their terms and conditions.52

Finally, House Bill 250 contained a variety of Medicaid reforms, mainly aimed at broadening the use of managed care cost containment features. At the time House Bill 250 was passed, many of these provisions were dependent upon the Commonwealth’s receipt of a waiver from the Health Care Financing Administration under the provisions of Section 115 of the Social Security Act.53

3. The Aftermath of House Bill 250

Although House Bill 250 enacted sweeping responses in a number of areas, its impact upon the health insurance market has been most visible to the average Kentuckian. While the goals of House Bill 250 were laudatory, “[i]n retrospect, it was clearly unrealistic to make Kentucky’s small, fragile state-regulated market the engine of health reform in the absence of a national context of similar reform.”54

Because of public concerns regarding the implementation of the insurance reforms (particularly those requiring modified community rating and standard plans), and the time needed to get the new regulatory structure running, a series

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50. Providers were required to provide each patient with one free copy of his or her medical record upon request. Citizen’s Handbook, supra note 46, at 19.

51. Noncompetition clauses were declared against public policy, but would be enforceable if limited to one year or less. Id. at 18.

52. Ky. Rev. Stat. Ann. § 304.17A-110(3) (Michie 1999); DOI Market Report, supra note 43, at x (“With the current Any Willing Provider Law, Kentucky may never truly benefit from any savings brought about by managed care.”). This Report also notes that Kentucky was one of only eight states with an Any Willing Provider Law applying to all medical providers.


54. What Next, supra note 2, Ch. 3, at 21.
of executive orders allowed insurers to extend pre-House Bill 250 policies for almost three years, until the 1996 General Assembly repealed many of the most controversial provisions.\textsuperscript{55} It is true that, due to the guaranteed issue provisions of House Bill 250, some people were able to purchase health care insurance for the first time. However, the cost of coverage for Kentuckians subject to modified community rated policies began to increase, often dramatically, which forced some small businesses and healthy individuals out of the market altogether.\textsuperscript{56} Many insurers believed the combination of guaranteed issue and modified community rating would make it impossible for them to operate in Kentucky on a fiscally sound basis. Indeed, by the middle of 1996, forty-five insurers and managed care organizations had pulled out of Kentucky,\textsuperscript{57} leaving consumers fewer choices among managed care organizations and only the state-run program to offer indemnity coverage in Kentucky.\textsuperscript{58}

4. The 1994 Act – Senate Bill 343

Governor Paul Patton, who was elected in November 1995, was determined to modify or repeal much of House Bill 250. By this time, many legislators agreed there was a need to retreat from some of the most aggressive aspects of House Bill 250's reform measures. After many compromises in the House and Senate, Senate Bill 343 was passed on April 1, 1996.\textsuperscript{59}

Among the most important provisions of Senate Bill 343 were those preserving guaranteed issue, portability of insurance, and the purchasing alliance, although it limited mandated members to state employees. Senate Bill 343 limited the availability of guaranteed issue to persons who had been Kentucky residents for the previous twelve months, it extended allowable pre-existing condition exclusions to twelve months, and it allowed the use of non-standard policies once they had been approved by the Department of Insurance.

\textsuperscript{55} Id. at 19.

\textsuperscript{56} Modified community rating has increased premiums for the younger and healthier insureds. Combined with the overall rate increases resulting from richer benefit plans, guaranteed issue, and guaranteed renewal, numbers of younger and healthier persons have dropped health insurance. Thus, the spiral has begun in the modified community rated market in Kentucky. DOI Market Report, supra note 43, at vi.

\textsuperscript{57} Id.

\textsuperscript{58} This state-run program was known as Kentucky Kare, and it was originally created by KY. REV. STAT. ANN. § 18A.2281 as a self-insured fund for state employees.

Senate Bill 343 also included a number of provisions that revised the rating of health care benefit policies, including some that required hearings for any rate filing that would raise premiums beyond a preset limit. Senate Bill 343 also abolished the Kentucky Health Policy Board and reassigned its duties to the Cabinet for Health Services and the Department of Insurance.

There had been little time to determine the impact or effectiveness of House Bill 250, which caused the Kentucky Long Term Policy Research Center to note with respect to Senate Bill 343: “These provisions took effect when the majority of post-reform policies had only been in place a few months, greatly compounding the difficulty of any coherent analysis of the 1994 Act’s effects.” Even as Kentucky has continued to restructure its health care delivery system, the march toward managed care continued at the national level. The steps taken by the federal government beginning in 1996 were two-fold: on one hand, the federal government continues to push enrollees in federal programs toward managed care, and on the other hand, both the executive and legislative branches continue to impose limitations and obligations upon the managed care delivery system. The long term result of these measures would appear to be an increasing federalization of the field of health insurance, an area of regulation historically considered to be the responsibility of the states.

FEDERAL HEALTH CARE REFORM IN THE MID-1990s

In 1979, only five percent of all Americans were enrolled in Health Maintenance Organizations (HMOs). Recent estimates place the percentage of Americans enrolled in managed care plans at seventy-five to eighty percent.

60. Hearings were required for any rate filing that would raise premiums more than the sum of the medical care consumer price index plus three percent. The Attorney General would be designated as a consumer intervenor in all rate hearings. See Legislative Research Commission, COMPARISON OF KEY PROVISIONS OF 94 HB 250 AND 96 SB 343 AS ENACTED, (April 12, 1996); see also DOI Market Report, supra note 43, at 2-1 (discussion of the rating reforms and DOI Bulletin 96-3).

61. WHAT NEXT, supra note 2, Ch. 3, at 19.


63. See Melissa B. Robinson, Public Worries About Managed Care Highlighted at Demographic Hearing, ASSOC. PRESS, Dec. 17, 1997, available in LEXIS, News Library, AP File ( “about 75 percent of privately insured Americans receive their health care through managed care.”); Deborah Mihm, Specious Talk About Medicare, WASH. POST, Jan. 16, 1998, at A20 ( “about 80% of
Today, most individuals would have difficulty locating, much less affording, a traditional indemnity health insurance plan. In 1996, even as Governor Patton was working to unravel many of Kentucky’s 1994 reform measures and attempting to stabilize the insurance markets in Kentucky, the federal government stepped into the reform movement again.

A. The Health Insurance Portability and Accountability Act of 1996

On August 21, 1996, President Clinton signed into law the bi-partisan Kassebaum-Kennedy Act, known as the Health Insurance Portability and Accountability Act. The provisions of HIPAA, codified in the Internal Revenue Code and the Employee Retirement Income Security Act, are primarily aimed at employers and any health plan they offer, while the HIPAA provisions codified in the Public Health Service Act are directed to insurers and employers not covered by ERISA, or non-federal government plans.

HIPAA is divided into several titles, each of which addresses a different aspect of health care. Title I generally mandates portability and nondiscrimination in connection with health insurance offered through employer-sponsored health plans, including self-funded plans, and individual policies, and Title IV contains COBRA revisions and other enforcement provisions addressing insurance concerns. Title II is directed at fraud and abuse in the health care industry and insurance market, and it authorizes the Department of Health and Human Services and Health Care Financing Administration to issue such regulations as may be necessary. Titles III and V address various tax issues, including Medical Savings Accounts.

The most obvious impact of HIPAA has been upon the health insurance industry and markets. HIPAA’s provisions apply to group health plans and

64. Pub. L. No. 104-191 [hereinafter “HIPAA”].
65. HIPAA’s provisions are codified in the Internal Revenue Code (26 U.S.C.), ERISA is codified at 29 U.S.C., and the Public Health Service Act is found at 42 U.S.C. § 300gg.
66. HIPAA, supra note 64.
67. COBRA is the more familiar term for the Consolidated Omnibus Budget Reconciliation Act of 1985.
68. HIPAA, supra note 64.
69. Id. at §§ 201-231.
70. Id. at §§ 300, 301.
One specific requirement was that within twelve months of HIPAA's effective date, each state would adopt legislation compatible with the HIPAA requirements for the individual market for health insurance, or else be deemed to have adopted the federal scheme. Because Kentucky's General Assembly would not meet in regular session until January 1998, Kentucky received an extension until July 1, 1998 to implement the individual market reforms.

1. Changes to the Large and Small Group Markets

Prior to HIPAA, Kentucky and a number of other states had adopted guaranteed issue for some of their citizens. However, under the Employee Retirement Income Security Act, states cannot regulate employer-sponsored health benefit plans. Through HIPAA, all group health plans, including self-insureds, and issuers in the small group market, must make coverage available to all eligible persons. Pre-existing condition limitations can be imposed only when the exclusion relates to a condition for which medical treatment, care, advice or diagnosis was recommended or received within the six month period immediately prior to enrollment in the group health plan. Pregnancy cannot be considered a pre-existing condition. Further, the exclusion cannot extend for longer than twelve months after the enrollment date. Under the HIPAA concept of "creditable coverage," prior health coverage must be counted toward the exclusion period, provided there has not been a break in coverage of more

71. The term "issuer" applies to both health insurers and managed-care organizations in HIPAA. Id. at § 9805.
72. See Correspondence between Governor Paul Patton and George Nichols, III, Commissioner, Kentucky Department of Insurance and the Health Care Financing Administration contained in Department of Insurance Seminar Materials "HIPAA, A State and National Perspective" (August 1997).
73. Id.
74. Id. The exclusion period is extended to 18 months for late enrollees in group plans. A late enrollee is one who does not enroll, when first eligible, in a group plan. Certain enrollees who fail to timely enroll are not considered late enrollees but rather "special enrollees" and must be allowed to enroll, if they so request within 30 days of a qualifying event. Qualifying events include (a) the end of coverage under another plan or policy, (b) exhaustion of coverage under COBRA, (c) termination of prior coverage due to loss of eligibility or because the employer ceased making contributions towards its cost, or (d) existence of a new dependent through marriage, birth or adoption.
Among HIPAA's most important provisions are those prohibiting discrimination based on health status. No issuer or group health plan can establish rules for eligibility, enrollment, or continuation of coverage that require any person to pay a higher premium than other enrollees because of health status. However, HIPAA does not regulate the premiums which may be charged to a group, or the factors upon which such premiums are based.

HIPAA also requires issuers in the small group market to accept every small employer and all eligible individual within that group, without regard to health status. An issuer may deny coverage when an employer fails to meet either employer contribution rules or participation rules. An insurer offering a network plan may also decline to cover a small group when employees work or reside outside the issuer's service area. Coverage may be refused when the issuer lacks financial reserves or network adequate for additional members or

75. Id. HIPAA requires "certification of prior creditable coverage" by the prior group or the issuer. Prior creditable coverage includes group and individual health coverage, Part A or B of Medicare, Medicaid, other federal health plans, and state health benefits risk pools.

76. See id. Health status-related factors include medical history, claims experience or receipt of medical care, medical condition [both physical and mental], genetic information, evidence of insurability [including domestic violence] and disability.

77. Id. Only in two instances are small group plans not impacted by HIPAA: (i) if the plan has less than two participants a "very small plan," or (ii) when the plan provides only "excepted benefits." Excepted benefits include (i) accident or disability insurance, (ii) liability or workers' compensation medical benefits, (iii) credit insurance, (iv) coverage for on-site medical clinics, and (v) limited scope dental or vision benefits, long-term care, home health care, or community based care. When a separate policy provides specific benefits [e.g., cancer policy], does not coordinate benefits and pays without consideration of other coverage, this is considered an excepted benefit.

78. Id.

79. Id. Contribution rules require the employer to contribute to the cost of its employees' insurance, while participation rules require a minimum percent of employees to participate in the insurance program.

80. Id.

81. Id. When an issuer does not offer coverage due to lack of an adequate network or reserves, the issuer is prohibited from writing additional business in that market for 180 days. An issuer may cease writing a form of coverage in a market upon 90 days notice to all affected insureds and the state department of insurance and by offering all affected insureds another coverage plan. An issuer may withdraw from a market completely upon 180 days notice and non-renewing all current business. The issuer cannot re-enter that market for five years.
writes coverage only through one or more bona fide associations. While guaranteed issue does not apply in the large group market, both large and small groups are subject to guaranteed renewability requirements, requiring renewal of coverage at the option of the plan sponsor.

2. Changes to the Individual Market

In apparent acknowledgment of the higher risks often associated with the individual market, it is treated somewhat differently than the group markets under HIPAA. For "eligible persons," the HIPAA rules are substantially the same as those for the small group market. An issuer cannot decline to issue a policy to, or impose any pre-existing condition limitation upon, an eligible individual. Individual policies are guaranteed to be renewable, subject only to the same exceptions previously noted for cancellation or non-renewal of policies in the small group market. If an individual is not an "eligible" person, the federal law provides no protection to that individual.

States are permitted to "opt out" of HIPAA's individual market rules by adopting an alternative market mechanism, which must be approved by the Health Care Financing Administration. An alternative market mechanism must meet the following requirements:

- Provide a choice of health insurance coverage to all eligible individuals;
- Impose no pre-existing condition exclusions or affiliation periods for eligible individuals;
- Include at least one form of coverage comparable to either comprehensive

82. *Id.* Such associations are exempted from guaranteed issue but not guaranteed renewability. A bona fide association is one actively in existence for five years; formed and maintained for purposes other than obtaining insurance; in which neither membership nor insurance is based on health status and insurance is made available only to or through its members. The association must also meet any additional requirements that may be imposed upon it under state law.

83. *Id.* An issuer may non-renew or discontinue coverage only for failure to pay premiums; misrepresentation by the plan sponsor; violation of minimum participation or contribution rules; termination of all coverage in a market; movement by all enrollees outside the service area; and, for coverage through a bona fide association, when the policyholder ceases to be a member.

84. *Id.*

85. *Id.* An eligible individual has had at least 18 months of continuous prior creditable coverage with the most recent coverage being under a group health plan and who is not eligible for Medicare, Medicaid or any group health plan or for COBRA or state continuation coverage.
individual coverage, or a standard plan, offered in the individual market in the state; and

- Implement either:
  
  (a) the National Association of Insurance Commissioners Small Employer and Individual Insurance Availability Model Act or Individual Health Insurance Portability Model Act; 86

(b) a qualified high risk pool or other risk adjustment/spreading mechanism or otherwise subsidizing eligible individuals; or

(c) allow eligible individuals to purchase all individual health policies otherwise available. 87

If a state fails to adopt an acceptable alternative market mechanism, HIPAA rules for the individual market will apply without exception.

The Secretaries of Labor and Treasury are responsible for enforcing the health portability requirements on group health plans under the Employee Retirement Income Security Act and through the excise tax provisions of the Internal Revenue Code, respectively. The individual states are responsible for enforcing the group and individual market requirements imposed on issuers, but if the Secretary of Health and Human Services determines that a state has failed "to substantially enforce" those laws, the Department of Health and Human Services may step in and assert federal authority to enforce the requirements against issuers in that jurisdiction.

B. Kentucky’s Response to HIPAA – House Bill 315

The passage of HIPAA meant that once again, Kentucky would need to revise its health insurance laws. Thus, during the 1998 General Assembly, a law was enacted in order to put Kentucky in full compliance with HIPAA.88 While a number of the HIPAA requirements were already in place in Kentucky, House Bill 315 continued to redesign the health insurance market in Kentucky. In particular, the following provisions were enacted:

- only one standard plan must be offered by each managed care organization and insurer;

86. Among its other functions, The National Association of Insurance Commissioners (NAIC) drafts Model Acts addressing various insurance regulatory issues for use by the states.


88. H.B. 315, Gen. Assembly (Ky. 1998) [hereinafter "House Bill 315"].
the Kentucky Health Purchasing Alliance was abolished as of July 1, 1999.89

rating methodologies and processes were once again revised; and

a Guaranteed Acceptance Program was implemented.90

House Bill 315 also implemented a number of consumer protection provisions regulating managed care, and it provided tax incentives for individuals and small businesses by allowing them to deduct health insurance premiums from their state income tax, beginning in 1999.91 Finally, the provider tax originally enacted in 1994 was further whittled away with the tax on prescription drugs, which was repealed effective June 30, 1999.92

Thus far, despite overtures at broader regulations of the entire health care delivery system, Kentucky’s efforts at reform have become more and more focused on regulating only health insurers and managed care organizations. One of the results of this approach is increasing financial difficulties for entities operating in the health insurance market. By 1998, it was obvious that the state’s self-funded plan, Kentucky Kare had become insolvent. In 1997, twelve of Kentucky’s fourteen domestic health maintenance organizations lost

89. News From State Auditor Ed Hatchett’s Office (November 19, 1998). The alliance experienced problems from the onset of its operations, which resulted in “inaccurate billing, administrative confusion and constant uncertainty for the 164,500 people who obtained insurance through [House Bill 250].” See &lt;http://www.state.ky.us/agencies/apa/releases/health%20purchasing%20alliance.htm&gt;.


[The GAP] was created in 1998 to provides access to insurance for persons with high cost conditions. From 7/1/98 from 3/99, a total of 1,443 persons have enrolled in GAP. This number was reduced to 1,245 when 203 persons were removed for nonpayment of premium. Losses for the six-month period ending 12/31/98 amounted to $1,621,770.96.

Id. at 30.


92. The 1996 General Assembly had previously passed 96 H.B. 397, which phased out the tax imposed upon physician services by June 30, 1999.
money.\textsuperscript{93}

On average, Kentucky managed care plans have spent between 85 percent and 90 percent of their revenues on medical benefits in each of the last four years. \[\text{It is not unlike spending in other states. ...} \]

In the health insurance sector as a whole, $835 million in losses was more than made up for with over $2 billion in investment income and gains on the sales of investments. Industry analysts and observers ... question how long insurers can continue to eat into their capital portfolios to make up for operational losses.\textsuperscript{94}

Kentuckians have begun to recognize that insurance reform alone does not create either access or affordability. Insurance is simply a tool by which risks of the insureds are pooled and the cost of the risks insured against is spread among the same insureds. Aside from the administrative costs associated with the insurance product, the premium reflects the monies expended by the insurer to pay claims. In response to a questionnaire circulated by the Kentucky Long Term Policy Research Center, a number of Kentuckians stated that Kentucky has never really dealt with the cost of care, leading to the conclusion that “[t]he issue of the cost of health services – the ultimate obstacle to more widespread health insurance coverage – has not yet been addressed coherently at either the state or federal level.”\textsuperscript{95}

\textbf{D. More Federal Laws and Initiatives}

\textit{1. Government Payors And Managed Care}

\textit{a. Medicare}

The Health Care Financing Administration reported that in 1998, the public share of expenditures on health care in America was 47.1 percent, principally for Medicare and Medicaid enrollees. Additionally, “[t]he Congressional Budget Office and HCFA’s Office of the Actuary predict that during the first decade of the new millennium, national health spending ... [will rise] from $1.0 trillion in 1996 to about $2.1 trillion in 2007.”\textsuperscript{96}

\begin{footnotes}
\textsuperscript{93} 2000 ISSUES, supra note 90, at 30.
\textsuperscript{94} WHAT NEXT, supra note 2, Ch. 5, at 30.
\textsuperscript{95} Id., Ch. 6, at 70.
\textsuperscript{96} WHAT NEXT, supra note 2, Ch. 2, at 11. This report also notes that, on a per capita basis, spending on health care has risen from $341 in 1970 to a projected $7,100 in 2007. HCFA Office
\end{footnotes}
The Health Care Financing Administration estimates that there are presently about nineteen million Americans enrolled in Medicare and Medicaid managed care plans, which makes these two programs the largest purchasers of managed care in the country.\textsuperscript{97} As of August 1997, more than 5.5 million Medicare beneficiaries were enrolled in a total of 398 managed care plans, accounting for about 14 percent of the total Medicare population.\textsuperscript{98} This is a 132 percent increase in managed care enrollment since 1992.\textsuperscript{99}

Managed care, or at least managed care techniques, have been used by Medicare since the 1970s, when Medicare implemented price controls and utilization review in an attempt to control costs.\textsuperscript{100} The federal government has continued to search for cost saving methods. The most recent effort was in the Balanced Budget Act of 1997, which provides another managed care option for Medicare beneficiaries known as Medicare+Choice.\textsuperscript{101} Medicare+Choice also includes a new category of plans for Medicare beneficiaries—provider-sponsored organizations.\textsuperscript{102} Advocates of provider-sponsored organizations argue that they will afford savings for Medicare because a layer of costs associated with insurers will be eliminated when the federal government contracts directly with the providers of medical services. The Health Care Financing Administration issued interim final regulations for provider-sponsored organizations and Medicare+Choice plans in May 1998 and June 1998,
respectively.\textsuperscript{103}

\textit{b. Medicaid}

As with Medicare, enrollment in managed care plans through state Medicaid programs has recently increased significantly. Since 1992, enrollment in Medicaid managed care plans has increased by more than 170 percent.\textsuperscript{104} In 1997, the Health Care Financing Administration reported that forty-eight states were using managed care plans in their Medicaid programs, primarily through federal waivers, which were used to approve managed care initiatives for Medicaid recipients at the state level.\textsuperscript{105} Kentucky received its waiver in October 1995.\textsuperscript{106}

The Balanced Budget Act of 1996 relaxed the rules for Medicaid managed care plans by expressly permitting states to require most Medicaid recipients to join managed care plans, without adhering to the previous requirement of a specified percentage of non-Medicaid enrollees. Recipients in urban areas must have a choice of at least two plans, and in rural areas, recipients must be able to choose between two primary care doctors or case managers.\textsuperscript{107} Recipients can be locked into a plan for a year, and may be charged copayments.\textsuperscript{108} Plans must follow consumer protection rules, such as establishing grievance procedures and reasonably covering emergency care.\textsuperscript{109}

The Kentucky Long Term Policy Research Center has recently reported, after analyzing the impact of Medicaid managed care in Kentucky:

\textsuperscript{103} HCFA published a final Medicare PSO solvency rule on December 22, 1999. A link to the final regulation may be found at <http://www.access.gpo.gov/su_docs/fedreg/a991222c.html>. Kentucky presaged the federal legislation authorizing provider sponsored organizations when in Section 46 of House Bill 250, it first authorized the creation of provider sponsored networks. A number of additional and revisions to the regulatory scheme for these entities have occurred since their initial authorization. See, e.g., KY. REV. STAT. ANN. §§ 304.17A-010(12), 304.17A-300-310 (Michie 1999).

\textsuperscript{104} Health Care Financing Administration, \textit{Managed Care in Medicare and Medicaid} (1997). \textit{See Medicare and Medicaid Guide}, (CCH) ¶ 14,010 (Forty-nine states now offer some form of managed care to Medicaid patients.).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} Hospitals \& Health Networks, November 20, 1997.
Efforts to move more public sector health care recipients into managed care plans have also met myriad problems. Physicians in some regions, such as western Kentucky, have resisted managed care, public or private. Some private health maintenance organizations . . . in other states have abandoned these public sector partnerships in the face of declining reimbursements and unmanageable costs . . .

Several health care leaders we interviewed fear that Medicare reimbursement schedules . . . combined with the state's movement into Medicaid managed care will ultimately leave significant gaps in an already inadequate safety net and deplete services in rural areas . . . Without replacement revenues, many providers of indigent care, from primary care clinics in health departments to community hospitals, could be lost. 110

It does appear that one unintended consequence of Kentucky's move to managed care for its Medicaid population is a substantial financial shortfall facing many public boards of health, including those in Fayette, Jefferson, and Warren counties. In thirty-seven counties, Kentucky now pays private managed care organizations to treat Medicare recipients, diverting these patients from boards of health facilities. Historically, Medicaid payments to boards of health were sufficient to make up for the costs associated with uncompensated services provided to indigents. This process, in effect, made many public health boards Medicaid dependent. The Kentucky Long Term Policy Research Center has noted with respect to this phenomenon:

The funding shortfalls at some county health departments are yet another example of the eroding health safety net. Public sector efforts to control costs [must] be carefully planned to avoid further undermining access to health care. We may need to rethink services provided, increase state support for health departments and indigent care, or combine departments in areas of the state. Until we use public resources to design a health care system that is inclusive and values the health and well-being of all citizens, regardless of income, we will continue to experience problems. Funding woes are merely a symptom. 111

c. State Children's Health Insurance Program

One recent Medicaid initiative was intended to address the problems of lack of access and affordability. The 1997 Balanced Budget Act authorized forty-eight billion dollars over ten years to enable states to extend health care coverage

110. WHAT NEXT, supra note 2, Ch. 4, at 40.
111. Kentucky Long Term Policy Research Center, ISSUES (Spring 1999).
to uninsured children under the State Children’s Health Insurance Program,\textsuperscript{112} which allows each state to expand health care coverage to uninsured children living in low income families through Medicaid expansion, through the creation of a separate program, or through some combination of these two approaches.\textsuperscript{113}

The Kentucky Cabinet for Health Services originally opted for the combined approach and began enrolling additional children in Medicaid in July 1998. The employment based, non-Medicaid children’s health insurance component of the program received federal approval on November 25, 1998, with implementation of the insured component anticipated by July 1999. It was hoped that by implementing the program in this fashion, the stigma associated with public assistance could be avoided and individual responsibility would be fostered. When this initial program proved too difficult to implement, in July 1998, Kentucky reverted to the Medicaid model and became the forty-sixth state to make its SCHIP operational.\textsuperscript{114}

In 1998, the Legislative Research Commission estimated there were 123,000 uninsured Kentucky children eligible for this program.\textsuperscript{115} As of September 1999, the Kentucky version of SCHIP had enrolled only 20,000 children, according to the Cabinet for Health Services.\textsuperscript{116} As a result, Governor Patton

\begin{itemize}
\item \textsuperscript{112} Pub. L. No. 105-33 (1997) [hereinafter “SCHIP”].
\item \textsuperscript{113} The Kaiser Family Foundation has undertaken extensive research and analysis of the SCHIP program through its Project on Incremental Health Reform. See Kaiser Family Foundation Online, <http://www.kff.org>.
\item \textsuperscript{114} In its interim steps, Kentucky expanded Medicaid eligibility to fourteen- to eighteen-year-olds living in families with incomes up to 100% of the federal poverty level. This was later increased to 150%, and finally, effective November 1, 1999, up to 200% of the federal poverty level. The Cabinet for Health Services had hoped to use managed care organizations which were devoted to pediatric issues to implement the insured portion of KCHIP, calling these entities accountable pediatric organizations or APOs. When the Cabinet for Health Services requested bids for this component only two entities responded: University Health Care, Inc. of Louisville, and CHA Health Care of Lexington.
\item \textsuperscript{115} Legislative Research Commission, RESEARCH MEMORANDUM NO. 480 (1999).
\item \textsuperscript{116} WHAT NEXT, supra note 2, Ch. 2, at 13. Funding for SCHIP programs is available through an enhanced match of state expenditures, and payment may only be made based on actual expenditures not based on the state’s allotment. After three years, the federal government has the option of withdrawing unused funds and reallocating them to states that need additional funding for their programs. Availability of fiscal year 1998 funds will expire on October 1, 2000. It seems clear that Kentucky may lose some federal funds. The Kentucky version of SCHIP is called KCHIP.
\end{itemize}
announced in October 1999 that the state would spend four million dollars to fund an outreach effort through local health departments. The Cabinet has already spent $2.3 million on a statewide television, radio and newspaper campaign and other outreach activities to educate people about the benefits they may receive.\(^\text{117}\) It should be noted that Kentucky’s experience is not unique: as of December 1999, approximately 1.3 million children have been enrolled in SCHIP programs nationwide, but this is less than one-half of the number that had been expected to enroll.\(^\text{118}\)

d. Other federal initiatives

During the 1990’s, the federal government has initiated additional health care measures in a variety of areas, often without fanfare. It would be impossible to identify all of these measures or even all of the federal agencies currently involved in health care initiatives, so the following discussion is intended to be only a sampling of these less-publicized programs.

The Ticket to Work and Work Improvement Act of 1999 was signed into law on December 17, 1999. This legislation will allow disabled Americans to work and still retain their Medicare and/or Medicaid benefits. The Act extends Medicare benefits for an additional four and one-half years for persons drawing disability insurance who return to work. The Act also creates a $250 million Medicaid buy-in demonstration to assist those whose disability does not prevent them from working.\(^\text{119}\)

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 severed the longstanding relationship between welfare and Medicaid by assuring poor families who leave welfare will continue to be eligible to remain enrolled in Medicaid.\(^\text{120}\)

Access to adequate health care in rural areas remains a nationwide problem, and the federal government has determined that one way of resolving this


\(^{118}\) 3 Health Law News 12,18, American Health Lawyers Association (1999).

\(^{119}\) H.R. 1180, found at <http://www.whitehouse.gov/WH/Work/121799.html>. See also 42 American Medical News at 5-6 (1999).

problem is through the encouragement of telemedicine. Telemedicine involves
the transmission of medical information from a local site to a distant one,
allowing a provider anywhere in the world to provide medical advice through
computer access and teleconferencing. The use of telemedicine raises a number
of legal issues, including malpractice, licensure and confidentiality. These
issues, as well as cost concerns, have been addressed by the federal government
in a number of ways. For example, the Balanced Budget Act of 1997 includes a
specific provision for Medicare reimbursement for health services for persons
living in rural areas. On June 22, 1998, the Health Care Financing
Administration published a set of proposed rules for the reimbursement of
teleconsults rendered to Medicare insureds living in rural areas. The Health
Care Financing Administration has also established an Office for the
Advancement of Telehealth, which will administer thirty-seven telemedicine
projects previously funded through the Office of Rural Health Policy. The
Telecommunications Act of 1996 provides for Universal Service, requiring
telecommunications services to be made available to eligible rural health care
providers at a discounted rate.

2. Federal Controls On Managed Care

One of the most highly publicized federal initiatives was the appointment of
the President's Advisory Commission on Consumer Protection and Quality in
the Health Care Industry and its subsequent recommendation of a Consumer Bill
of Rights and Responsibilities.121 The CBRR, originally endorsed by President
Clinton in November 1997, is divided into eight chapters, each of which is
aimed at a separate area of concern. The similarity of the President’s Advisory
Commission’s proposal to private initiatives already implemented within the
health insurance industry is striking.122 The essence of the CBRR’s provisions

121. White House Press Release, President Clinton Endorses Consumer Bill of Rights and Calls
for Immediate Action to Implement (Nov. 20, 1997) (visited Jan. 4, 2000)
<http://www.whitehouse.gov/WH/Work/11/20/97.html> [hereinafter “CBRR”].
122. In September 1997, HIP Health Insurance Plans, Kaiser Permanente, Group Health
Corporation, Inc., the American Association of Retired Persons and Families USA announced an
agreement to seek the national standards for 18 areas of consumer concerns. Since May 1997, the
American Association of Health Plans (“AAHP”) has required members to abide by its Putting
Patients First initiative and its 1996 Philosophy of Care Statement. See Families USA Press
Release, New Agreement on Managed Care Protection (Aug. 24, 1997) (found at
<www.familiesusa.org/hmoagre.htm>); see also <www.aahp.org/services/prncpls.htm>.
are as follows:

- Chapter One: consumers have the right to information from their health plan about coverage limits, dispute resolution processes, rules for out-of-network services and for primary care referrals to specialists. 123

- Chapter Two: consumers have a right to a choice of providers within a network sufficient to assure that covered services are accessible without unreasonable delay."124

- Chapter Three: coverage for necessary emergency room services. 125

- Chapter Four: consumers have a right and responsibility to participate in health care decisions.126

- Chapter Five: consumers have the right not to be discriminated against based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, sexual orientation or source of payment.127

- Chapter Six: consumers have a right to the confidentiality of their


124. Consumer Bill of Rights and Responsibilities, Chapter Two (visited Jan. 4, 2000) <http://www. hcqualitycommission.gov/cborr/chap2.htm>. Specifically, women seeking gynecological services and persons with complex, chronic or disabling conditions would have direct access to specialists.

125. Consumer Bill of Rights and Responsibilities, Chapter Three (visited Jan. 4, 2000) <http://www. hcqualitycommission.gov/cborr/chap3htm>. Emergency room coverage is required when a "prudent layperson' could reasonably expect the absence of medical attention to result in placing that consumer's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." Id.


individually identifiable health care information.128

- Chapter Seven: consumers have the right to a fair and timely dispute resolution process.129

- Chapter Eight: consumers have the obligation to engage in healthy habits and to cooperate in agreed-upon medical treatments.130

The rights and responsibilities contained in the CBRR were intended to serve as a basis for federal legislation. President Clinton has ordered those federal agencies responsible for administering federal health benefit programs to implement policies consistent with the CBRR,131 and has called on Congress to pass legislation giving legal force to the CBRR nationwide.132 While Congress has not yet acted, the executive branch continues to act to extend patient rights and protections. For example, on November 8, 1999, the Department for Health and Human Services proposed regulations requiring states to extend a number of the patient protections encompassed by the CBRR to children enrolled in SCHIP programs.133

A number of the provisions of the CBRR were echoed in the several managed care bills which have been introduced in the 105th and 106th Congresses. Among the many bills which have been introduced, the Patient Access to Responsible Care Act of 1997, originally sponsored by Representative Charles Norwood of Georgia and Senator D'Amato of New York, was the broadest-ranging and most widely debated, with over 200 members of the House ultimately signing on as cosponsors.134 Perhaps the most significant provision of the Norwood Bill, not mirrored in the CBRR, would amend the Employee Retirement Income Security Act to allow state causes of action for personal

131. White House Press Release, supra note 121.
132. Id.
injury and wrongful death for which the health plan is allegedly at fault. 135

During 1999, the House and Senate each passed patients' rights bills, with the House bill being a modified version of the bill proposed by Representative Norwood. A conference committee has been appointed to iron out the differences, although no meeting had been scheduled when Congress adjourned on November 22, 1999. The House bill, the Bipartisan Consumers Medical Care Improvement Bill of 1999, passed in October, together with the Quality Care for the Uninsured Bill of 1999. The Senate bill is less expansive, containing fewer consumer rights and tax reform measures than the House-passed legislation. It remains to be seen what, if any, broad patient protection legislation will ultimately be passed by Congress.

3. Administrative Simplification

A major aspect of HIPAA which has been mostly ignored until recently, is its Administrative Simplification provisions. 136 AS mandates the development of federal standards for the maintenance and transmission of electronically-maintained health information. The purpose of AS is to reduce the costs and administrative burdens of health care, while protecting confidential health care information by setting standards for the security of health care data during storage and transmission. 137 The rationale behind AS is two-fold: (1) electronic transmissions of information are not easily nor effectively regulated at the state level and (2) the failure of the states to act, or to act consistently, in many of the areas subject to the AS requirements of HIPPA.

HIPAA required the Department of Health and Human Services to implement AS by adopting national standards for the electronic exchange of health information, including regulations specifically addressing each of the following: (1) electronic transactions and code sets; (2) unique identifier numbers for health care providers, employers and health plans; (3) electronic data security; and (4) a unique health identifier for every individual. 138 As of

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135. H.R. 1415, § 4(a). See also Laurie McGinley, Broad Battle to End HMOs' Limited Liability For Treatment - Coverage Denial Gains Steam, WALL ST. J., Jan. 12, 1998 ("The change is coming from wings of both political parties: Two conservative Republicans, Rep. Charlie Norwood of Georgia and Sen. Alfonse D'Amato of New York, are pushing one proposal, while liberal Democratic Rep. Fortney H. "Pete" Stark of California champions another.").
the date of this writing, the Department for Health and Human Services has promulgated proposed rules covering each of the foregoing areas, except unique identifier numbers for health plans and individuals.\textsuperscript{139}

In addition, HIPAA required the Secretary of Health and Human Services to make recommendations to Congress on how to protect the privacy of health information, in order to aid Congress in the passage of privacy legislation.\textsuperscript{140} Pursuant to that requirement, in September 1997, Secretary Donna Shalala provided testimony before the Senate Committee on Labor & Human Resources, during which she emphasized the need for a national standard to govern the privacy of health information in order to protect information which may or may not currently be protected by the patchwork of various state privacy laws.\textsuperscript{141} Congress gave itself until August 21, 1999, to enact privacy legislation, and further provided that if privacy legislation was not enacted by that date, the Secretary of Health and Human Services would be required to implement privacy regulations.\textsuperscript{142}

The deadline came and went, and on October 29, 1999, the Department for Health and Human Services announced the release of the new federal medical record confidentiality regulations.\textsuperscript{143} The proposed rule, officially entitled "Standards for Privacy of Individually Identifiable Health Information," was not actually published in the Federal Register until November 3, 1999.\textsuperscript{144} The new regulations will apply to all health plans, health care clearinghouses, and all health care providers who electronically transmit any health information in connection with certain financial and administrative transactions.\textsuperscript{145}

The AS regulations will soon have a significant impact on the entire health care industry, because the proposed regulations require large entities to comply


\textsuperscript{140} Pub. L. No. 104-191, § 264.

\textsuperscript{141} Testimony of Donna Shalala, Secretary of Health and Human Services, before the Senate Committee on Labor & Human Resources (visited Jan. 4, 2000) <http://aspc.hhs.gov/adminsimp/pvctest.htm>.

\textsuperscript{142} Id.


\textsuperscript{144} 64 Fed. Reg. 59918 (1999).

\textsuperscript{145} Id.
with the requirements within twenty-four months of implementation, while smaller entities are granted a thirty-six month grace period. While the regulations will likely result in significant costs to those subject to the requirements, the regulations should also provide some value to parties charged with maintaining health information through the development of national standards. It should be noted, however, that the federal standards are intended to be minimum requirements for the protection and transmission of health information, and that states will still be permitted to enact more onerous requirements. As a result, providers, health plans, and other keepers of health information will still need to monitor state law developments pertaining to the protection of health information.

The remainder of this section provides a summary of each of the AS regulations proposed by the Department of Health and Human Services as of the date of this writing. While the regulations are currently in proposed form, it is likely that most of the concepts contained in the proposed rules will be included in the respective final regulations.

a. Standards for Electronic Transactions and Code Sets

On May 7, 1998, the Department of Health and Human Services published a Notice of Proposed Rule Making which would allow every health care provider to use a single standard electronic format to bill for services rendered, regardless of the identity of the payor. The proposed rule establishes standards for the following eight electronic transactions and code sets to be used in connection with those transactions:

1. Health claims or equivalent encounter information;
2. Health claims and remittance advice;
3. Coordination of benefits;
4. Health claim status;
5. Enrollment and disenrollment in a health plan;

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146. 42 USC § 1320d-4(b)(1).
147. Id. at § 1320d-7.
6. Eligibility for a health plan;
7. Health plan premium payments; and
8. Referral certification and authorization. 149

According to the Health Care Financing Administration, the use of standard transactions in code sets “would improve the Medicare and Medicaid programs and other Federal health programs and private health programs, and the effectiveness and efficiency of the health care industry in general, by simplifying the administration of the system and enabling the efficient electronic transmission of certain health information.” 150 Under the proposed rule, all health plans would be required to accept electronic claims structured in accordance with the standards set forth in the regulation. 151

The implementation of the AS provisions of HIPAA, and the related regulations involving the standards for electronic transactions, illustrate the federal government’s desire to influence the use of electronic data transmission throughout the health care industry. The Health Care Financing Administration argues that the use of standard electronic transaction throughout the health care industry will help eliminate the inefficiencies of handling paper, thereby significantly reducing the administrative burden, lowering operating costs, and improving overall data quality transmitted between health care entities. 152 However, the Health Care Financing Administration also acknowledges that the implementation of the standards will have a significant impact of over $100 million on the economy, and that “the combined effects of all of the proposed standards may have a significant impact on a substantial number of small entities.” 153

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150. Id. at 25271, 25272 (1998).
151. Id.
152. Id. It is estimated that there about 400 formats for electronic health care claims currently in use. Since 1980, Kentucky has authorized its Commissioner of Insurance to prescribe a uniform health claim form to be used by all insurers. Ky. Rev. Stat. Ann. § 304.14-135 (Michie 1999). This statute was obviously not originally intended for electronic communications.
b. Standards for Unique Identifier Numbers for Providers, Employers, and Health Plans

i. Providers

On May 7, 1998, the Department of Health and Human Services published a Notice of Proposed Rulemaking for the establishment of a national health care provider identifier. Public comments were received until July 1998, and the Department is now in the process of preparing the final rule. The Health Care Financing Administration had expected to publish the final rule by December 1999, but as of the date of this writing, it has not been published.

The concept of a national provider identification number began in 1993, when HCFA convened a workgroup including representatives from the private sector and state and federal agencies. The workgroup examined existing methods of identifying providers and concluded that no currently-used system satisfied all of the goals they wished to accomplish. The workgroup proposed the use of an eight-position alphanumeric identifier, the national provider identifier, which would contain no embedded information, such as the type of provider or state of domicile. It was not until the passage of HIPAA that the identifier movement gained momentum as a part of HIPAA's AS requirements.

Under the proposed regulations, each health care provider would be given an identifier, and all health plans, health care clearing houses, and health care providers would use that identifier in connection with certain electronic transactions. The file which would be maintained for each health care provider in connection with the identifier would include: the identifier, name, business name, social security number, medical degree, employer identification number, birth date and state or country, sex, race, addresses, telephone and fax numbers, license number, and educational background. While public use files would be created for this database, information maintained within the system would be protected in accordance with the Privacy Act. Each health care provider will be required to provide updated information to the system.

154. *Id.* at 25320.
158. 5 U.S.C. § 552a.
within sixty days of the date on which a change occurs.\textsuperscript{159}

\textit{ii. Employers}

The identity of an individual’s employer is important in the processing of a variety of health care claims. For instance, employer information is often used to develop coordination of benefits information, to transmit information to health plans when enrolling or disenrolling an employee as a health plan participant, to identify the source or receiver of eligibility or benefit information, and to identify the employer when making or keeping track of health plan premium payments or contributions relating to an employee.\textsuperscript{160} Currently, health plans, providers, and employers may use different numbers to identify an employer.\textsuperscript{161} The Health Care Financing Administration argues that it would be beneficial to identify employers using standard identifiers in all health care transactions.\textsuperscript{162} As a result, on June 16, 1998, that Administration published a proposed rule requiring that the national employer identifier that must be used for all electronic transactions is the employer identification number assigned to each employer by the Internal Revenue Service.\textsuperscript{163} Since any entity that pays wages to one or more employees is required to obtain a number from the IRS, the Financing Administration believes there will be few, if any, employers that will not already have an number.\textsuperscript{164}

\textit{iii. Health Plans}

In connection with the requirement in the AS provisions of HIPAA, the Health Care Financing Administration is currently developing a unique identifier number standard for health plans, through the National Health Plan ID initiative.\textsuperscript{165} The National Health Plan ID was expected to have been introduced

\begin{thebibliography}{99}
\item \textsuperscript{159} 63 Fed. Reg. 25320, 25356 (1998) (to be codified at 45 C.F.R. § 142.408(c)).
\item \textsuperscript{160}  Id. at 32784, 32785.
\item \textsuperscript{162} 63 Fed. Reg. 32785 (1998).
\item \textsuperscript{163}  Id. at 32798 (to be codified at 45 C.F.R. § 142.602).
\item \textsuperscript{164}  Id. at 32793.
\item \textsuperscript{165} \textit{See Health Care Financing Administration and Department of Health and Human Services Initiatives}, <http://www.hcfa.gov/hcfainit.htm>.
\end{thebibliography}
via a proposal made in December 1999, however, as of the date of this writing, no proposed rule has been published to regulate the development of a unique identifier number for health plans.

iv. Individuals

One of the most controversial aspects of the AS provisions of HIPAA is the requirement that a unique identifier number be established for each individual. This provision has drawn fire from privacy and civil rights advocates, who see it as a mechanism through which the government will be able to create a national identification number for each individual. In addition, the development of regulations governing the establishment of a unique identifier number for all individuals has been delayed by the implementation of the pending privacy regulations. On September 9, 1997, the Chair of the National Committee on Vital and Health Statistics, which provides recommendations to the Secretary of Health and Human Services (as required by HIPAA, indicated that it would be unwise and premature to implement a unique identifier number before the passage of federal health information privacy legislation. Likewise, the 1999 appropriating bill prohibited the Department of Health and Human Services from promulgating a standard for a unique identifier number without the approval of Congress. More recently, the Clinton administration has stated that no proposal for unique identification numbers for individuals will be implemented until privacy protections have been established, as required by HIPAA.

D. Electronic Data Security Standards

This proposed regulation includes both a security standard, which addresses developing and maintaining the security of electronic health information, and an

168. The privacy regulations are discussed in § III(E), infra.
169. Letter from Don E. Detmer, M.D., Chairman, National Committee on Vital and Health Statistics, to Donna E. Shalala, Secretary of Health and Human Services (Sept. 9, 1997), found at <http://aspc.os.dhhs.gov/ncvhs/uhid.htm>.
170. Waller, supra note 167, at 723.
electronic signature standard, which is an electronic attribute affixed to an electronic document in order to ensure the integrity of the data contained therein. The security standard applies to any health plan, health care clearinghouse, or health care provider that electronically maintains or transmits any health information relating to an individual. The electronic signature standard applies to any health plan, health care clearinghouse, or health care provider that transmits any electronic health information in connection with transactions covered by the regulation, or any other electronic signature required by law, regulation, or contract. However, the electronic signature standard does not, by itself, mandate the use of an electronic signature for any particular type of transaction. Importantly, the proposed regulations also provide that the use of the electronic signature standard will satisfy any federal or state requirement for a signature, either electronic or written.

E. Standards for Privacy of Individually Identifiable Health Information

It is likely that the proposed standards for maintaining the privacy of health information will have the most significant impact of all of the administrative simplification requirements. Those regulations will impact the manner in which “covered entities” use or disclose “protected health information” for all individuals. As a result, once information has been maintained or transmitted electronically by a covered entity, the information remains subject to the proposed regulations regardless of the form in which the information is subsequently maintained or transmitted, including paper records.

The purpose of the proposed regulations is three-fold. First, the regulations attempt to define and limit the circumstances in which an individual’s protected health information may be used or disclosed by a covered entity prior to the disclosure of protected health information, as well as the circumstances under

173. Id. at 43242.
174. Id.
175. Id.
177. A “covered entity” includes health plans, health care clearing houses and health care providers who transmit covered health information. The term “protected health information” includes any individually identifiable health information that is or has been electronically transmitted or maintained by a covered entity.
HEALTH CARE REFORM IN KENTUCKY

which an authorization must be obtained from an individual. The proposed regulations also establish certain individual rights with respect to protected health information, which are "intended to facilitate individual understanding of an involvement of the handling of... protected health information." Finally, the proposed regulations require all covered entities to develop and implement administrative procedures to protect the confidentiality of protected health information and the rights of individuals with respect to such information.

The Department of Health and Human Services has estimated the cost for covered entities to comply with the proposed regulations to be $1.2 billion in the first year and $3.8 billion over five years. "The Blue Cross and Blue Shield Association ("the Blues") scoffed, estimating that the cost could be as high as $43 billion.”

Generally, the proposed regulations prohibit a covered entity from using or disclosing an individual's protected health information, except as permitted or required under the regulations. A covered entity is, however, permitted to use or disclose protected health information (1) to carry out treatment, payment or health care operations, (2) pursuant to a valid authorization by the individual to whom the protected health information relates, and (3) as otherwise specifically permitted in compliance with the regulations, particularly §164.510 of the proposed regulations. In addition, a covered entity may use or disclose protected health information without first receiving authorization from the individual, subject to certain limitations, for the following purposes:

180. Id. at 59976.
181. Id. at 59988. In particular, covered entities must designate a privacy official with responsibility for developing and implementing policies and procedures, privacy training must be provided for all staff members likely to have access to covered information, and administrative, technical and physical safeguards must be implemented, including complaint procedures and sanctions for violations. Adequate documentation must be retained for each of these requirements. Id. at 60059-60062 (to be codified at 45 C.F.R. § 164.518(a)-(e), 45 C.F.R. § 164.520).
183. 64 Fed. Reg. 60053 (to be codified at 45 C.F.R. § 164.506(A)).
184. Id. Uses and disclosures permitted without individual authorization include public health surveillance, investigations and interventions. HHS states in the rules, "We considered requiring individual authorization for certain public health disclosures, but rejected this approach because many important public health activities would not be possible if individual authorization were required." 5 MED. SENTINEL No. 1, 21 (Jan/Feb 2000).
1. Public health activities;
2. Health oversight activities;
3. Judicial and administrative proceedings;
4. To coroners and medical examiners;
5. For law enforcement purposes;
6. For Government health data systems;
7. Directory information;
8. For banking and payment processes;
9. For research purposes;
10. In emergency circumstances;
11. To next-of-kin;
12. For certain specialized classes (e.g., military purposes); and
13. As otherwise required by law.\textsuperscript{185}

Furthermore, a covered entity is required to disclose protected health information without individual authorization in the following two circumstances: (1) in response to a request by an individual to inspect and obtain a copy of his or her protected health information, and (2) in connection with an enforcement action or compliance review brought by the Secretary of Health and Human Services.\textsuperscript{186}

With respect to individual rights, the proposed regulations would also provide that individuals have the right to receive written notice of a health plan’s or provider’s policies and procedures on protected health information, and that plans and providers would be required to update the written notice whenever

\textsuperscript{185} 64 Fed. Reg. 60053, 60056 (to be codified at 45 C.F.R. § 164.510).
\textsuperscript{186} However, covered entities must make all reasonable efforts not to use or disclose more than the minimum amount of protected health information necessary to accomplish the intended purpose of the use or disclosure. \textit{Id.} at 60054 (to be codified at 45 C.F.R. § 164.506(A)(2)).
they change their information practices. Further, individuals would have the right to obtain access to protected health information, including the right to inspect and copy protected health information. Individuals would also have the right to receive an accounting of all disclosures of protected health information made by a covered entity, as long as it is maintained by the entity, except for certain limited disclosures. Finally, individuals will have the right to request amendment or correction of protected health information that is inaccurate or incomplete.

The proposed regulations, once final, will preempt conflicting state laws, but only to the extent that the state privacy protections are less stringent than those provided by federal law. That is, the privacy regulations promulgated by the Health Care Financing Administration will not supersede any contrary provision of state law, if the state imposes requirements or standards which are more stringent than the requirements set forth in the regulations. Finally, as with the rest of the AS regulations, the proposed privacy regulations provide that a covered entity must be in compliance with the regulations within twenty-four months following the effective date of the final rule, except that a covered entity that is a “small health plan” is given thirty-six months in which to comply.

CONCLUSION

With the exception of federally operated health plans, such as Medicare and Medicaid, regulation of America’s health care delivery system, particularly the health insurance component, has historically been a prerogative of the states. It is true that federal legislation has long impacted the health care and health insurance industries, but this has generally been a result of the societal impact, and not direct regulation. Examples of such legislation would be Medicare and Medicaid reimbursement policies and federal income tax statutes. Medicare and Medicaid reimbursement policies have influenced the nature and scope of capital expenditures by Medicare-compensated providers, and the consequent development of state certificate of need programs. Tax laws, through the

187. Id. at 60059 (to be codified at 45 C.F.R. § 164.512).
188. Id. (to be codified at 45 C.F.R. §164.514).
189. Id. at 60060 (to be codified at 45 C.F.R. § 164.515).
190. Id.
192. Id.
193. Id.
differing treatment afforded health insurance costs when paid by an employer as opposed to an individual or self-insured, have reinforced the employer-based health insurance system.\textsuperscript{194}  

The societal impact of federal legislation, therefore, has long influenced the growth and development of the American health care delivery system, even while the great weight of health-related regulations occurred at the state level. During the 1990's, the federal government has continued methodically and incrementally to federalize more and more aspects of health care. Admittedly, many of the federal initiatives have been undertaken in areas not readily susceptible to state regulation. However, the impact of increasing federal control will inevitably mean limitation of the choices and options available to the individual states.

One of the interesting aspects of many of the recent federal initiatives is the more aggressive regulatory role the federal government has assumed in the area of health insurance, an area that has historically been left to state regulation. If the current wave of legislation and regulations is any indication, all aspects of the health care delivery system will soon be subject to federal standards. The currently unanswered question is the extent to which federal regulation will replace state laws, leaving the individual states with only the obligation to enforce federal standards. At least one commentator has stated in this regard: “Meanwhile, back in the real-world-health-care-reform debate, we move inexorably toward socialism anyhow, while denying it every step of the way.”\textsuperscript{195}

Whether this is an accurate assessment may be open to question, but there is no doubt that many, including Kentuckians, believe the country’s health care delivery system is in need of an overhaul.

Though much work remains to be done at the national level to ensure greater parity in health care cost, quality, and access, the Commonwealth can exert significant influence over our health care. Our first step... is reckoning with the very difficult question of our values in regard to health care. Citizens of the Commonwealth continue to express strong support for an inclusive health care system... To respond to citizen values, we must begin to set goals and priorities and chart a course of action. The short term costs may not yield immediate benefits, but preventing needless and costly ill health remains in the

\textsuperscript{194}  Other areas of federal influence include the use of (and selection process for) research and development funding and other grants by such agencies as the National Institutes of Health, regulations by the Food and Drug Administration, and more recently, the development of organ transplant and AIDS protocols and policies.

\textsuperscript{195}  Michael Kinsey, \textit{Share The Health}, \textsc{The New Yorker}, July 11, 1994, at 49.
best long-term interest of our state. To do so we must include more people in our system of health.\textsuperscript{196}

It seems inevitable that at both the state and federal levels, the nature of and the direction to be taken by the American health care delivery system will remain a hotly debated topic in the twenty-first century. However, precisely where that debate will lead us remains to be determined.

\textsuperscript{196} \textit{WHAT NEXT}, \textit{supra} note 2, Ch. 6, at 2.
THE LOCH NESS MONSTER, BIG FOOT, REPOSSESSION TITLES AND OTHER MYTHS: DEFENSES AND COUNTERCLAIMS IN A REPOSSESSION AS AN ALTERNATIVE TO BANKRUPTCY

by Patrick B. McClure, Esq.¹

Often times a bankruptcy is triggered by the repossession of an automobile and the collection efforts that follow. Many of the clients for whom I have used the defenses and counterclaims set forth in this article initially sought bankruptcy to avoid either a default judgment, a lawsuit, or to stop the collection efforts of a repossessing creditor. Although this is not the solution for all clients in this situation, a number of clients can benefit by a defense and counterclaim arising from the creditor taking title to the vehicle before offering it for sale. In some cases, a malicious prosecution action may even be appropriate.

It has become a common practice in the Louisville, Kentucky market for a repossessing creditor such as a bank or other lender to title the vehicle in its own name before selling the vehicle through an automobile auction house. As was explained to me by a bank officer in a deposition, the auction houses will not accept the automobiles for sale unless the car is titled in the bank's name. This has become so prevalent that many a repossessing creditor immediately titles the vehicle in its own name on the day of repossession and prior to informing the debtor.

A look at the requirements of the title statutes and the Uniform Commercial Code as adopted by the Commonwealth of Kentucky indicates that in most, if not all cases, this should be a fatal mistake for the financial institutions. However, convincing district and circuit court judges that it is a fatal mistake has proven to be difficult in some instances. The Kentucky Revised Statutes provide that secured parties have the right to take possession of the collateral, and they impose duties upon the creditor after taking possession of the collateral.² If the lender fails to abide by the statutory requirements, then the statutes provide for damages to the debtor.³ In addition, Kentucky courts have interpreted these statutes to mean that the repossessing creditor forgoes its right to a deficiency judgment if it does not obey the statutory requirements.⁴

1. The author maintains a private law practice in Shepherdsville, Kentucky.
I. A SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT

Kentucky Revised Statutes section 355.9-503 clearly states that a secured party has a right, upon default, to take possession of the collateral securing the loan. It allows the secured party to do so without any type of judicial process, if this can be done without breach of the peace. The repossessing creditors seem to have no problem understanding this portion of the Kentucky Revised Statutes. In fact, the creditors seem to be well acquainted with their right of repossession, and they frequently exercise this right under the statute.

One federal case has held that if a repossessing creditor has wrongfully repossessed the property and sold it, he has converted that property.

II. A SECURED PARTY'S RIGHT TO DISPOSE OF COLLATERAL AFTER DEFAULT AND THE EFFECT OF DISPOSITION

Kentucky Revised Statutes section 355.9-504 is the section that the repossessing creditors seem to have a problem understanding.

In subsection (1), it is clear that the secured party has the right to sell, lease, or otherwise dispose of any or all of the collateral, following any commercially reasonable preparation process. Subsection (1) goes on to explain how the proceeds from the disposition should be applied.

Subsection (3) seems to cause the repossessing creditors the most trouble. Although this paragraph appears to be fairly straightforward, creditors seem to have some trouble understanding that the disposition must occur before the

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5. KY. REV. STAT. ANN. § 355.9-503 (Michie 1996) provides:
   Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor’s premises under KRS 355.9-504.

6. Id.


9. Id.
Affidavit Supporting Repossession and Disposition of a Vehicle is filed. Although some repossessing creditors believe they can file the affidavit and take title, the so-called "Repossession Title," before they sell the vehicle and then collect a deficiency judgment, two Attorney General Opinions agree that the Affidavit Supporting Repossession and Disposition of a Vehicle is to be filed after the sale.

In OAG 72-549, Assistant Attorney General William S. Riley, in referring to Kentucky Revised Statutes section 355.9-504, stated, "[f]rom ... an examination of this statute, it would appear that [the creditor] should file with your office, after it has sold the vehicle which it repossessed, a copy of revenue form 71A192, Affidavit Supporting Repossession and Disposition of a Vehicle."^10 Form 71-A-192 has been updated, and is now known as form TC 96-192, but it is still titled "Affidavit Supporting Repossession and Disposition of a Vehicle." This affidavit is the one mentioned in and required by Kentucky Revised Statutes section 186.045.\(^\text{11}\) The Attorney General opinion said that a transfer certificate should be issued transferring the vehicle from the previous owner to the purchaser, based upon this affidavit.\(^\text{12}\) Although this opinion pre-dates Kentucky's titling statutes, the requirements of Kentucky Revised Statutes section 355.9-504 have not changed. The same assistant Attorney General, in OAG 73-295, in a question posed by an attorney for Citizens Fidelity regarding whether a transfer certificate could be issued without the lien having been previously filed, noted that the department has prepared the affidavit to effectuate transfers from the debtor to the good faith purchaser after disposition of the vehicle.\(^\text{13}\) "However, in order for the clerk to be protected in transferring a vehicle that is repossessed by a financing company, from the borrower to a new purchaser, it is incumbent upon the secured party who has repossessed the vehicle to file the financing statement with the clerk."\(^\text{14}\) Although this opinion dealt with whether the financing statement had been filed with the clerk, Mr. Riley does not say that the transfer is from the borrower to the repossessing creditor, and then to the purchaser.

Subsection (3) also requires reasonable notification of the time and place of a public sale or reasonable notification of the time after which any private sale or


\(^{11}\) Ky. REV. STAT. ANN. § 186-045 (Michie 1997).


\(^{14}\) Id.
any other intended disposition is to be made.\textsuperscript{15} It requires the secured party to send notice to the debtor of these dates,\textsuperscript{16} and this notification is so important that failure to give the notice will result in the repossessing creditor's being unable to pursue a deficiency judgment.\textsuperscript{17}

Subsection (4) states that the disposition of the collateral transfers to the purchaser for value all of the debtor's rights therein.\textsuperscript{18} It does not say that the rights of the debtor are transferred from the debtor, to the repossessing creditor, and then to the purchaser. Kentucky Revised Statutes section 355.9-504 has been interpreted to require that the sale be commercially reasonable,\textsuperscript{19} and it is the burden of the secured party to prove that it has acted with the requisite commercial reasonableness.\textsuperscript{20} If the commercial reasonableness of the sale cannot be shown, the repossessing creditor is not entitled to a deficiency judgment.\textsuperscript{21}

How is all of this relevant to a defense against a repossessing creditor? As discussed above, the notice requirement of Kentucky Revised Statutes section 355.9-504(3) is so important that failure to notify the debtor of the scheduled date of disposition will bar the creditor from receiving a judgment.\textsuperscript{22} To avoid stating that the vehicle is taken in satisfaction of the debt, the creditor will complete the affidavit by stating that the automobile was disposed of to the creditor. First, the debtor should request a copy of the notice sent prior to the date of disposition stated in the affidavit. The affidavit states that the notice was sent. Second, the debtor should request a copy of the documents showing the proceeds of the sale and how the proceeds were applied. Third, the debtor should request proof of the commercial reasonableness of the sale. The court stated in \textit{Holt} that the notice is so fundamental that nothing less severe than the forfeiture of the deficiency amount would be adequate.\textsuperscript{23} If the repossessing creditor fails to produce these items, the debtor may move for summary
judgment.

In addition to the above arguments, Kentucky Revised Statutes section 186.010 defines the owner of an automobile as the titleholder. When the creditor takes title to the automobile, it becomes the owner. That is, the creditor takes the collateral as its own. When a creditor takes the property as its own, the property is taken in full satisfaction of the debt. So by titling the vehicle in its own name, the creditor has accepted the vehicle in full satisfaction of the debt, and is not entitled to a deficiency judgment.

III. COMPULSORY DISPOSITION OF COLLATERAL: ACCEPTANCE OF THE COLLATERAL AS DISCHARGE OF OBLIGATION

Kentucky Revised Statutes section 355.9-505(2) gives the secured party the right to take the property in satisfaction of the debt, but also places upon the repossessing creditor the duty of notifying the debtor. The debtor then has the choice of allowing this retention to occur, or to object and require the property to

24. KY. REV. STAT. ANN. § 186-010(7)(a) (Michie 1997).
26. KY. REV. STAT. ANN. § 355.9-505(2) (Michie 1996) provides:

(1) If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty (60%) percent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under KRS 355.9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under KRS 355.9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one (21) days after the notice was sent, the secured party must dispose of the collateral under KRS 355.9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.
be sold under Kentucky Revised Statutes section 355.9-504. In *Herring*, the court of appeals found that a repossessing creditor must either sell the property in a commercially reasonable manner, with a notice provided to the debtor of the sale, or the repossessing creditor may elect to retain the collateral in satisfaction of the debt, with proper notice to the debtor. But even if the notice is not sent, the creditor may be deemed to have "clearly evinced" its intention to keep the vehicle in satisfaction of the debt by its actions. Kentucky Revised Statutes section 355.9-505(2) requires the repossessing creditor to accept the collateral in full satisfaction of the debt, if the repossessing creditor elects to retain the collateral. The language clearly states that the repossessing creditor may retain the collateral in satisfaction of the obligation. Kentucky Revised Statutes section 355.9-506 gives the debtor the right to redeem the collateral, and that is why the notice requirements of sections 355.9-504 and 355.9-505 are so important. If a debtor has the ability to redeem the collateral, he must be given notice before the disposition or retention of the property. The affidavit, whether it is completed as a disposition to the creditor or as a retention by the repossessing creditor, states that the appropriate notice has been sent. Since the creditors do not send any notice, they effectively eliminate the debtor's right of redemption.

IV. DAMAGES AND COUNTERCLAIMS

A counterclaim should be made for damages under Kentucky Revised Statutes section 355.9-507 when the creditor fails to abide by the statutory requirements of notice or reasonableness, and the damage amounts are easily calculated from the formulas given in the statute. The question which is not yet answered is whether the total of damages is the interest actually paid before default, plus ten percent of the amount financed; or is the total of damages the interest which would have been paid over the life of the loan, plus ten percent of the amount financed. Perhaps one should adopt the stance that it is the total interest that would have been paid over the life of the loan, plus ten percent of

27. *Id.*
28. *Herring*, 747 S.W.2d at 619.
29. *Id.* at 618.
30. KY. REV. STAT. ANN. § 355.9-505(2) (Michie 1996).
31. *Id.* (emphasis added).
33. *Id.*
the amount financed.

In the case where a repossessing creditor has completed the affidavit by stating that the vehicle is taken in satisfaction of the debt, and then still files suit, the debtor may have a claim for abuse of civil process or malicious prosecution. The repossessing creditor knew from the time it completed and filed the affidavit that it had retained the automobile in full satisfaction of the obligation. The debtor is usually in such dire financial straits that he cannot afford to retain counsel when he is served with the complaint, or he retains counsel and exhausts what little resources he has. It is unlikely that the creditor's counsel has seen the Affidavit before filing suit. However, if the creditor's counsel is house counsel, she may be charged with constructive knowledge of the satisfaction. At the time of this writing, there is no case law on whether suing a debtor after retention of collateral in satisfaction of the debt meets the elements of these actions, but it would appear that the elements can be met.

There are six elements which must be established to prevail on a claim of malicious prosecution:

(1) [T]he institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.34

First and foremost, the claim of the repossessing creditor must be dismissed by the court's ruling that the obligation was satisfied before the filing of the complaint, as the repossessing creditor stated in its affidavit. If the suit is dismissed upon agreement, with both parties having waived any claim against the other, this will not meet the requirement that the action be completed in the debtor's favor, and malice may be inferred from a lack of probable cause in a malicious prosecution action.35 The repossessing creditor's own sworn testimony that the vehicle is being retained in satisfaction of the obligation should be sufficient to establish the lack of probable cause to file suit. The damages may arise from both the attorney's fees and from the mental anguish suffered from defending a suit that should never have been brought.

35. See Massey v. McKinley, 690 S.W.2d 131, 133 (Ky. Ct. App. 1985) (citing Sweeney v. Howard, 447 S.W.2d 865 (Ky. 1969)).
This counterclaim probably will not be available to a client where the repossessing creditor has not completed its affidavit as a retention under Kentucky Revised Statutes section 355.9-505. However, if the creditor has in-house counsel handling its litigation, an argument that the creditor has constructive knowledge that the pre-notice disposition forbids collecting a deficiency judgment may successfully show lack of probable cause to file suit.

If a court does not find that a repossessing creditor's affidavit bars recovery of a deficiency, the repossessing creditor still may not be entitled to a deficiency judgment. Often, a repossessing creditor, in the notice that it sends to the debtor, will state that the vehicle is being sold at a private sale. In Cox Motor Car Co. v. Castle,36 the court said that "having repossessed the truck, Cox was required to liquidate it at reasonable public sale, as a condition of seeking further recovery from Castle . . . ."37 The repossessing creditor's private sale is in violation of this requirement, and so the creditor should be barred from seeking further recovery from the debtor.

37. Id. at 432 (emphasis added).
THIRD-PARTY STANDING IN CHILD CUSTODY DISPUTES: WILL KENTUCKY’S NEW "DE FACTO GUARDIAN" PROVISION HELP?

by Lawrence Schlam

I. INTRODUCTION

Because over half of all marriages in America end in divorce, children are increasingly being raised in non-traditional families. One out of every two children will spend some time living in a step-family. Often a non-parent is the only father or mother a child has known, and is the “one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, [has fulfilled] the child’s psychological need for a parent.” That person is essential

1. Professor of Law, Northern Illinois University College of Law. The author wishes to gratefully acknowledge the invaluable research assistance of Carolyn D. Sexton (J.D., N.I.U., ‘01) and Julie A. Fennell (J.D., N.I.U. ‘01) in the preparation of this article. Certain portions of this article are adapted from, and are modified versions of, an earlier article discussing third party custody disputes in Illinois. See Lawrence Schlam, Children “Not in the Physical Custody of One [their] Parents”: The Superior Rights Doctrine and Third Party Standing Under the Uniform Marriage and Dissolution of Marriage Act, 24 S. ILL. U. L.J. 405 (2000).

2. Beth Bailey, Broken Bonds: The Effects of Divorce on Society, Family, and Children, CHI. TRIB., Feb. 9, 1997, at 6. In 1990, the United States had the highest divorce rate among advanced Western nations; six out of ten divorces took place in families with children.


4. Virginia Rutter, Lessons from Stepfamilies, PSYCHOL. TODAY, May-June 1994, at 30. It is predicted that by the year 2000, stepfamilies will be the dominant family type. Id.

to a child's development and well-being, often more than a biological or adoptive parent. Indeed, the emotional bonds that children form with these "non-parents" can be as strong and meaningful as the bonds between natural or adoptive parents and their children.

Unfortunately, however, third parties who have become "psychological parents" are faced with an obstacle not encountered by biological or adoptive parents; because they may be precluded from custody of a child with whom A child's perception of a parent is shaped by his or her day-to-day needs. See James B. Boskey, The Swamps of Home: A Reconstruction of the Parent-Child Relationship, 26 U. TOL. L. REV. 805, 808 (1995). 6. JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973) (suggesting resolving custody disputes by recognizing the importance of this sort of psychological parent, rather than focusing on the biological aspects of parenting). This book, which attempts to integrate legal standards with current psychological theories, results in the articulation of a standard known as "the least detrimental alternative" which, it is suggested, should replace the "best interests" rule. LEGAL RIGHTS OF CHILDREN, § 2.08, at 52-53 (Donald T. Kramer ed., 2d Ed. 1994).

7. Arelene B. Huber, Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture, 32 U. LOUISVILLE J. FAM. L. 33 (1993-94). "[T]erminating custodial relationships between stepparents and stepchildren simply because the marriage ends is unfair to stepparents who assumed a parental role during marriage and can be detrimental to children, especially if they view their stepparents as 'psychological parents.'" Mangnall, supra note 5, at 403 (citing Bartlett, infra note 9, at 902). See also Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (Cal. Ct. App. 1994) (the relationship between a child and the man she knows as her father does not disappear upon divorce from the child's mother).

8. See supra note 5; see also James G. O'Keefe, The Need to Consider Children's Rights in Biological Parents v. Third Party Custody Disputes, 67 CHI.-KENT L. REV. 1077, 1081 (1991) (defining "psychological parent" as an "individual the child perceives, on a psychological and emotional level, to be her parent" and pointing out that, under the "parental rights" doctrine, such individuals are not even considered for custody until after the natural parent has been shown to be unfit).

9. Even stepparents are not afforded the same rights in child custody suits as parents, because in the eyes of the law, stepparents are seen as legal strangers to their former step-children. See Katherine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 VA. L. REV. 879, 912 (1984); see also Barbara B. Woodhouse, "Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family, 8 BYU J. PUB. L. 321, 335 (1994) (arguing that when two adults have raised a child together in the context of a nuclear family setting, there should be no significance attached to the nonexistence of a biological or legal connection between the child and one of the
they have had a parent-child relationship unless they can first be found to have standing to petition for custody.10 Standing requirements such as these were incorporated into child custody law as a means of maintaining the “superior rights” doctrine,11 a presumption of long standing in most states, including Kentucky,12 that unless he or she is at least in some broad sense “unfit,” a biological or adoptive parent is the best person to raise and nurture a child.13

This presumption is also found in the Uniform Marriage and Divorce Act (UMDA),14 promulgated almost thirty years ago. One of the “model” provisions that Act introduced, in an effort to maintain the “superior rights”

parents).

10. Kentucky Revised Statute § 403.420(4) (Michie 1997 and Supp. 1998) establishes when a court will have jurisdiction to hear a custody dispute and who can commence the proceeding. Once a non-parent is determined to be a “de facto guardian” under section 403.270, the court confers the same standing on that person as is conferred on a parent, and the focus is on the proof required of third parties in order to be granted custody. KY. REV. STAT. ANN. § 403.270(1)(b) (Michie 1997 and Supp. 1998). The standing conferred on de facto guardians to commence custody proceedings was incorporated into section 403.420(4)(c), effective July 15, 1998.

11. See infra notes 31-68.

12. See Jones v. Jones, 577 S.W.2d 43 (Ky. Ct. App. 1979) (all other factors being equal, a parent will prevail over a non-parent).


THIRD-PARTY STANDING - CHILD CUSTODY

preference, was a requirement calculated to give standing to third parties only under the most urgent and narrow circumstances. This approach, with some subsequent modifications or repeals in several states, was incorporated into the law of Arizona, Colorado, Illinois, Missouri, Montana, Washington, and Kentucky. In these states, someone other than a biological or adoptive parent is able to petition for custody, regardless of questions of parental fitness, only if the child is not in the physical custody of one of his parents. These provisions were:

... designed to protect the parental rights of custodial parents. Although a parent may bring a petition against a custodial parent, a non-parent may bring such petition only if the child is not in the physical custody of a parent. Thus, a non-parent ... must qualify under the 'dependent, neglected, needy or abandoned' standard of juvenile court.

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15. See id.
16. See, e.g., Wash. Rev. Code Ann. § 26.09.180 (West 1986), repealed by 1987 Wash. Laws ch. 460, § 61. But see Wash. Rev. Code Ann. § 26.10.030 (West 1997 and Supp. 1999) (augmenting the third party standing language found in Kentucky as follows: "... only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian. . . ."); See also infra note 244.
17. See Carolyn Wilkes Kaas, Breaking up a Family or Putting it Back Together Again: Refining the Preference in Favor of the Parent in Third Party Custody Cases, 37 WM. & MARY L. Rev. 1045, 1069, n.02 (1996) (the author also includes Minnesota, but that appears to be an error).
18. In 1972, Kentucky adopted portions of the UMDA. Edwardson v. Edwardson, 798 S.W.2d 941 (1990). Section 403.420 contains the exact language of § 401 of the Uniform Child Custody Jurisdiction Act of the National Conference of Commissioners on Uniform State Laws. See Ky. Rev. Stat. Ann. § 403.420 (Michie 1997); See also supra note 14 at § 401. It sets forth the circumstances under which a circuit court possesses the subject matter jurisdiction necessary to make a "child custody determination by initial or modification decree." Ky. Rev. Stat. Ann. § 403.420(1) (Michie 1997). Personal jurisdiction over the child is not required if Kentucky is the child’s home state at the time of the commencement of the proceedings, or has been the child’s home state within six months prior to commencement of the proceedings and the child is absent because of removal by persons claiming custody. Ky. Rev. Stat. Ann. § 403.420(1)(a) (Michie 1997).
21. RALPH S. PETRILLI, KENTUCKY FAMILY LAW, 406 n. 12 (2d ed. 1988); see also Uniform
If this standing requirement is met, third parties may be considered under the “best interests” standard, ordinarily the basis for custody determinations between parents.\(^{22}\)

The problem, however, is that third party standing requirements not only unnecessarily duplicate the work of the Adoption and Juvenile Court Acts,\(^{23}\) but they also interfere with the court’s ability to focus on the best interests of children,\(^{24}\) and are not necessary for the ultimate protection of the legitimate

Marriage and Divorce Act, § 401, 9A(2) U.L.A. 264 (1998). Most judges and practitioners appear to support this statutory parental preference:

[Given the] intense emotionalism [of custody adjudication], how ‘unfit’ litigating parents often appear or are made to appear to judges, and the invitation the ‘best interests’ standard’s indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their [own, the alternative of] an expansion of judicial discretion may well produce a much larger increase in the number of stepparents custody awards than is warranted by the number of [stepparents who truly deserve custody].\^[citation omitted]\.

Denying ‘standing’ to stepparents can be justified, then, because many of the ‘truly’ meritorious stepparent claims will in any event be honored by decisions ‘outside doctrinal parameters,’ while the [formal no standing] rule will serve to protect many biological parents from those trial judges tempted to use indeterminate custody standards to prefer stepparents inappropriately.

Robert J. Levy, Rights and Responsibilities for Extended Family Members?, 27 Fam. L.Q. 191, 197-98 (1993) (speculating on why participants at a family law conference seemed committed to “protecting the interests of the biological parents” and favoring the “traditional doctrine”); see also id. at 200-01 (discussing additionally the difficulties in attempting to liberalize third party standing requirements in order to use them as “aspirational legal doctrines”).

22. The “supreme and paramount consideration” in custody determinations is the welfare of the child. Irvin v. Irvin, 105 Ky. 632 (Ky. 1899); Davis v. Davis, 619 S.W.2d 727 (Ky. 1981) (pointing to the continuing reliance on the “best interest” standard).

23. Child abandonment, for example, which will normally allow a non-parent to establish standing in custody matters, is also a matter properly brought as a matter of neglect or adoption Juvenile or Family Courts, and may be demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child. O.S. v. C.F., 655 S.W.2d 32, 34 (Ky. Ct. App. 1993). In neglect cases, the petitions of parents who fail to support their children, relinquish custody, or otherwise forfeit a claim to parenthood, and then at some later date change their minds and want the child back, are usually denied. See, e.g., In re Smith, 222 N.Y.S. 2d 705 (N.Y. Sup. Ct. 1961).

interests of parents. Indeed, the “superior rights” presumption was directly called into question just a few years ago in a Pennsylvania case, Rowles v. Rowles. The concurring opinion in Rowles questioned the legitimacy of recognizing “a prima facie presumption that parents have a right to custody of their children as against third parties;”

serious question may be posed with respect to the soundness of the apriorism that mere biological relationship assures solicitude, care, devotion, and love for one’s offspring. . . . Where a third party better fulfills these needs, or other circumstances indicate third party custody preferable, the courts, when exercising judgment as to a child’s welfare, should not be restrained solely by a presumption. . . .

The question, then, is if the “superior rights” presumption in ultimate custody determinations is questionable, how can it justify an additional jurisdictional barrier for non-parents? The UMDA barriers, such as Kentucky’s, raise this question even more pointedly, since it may be argued that they inhibit the development of doctrine with regard to the characteristics of third party

25. See supra notes 21 and 24, and infra notes 208-210 and 234-235.
   Whether as a result of [feeling inadequate to determine the best interests of children] or because of a sympathy for parental emotions, most courts applying the best interest test to third party situations [already] utilize a variety of procedural devices which increase the probability of the natural parent winning a suit.

Note, Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties, 73 Yale L.J. 151, 154 (1963); see also, Maguire, Evidence: Common Sense and Common Law 185-86 (1947). “[If] the [superior rights] presumption, [a] shift in the persuasion burden, and [a] raised level of proof were all used [during the course of custody hearings], the resulting law would be virtually indistinguishable from the parental right doctrine.” Note, Alternatives, supra, at 155 n.1.

27. Id. at 127 (quoting Ellerbe v. Hooks, 416 A.2d 512, 516 (Pa. 1980) (Flaherty, J., concurring)).
28. Id. at 128; see also infra note 33.
29. “Superior rights” doctrines are sometimes justified today through the assumption that a natural parent will most adequately fulfill his child’s needs. See, e.g., Newby v. Newby, 202 P. 891, 892 (Cal. Dist. Ct. App. 1921). There is, however, little scientific basis for the presumption that a child’s best interests are best served by being in the custody of natural parents. Richard J. Gelles, Family Reunification/Family Preservation: Are Children Really Being Protected? 8 J. Interpersonal Violence 557, 560 (1993).
caregivers calculated ultimately to achieve the best interests of children.

Why not, instead, reasonably broaden the definition of "parent" and the presumptive circumstances needed to infer the parent-child relationship beyond those defined at present in terms of property rights? Why not allow greater numbers of third parties with arguable, even unconventional claims to custody to be considered in the effort to get at the best interests of the child? Would it be unreasonable or valueless to have all those with good faith interests in a relationship with a child to participate and advocate their interests in custody hearings?30

This article discusses the "superior rights" doctrine in Kentucky, and examines the impact Kentucky’s adoption of the UMDA’s third-party custody provisions has had on the ability of that state’s courts to promote the “best interests” of children. First, factors important in third-party custody decisions in Kentucky are isolated and evaluated in terms of whether or not focus on such variables has tended to serve the best interests of children. Second, alternatives to the “not in the physical custody of parents” approach in both UMDA and non-UMDA states are discussed. Finally, suggestions are offered to both courts and legislatures in UMDA jurisdictions, such as Kentucky, with regard to an approach to third party standing better suited to ultimately furthering, rather than merely paying lip service to, the best interests of children.

II. THE PARENTAL “SUPERIOR RIGHTS” PRESUMPTION IN KENTUCKY: HAS PARENTAL UNFITNESS BEEN THE ONLY BASIS FOR THIRD PARTY CUSTODY?

It is likely that the “superior rights” doctrine evolved from very early decisions which looked only to parents’ possessory interests in custody matters.31 The growing obsolescence of the concept of children as property, however, led to changes in judicial attitudes and approaches.32 Nevertheless, “[e]ven into the early twentieth century, courts in the United States held almost

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30. After all, several critics of GOLDSTEIN, ET AL., supra note 6, have said that the real best interests of a child may be in retaining relationships, if they exist, with more than one psychological parent. See generally, e.g., Peggy C. Davis, Use and Abuse of the Power to Sever Family Bonds, 12 REV. L. SOC. CHANGE 557 (1983-84). For other criticisms of the conclusions of GOLDSTEIN ET AL., see Nanette Dembitz, Beyond Any Discipline’s Competence, 83 YALE L.J. 1304 (1974); Peter L. Strauss & Joanna B. Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).
32. See, e.g., United States v. Green, 26 Cas. 30 C.C.R.I. 1824) (No. 15256); Chapsky v. Wood, 26 Kan. 650 (Kan. 1881).
uniformly that a father had the right to custody of his children as a matter of property law or title."33 Indeed, one commentator has suggested that "[t]he common law tradition of viewing fathers as entitled to do what they wished with their children has made a contemporary reappearance in doctrines recognizing the rights of biological parents over a child's relationships with significant others."34 Today, most state courts require "extraordinary circumstances" in order to place custody in non-parents;35 some states still refuse to do so unless surviving parents can be shown sufficiently unfit to allow for termination of parental rights.36

Before the 1972 passage of the Kentucky Uniform Custody and Child Jurisdiction Act,37 a non-parent could obtain custody of a child as a consequence of probate,38 juvenile court,39 or adoption proceedings.40 Obtaining custody in probate was limited to situations where both parents had died or had lost the capacity to care for the child.41 Under juvenile court proceedings, as well as adoption proceedings, custody could be placed in non-parents only upon a showing of parental unfitness or abandonment,42 even if custody in the non-

33. Kaas, supra note 17 (citing generally, Paul Sayre, Awarding Custody of Children, 9 U. Chi. L. Rev. 672, 675 (1942)(explaining the historic interpretation of custody as a property interest)).
35. Prior to 1964, even those states that employed the best interests test in custody disputes between parents replaced it with the "fitness test" where the contest was between a parent and a non-parent. See Foster & Freed, infra note 42, at 425; see also Sayre, supra note 33.
36. See, e.g., In re A.R.A., 919 P.2d 388 (Mont. 1996) Under the UMDA, a third party may have standing, but can only be awarded custody only after there has been a finding of abuse, neglect or dependency. Id.
41. KY. Rev. Stat. Ann. § 387.25 (Michie 1997) (stating that any person can petition the court for guardianship of an unmarried minor who owns real property requiring management or protection). The statute also requires that the minor's parents or next of kin be listed on a petition for guardianship of the minor and receive notice of the petition. Id.
42. It has long been the case that parents who neglect, desert, or abandon their children may forfeit their rights to custody. Henry H. Foster, Jr. & Doris Jonas Freed, Child Custody (Part I), 39 N.Y.U. L. Rev. 423, 432 (1964). Family and juvenile courts in several states, including Kentucky,
parent was in the child’s best interests. Thus, by the early years of the twentieth century, the Kentucky courts had explicitly adopted a “superior rights” doctrine, while at the same time acknowledging that “the controlling question” in custody determinations was the “best interests of the child.” In Rallihan v. Motshmann, a 1918 habeas corpus case, for example, in holding for the father instead of maternal grandparents, the court stated: “The laws of God, as well as of man, have made the parent the natural protector and guardian of his children, and the natural family relation should be favored in fixing its custody, if the parent is fit for the trust.”

By the 1960s, it continued to be clear that “the natural parent [had] the superior right [in custody disputes] unless [he or she was] not suitable, fit, or capable of making reasonably adequate provisions.” “Unfitness”, however, was determined by evaluating “moral fitness and habits, home environment, age, financial stability, relationship with the child, and ‘any circumstances . . . prejudicial to the best interest of the child.’” Thus, parents’ “superior rights” have long had authority to terminate and fix custody in cases of dependent or neglected children. See Jensen, The Child Without a Family: Problems in the Custody and Adoption of Children, 14 U. ILL. L. F. 633 (1962).

43. See, e.g., Greathouse v. Shreve, 891 S.W.2d 387, 388 (Ky. 1995) (stating that the best interest of the child standard does not apply between a parent and a non-parent unless the parent is found to be unfit). Only occasionally did courts circumvent this “fitness” rule. Wynn v. Wynn, 689 S.W.2d 608 (Ky. Ct. App. 1985) (affirming the judgment of the lower court to award custody to the paternal grandparents over the mother even though the mother was not shown to be unfit in any traditional sense, the court looked at the best interests of the child in making the decision).

44. Not until 1952 did the Kentucky General Assembly codify the superior parental right to custody: “[t]he father and mother shall have the joint custody, nurture, and education of their children.” KY. REV. STAT. ANN. § 405.020 (Michie 1997). The amendment passed in 1998 now contains provisions that apply to a de facto guardian. See infra notes 194-207 and accompanying text.

45. See, e.g., Shallcross v. Shallcross, 122 S.W. 223, 225 (Ky. 1909) (the paramount duty of the court is to look at the child’s welfare); see also Rallihan v. Motschmann, 179 Ky. 180 (Ky. Ct. App. 1918); Ellis v. Jessup, 74 Ky. 403 (Ky. Ct. App. 1875).

46. 200 S.W. 358 (Ky. 1918).

47. Id. at 363; see also Lewis v. Lewis, 174 S.W.2d 294, 295 (Ky. Ct. App. 1943) (“[E]veryone concedes that, both under statutory and divine law, parents have the superior right to the custody and rearing of their offspring.”).


49. Hendrickson, infra note 73, at 459 (quoting Reynardus v. Garcia, 437 S.W.2d 740 (Ky.
THIRD-PARTY STANDING - CHILD CUSTODY

were not absolute;\textsuperscript{50} third parties could receive custody if parental unfitness required it:

That principle is applied by the courts in order to protect and preserve the God-given and superior right of parents in the premises. If, however, the parent possessing such right is either morally unfit or unsuitable to discharge the task -- or later becomes such through his own vicious habits or through physical or mental disease -- to such an extent as that the future welfare of the child would become manifestly imperiled unless a different custodian was provided, then, and in such event only, will the universally adopted rule [favoring the parent] be disregarded.\textsuperscript{51}

Therefore, by 1970, the courts had become firmly committed to a rule of law that allowed children to be placed in the custody of third parties only if the natural parent was unfit.\textsuperscript{52} In fact, even more recently, in \textit{Greathouse v. Shreve},\textsuperscript{53} although the Supreme Court reiterated the long-standing rule that the "best interests" of the child is the determining factor in custody disputes between parents,\textsuperscript{54} it stated that:

[T]he 'best interests of the child' standard, does not apply in deciding custody between a parent and a non-parent, albeit a grandparent; ... KRS 405.020(1) and a trilogy of cases from this Court recognize a parent's superior right to obtain custody of the child vis-a-vis a grandparent unless proved unfit.\textsuperscript{55}

Yet, in many "parental rights" jurisdictions that still do not consider the "best interests" of children until and unless the biological parent is found unfit,\textsuperscript{56}
there is rarely any concrete rationale for this parental preference.\textsuperscript{57} In Arkansas, for example, all citations to the “superior rights” of parents ultimately lead back to the decision in \textit{Verser v. Ford}.\textsuperscript{58} \textit{Verser} held that because of biological ties and the duty and affection they engender, and his greater ability and worldliness, a father had a superior right to custody of his child - even over the rights of the mother, and notwithstanding considerations of the best interests of the child.\textsuperscript{59}

[The] historical context of that case [, however,] was clearly one different from contemporary American society. \textit{[Society]} has changed significantly; perceptions of what is real have changed and most of the assumptions upon which the paternal rights statement of \textit{Verser} and the parental rights doctrine of later cases are based are no longer considered to be true. Yet [the] position of \textit{Verser} [continues] to be used as authority for the parental rights doctrine [notwithstanding the fact that] the \textit{Verser} case, [itself,] was in fact decided upon best interest of the child criteria, taking into account the relationship of the child with the third party and despite the natural parent being perceived as a fit parent. [Thus, although it gave] lip service to the accepted view of the time that the father is lord of the home, [even \textit{Verser}] was actually decided for the benefit of the child, using what might be considered today a children’s rights standard.\textsuperscript{60}

A decision from Georgia, which shares the Arkansas approach,\textsuperscript{61} also illustrates the conflict between the “superior rights” doctrine and the notion that a child’s “best interests” are the ultimate goal in custody hearings.\textsuperscript{62} Because of the strong, occasionally irrational pull of the notion of “natural” and “superior” parental rights, even stepparents with long attachments to children in Georgia have a substantial burden of proving “unfitness” before they may be heard.\textsuperscript{63}

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UMDA, a third party may have standing, but can be awarded custody only after there has been a finding of abuse, neglect or dependency; State v. McCord, 825 P.2d 194 (Mont. 1992); see also Erger v. Askren, 919 P.2d 388 (Mont. 1996) (stepparent standing statute was unconstitutional because it infringes upon the rights of the natural parent who has not been adjudicated unfit).
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\textsuperscript{57} O’Keefe, \textit{supra} note 8, at 1092-94.
\textsuperscript{58} 37 Ark. 27 (1881); see also O’Keefe, \textit{supra} note 8, at 1091-93.
\textsuperscript{59} \textit{Id}.
\textsuperscript{60} O’Keefe, \textit{supra} note 8, at 1092-93.
\textsuperscript{61} In Georgia, the early seminal case was \textit{Miller v. Wallace}, 76 Ga. 479 (1886). There, too, even though the court decided for the father, it still felt it was necessary to address the welfare of the child. O’Keefe, \textit{supra} note 8, at 1092-94.
\textsuperscript{62} See \textit{Miller v. Wallace}, 76 Ga. 479 (Ga. 1886).
\textsuperscript{63} \textit{Id}.
In *Howell v. Gossett*, for example, a father attempted to recover custody from a stepfather after the mother's death. His petition was denied because he had neither provided support nor attempted to have any contact with his daughter for seven years prior to the lawsuit. Nonetheless, the Georgia Supreme Court reversed, stating that there was "no evidence of conduct . . . that would render the [father] unfit." "In the absence of such conduct, presumably something worse than his significant neglect for many years, the father was automatically entitled to remove his daughter from the home she had shared with her mother and stepfather [for most of her life]." Thus, it is evident that there is great potential for inequity in the strict application of the "superior rights" doctrine, such that inappropriate results with regard to a child's best interests may follow.

Kentucky, however, has long maintained a tradition of occasionally circumventing unduly strict requirements of "unfitness." Natural parents have been deprived of custody "under a variety of circumstances," usually as a result of habeas corpus proceedings. Kentucky courts, in other words, seem to have

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64. 214 S.E.2d 882 (Ga. 1975).
65. *Id.*
66. *Id.* at 883-884.
67. *Id.* (emphasis added).
68. MAHONEY, supra note 3, at 142.

When the issue of stepchild custody arises . . ., following the death of the custodial parent, the child's interest in stability and the continuity of family relationships are placed in serious jeopardy. First, the death of the custodial parent involves the traumatic end of what was probably the most important relationship in the child's life. Second, where family ties have been formed with the residential stepparent, the abrupt removal of the child from the family home and the stepparent's care constitute an additional threat to the child's sense of continuity in a family. Under the traditional standard, however, these matters become relevant only if the noncustodial parent is an unfit person.

*Id.*

69. Long before the UMDA, Kentucky courts on occasion awarded custody to non-parents in habeas corpus proceedings when the best interests of the child required it. See, e.g., Ellis v. Jesup, 74 Ky. 403, 415-16 (Ky. 1875) (concluding that the authority of the father is paramount to other considerations but must yield to the best interests of the child); see also Crase v. Shepherd, 240 S.W.2d 548, 551 (Ky. 1951) (commenting on the complex responsibilities and duties of child rearing). The court in *Crase* looked not only at the fitness of the parties, but at "any circumstances which would be prejudicial to the best interests of the child," such as the happiness of the child, the child's surroundings, the parties' financial ability to care for the child, the interest and affection shown to the child, and the implications of a disruption of the child's present relations. *Id.* The
had a relatively broad view of "unfitness" under which third party caregivers (and the child's best interests) occasionally prevailed. As early as 1925, in *Smart's Executrix v. Bree,* 71 a paternal aunt and uncle were allowed to retain custody of a child against the wishes of the deceased mother. The court implied that the "best interests" of the child could supercede the superior rights of the parents: "the legal right of the parent . . . will be enforced if the real and permanent interest of the child does not demand a different disposition, yet where the real and permanent interest of the child does demand a different disposition, the court should not hesitate to make such different disposition." 72

By 1970, the broad grounds that might outweigh parental rights were explicitly expanded to their present scope: "[t]he natural parent is entitled to custody unless he is shown to be unfit, to be harmful to the child, to have contracted away his right, or is clearly estopped to claim custody." 73

Yet, as the rights of third parties to petition for custody seemed to expand, the United States Supreme Court continued to reinforce the principle, articulated as early as 1923,74 that the parent-child relationship is a constitutionally protected, fundamental right. 75 The right of a natural parent to raise his or her own child was also protected by the constitutions of many states. 76

court in *Crase* ultimately found that the life of a child who had lived with foster parents since he was a baby and had formed bonds with them would be violently disrupted if custody were to be returned to his parents and reversed the order granting custody to the natural parents. *Id.* at 551-52.

70. Apparently, by the turn of the century, Kentucky courts had already incorporated the seminal dicta from *Chapsky v. Wood,* 26 Kan. 650, 653-54 (Kan. 1881), which cautioned that "ties of blood weaken, and ties of companionship strengthen, by lapse of time. . . ."

71. 277 S.W. 478 (Ky. 1925)

72. *Id.* at 480. The father was dead, and prior to her death, the mother designated her cousin as the custodian of the child even though the child was and had been living with the paternal aunt and uncle. *Id.*


74. *Meyer v. Nebraska,* 262 U.S. 404 (1923) (holding the right to raise and control one's child is a protected aspect of liberty).


76. "Natural parents are said to have a superior right to the custody, care, and control of their children." *Legal Rights of Children,* at 75 (Donald T. Kramer ed., 2d ed. 1994) (citing Matter of
Consequently, those courts that have succeeded in protecting children's interests in the continuity of step-family or other third party relationships often have afforded fundamental parental "preferences," but certainly as compared to the standard in termination of parental rights cases,77 have used a relatively broad definition of unfitness.78

III. THE ADOPTION OF THE UMDA’S THIRD PARTY STANDING REQUIREMENT: “NOT IN A PARENT’S ‘PHYSICAL CUSTODY’”

As a result of these parallel trends, and in an apparent effort to reinforce the "superior rights" of parents while clarifying the narrow circumstances under which third parties might have a legitimate claim to custody, Kentucky adopted the third party standing provisions from the UMDA.79 As a result, for non-
parents to have had standing to petition for child custody in Kentucky after 1972, they were first required to satisfy Section 403.020(4)(b) of the Kentucky Domestic Relations Statute, which stated that a custody hearing could be commenced by a person other than the parent "only if the child is not in the physical custody of one of his parents."

The language of this provision would appear to be rather straight-forward, yet the seemingly reasonable argument that lack of "physical custody" in a parent is satisfied by "physical possession" in a non-parent has been consistently rejected. In addition to lack of "physical custody" in a parent, non-parents must prove that the parent has given up her legal right to custody before the court will consider the child's "best interests." In determining whether the non-parent has done so, Kentucky courts consider a number of factors that might tend to establish (or not establish) quasi-property (legal) rights in third parties. These include: (a) how the third party acquired possession; (b) the duration and nature of the possession; and (c) whether one or more of the parents voluntarily agreed to relinquish physical possession of their child indefinitely; or (d) is otherwise estopped from denying third party standing.

80. KY. REV. STAT. ANN. § 403.420 (Michie 1997).
81. KY. REV. STAT. ANN. § 403.420 (Michie 1997); see Berry v. Berry, 386 S.W.2d 951, 952 (Ky. 1965) (holding in a contest between a foster parent and a natural parent who has not surrendered custody, the natural parent has superior right and must prevail); see also Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979) (citing from other states that have adopted the UMDA, Olvera v. Superior Court, 815 P.2d 925 (Ariz. Ct. App. 1991)); Levine, supra note 3, at 334-35. But see MINN. STAT. ANN. § 518.156 (West Supp. 1996) (in Minnesota, a state that does not have a UMDA third party custody provision, it is not necessary to show a child is not in the physical custody of parent at the time a third party petitions).
82. Williams v. Phelps, 961 S.W.2d 40, 42 (Ky. 1998); see also Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995).
83. See, e.g., Shifflet v. Shifflet, 891 S.W.2d 392 (Ky. 1995) (refusing to grant paternal grandmother best interest standard in petition for custody since custody is not lost to parent simply because the child is left in the care of a non-parent for a significant length of time).
84. Shifflet v. Shifflet, 891 S.W.2d 392 (Ky. 1995).
85. See, e.g., supra note 68.
A. Acquisition of Physical Possession

In addition to being helpful in understanding the nature of legally adequate acquisition of possession of children by non-parents, *Reynardus v. Garcia*86 also illustrates one of the fundamental problems with an “adult-oriented,” property-based “superior rights” presumption: The required evaluation of relative property interests between adults competing for a child overshadows the seemingly more pertinent question of who - in terms of their relationship with the child - should be heard to ensure an ultimate custody decision in the child’s “best interests?” The mother in *Reynardus*, for example, had been granted custody upon dissolution of the marriage.87 After the divorce, the mother moved to Kentucky and lived with her parents for a time, but ultimately died of self-inflicted wounds. The father asked for return of his children from the maternal grandparents. They refused, arguing that they were entitled to custody of the children.88

The court responded by pointing out that “for more than fifty years the statutory law in Kentucky has provided that in the event of the death of either one of the parents, father or mother, the survivor, if suited to the trust, shall have the custody, nurture and education of such infant child or children.”89 Any non-parent seeking custody has the burden of proving parental unfitness90 because “in a contest between a foster parent and a natural parent who has not surrendered custody, the natural parent has the superior right of custody....”91

The grandparents in *Reynardus*, however, served as “parents” to the same extent as did the mother and it most likely would have been in the child’s “best interests” if they had a continuing place in the child’s life,92 but the court was required to protect the “natural rights” of the father exclusively.93 In the absence of a showing of unfitness, therefore, grandparent custody was completely barred.94 Thus, where parents continue to have actual (or

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86. 437 S.W.2d 740 (Ky. 1968).
87. Id. at 740.
88. Id.
89. *Reynardus*, 437 S.W.2d at 742.
90. Id.
91. Id.; see also supra note 81.
93. KY. REV. STAT. ANN. § 405.020 (Michie 1997).
94. *Reynardus*, 437 S.W.2d at 743. Unless the non-parent can show by clear and convincing
“constructive”) possession of their children, they retain (or regain by “reversion”) their natural rights in their children. It is assumed that custody in a suitable parent is in the “best interests” of the child. 96

Another interesting case concerning the legal adequacy of a non-parent’s acquisition of child custody is Bond v. Shepard. 97 After being granted custody, with liberal visitation rights in the father, the mother and child went to live with the maternal grandparents. 98 The grandparents assisted greatly in caring for the child and after the mother left the child with them they petitioned for custody. 99 A “special commissioner” found that the father had acquiesced in his daughter’s stay with the maternal grandparents and thereby had waived his right to custody of the child. 100 The court found, however, that the father was not estopped from regaining custody because the father’s voluntary acquiescence in custody in a third party was not for an indefinite period of time. 101

Reynardus and Bond, therefore, appear to have been decided based on an evidence that the surviving parent is unfit to raise the child, the court will not proceed to an evaluation of the best interests of the child. Bond v. Shepherd, 509 S.W.2d 528, 529 (Ky. 1974); see also Sumner v. Roark, 836 S.W.2d 434, 439 (Ky. Ct. App. 1992) (holding the burden of proof is on the non-parents to show the parent is unfit for custody because there is a presumption that the surviving parent is competent and suitable to rear the child).

95. However, although the reported cases do suggest that “physical custody” reverts back to the surviving parent upon the death of the custodial parent, reversion is not automatic. See Middleton v. Middleton, 261 S.W.2d 640 (Ky. 1953) (holding it was in the best interests of the child to remain with the grandmother where a father showed no interest in his child and the mother left the child with the grandmother); Woodrum v. Dunn, 508 S.W.2d 38 (Ky. 1974) (the father showed no interest in the child and thus it was in the best interests of the child to remain with the grandmother).

96. See, e.g., infra note 102.

97. Bond v. Shepherd, 509 S.W.2d 528 (Ky. 1974).

98. Id.

99. Id. at 529.

100. Id. (holding that where a parent acquiesced in the child being left with the non-parent he had waived his right to custody by estoppel). But see Shifflet v. Shifflet, 891 S.W.2d 392 (Ky. 1995) (custody was not lost in the parent where the child was left with a non-parent for a significant amount of time).

101. Bond, 509 S.W.2d at 529.

102. Id. The grandparents testified that the father only wanted them to have temporary custody until the mother was capable of taking care of the child, and that the father had kept up his support payments and visitation. Id.
assumption that a child’s best interests are served by custody in a suitable natural parent, regardless of the upheaval the child’s return to the parent could cause to the child’s environment. 103 *Forester v. Forester*104 is a recent example of the continuation of this judicial attitude. In that case, the father was physically abusive to the mother.105 After responding to two phone calls which gave them concern over the father, the non-parents concluded the parents were unable to care for the child and they took the child into their custody.106 The state placed the child in their temporary custody pending a hearing.107 After the hearing, the parents and the non-parents were granted joint custody, with the non-parents to serve as the primary custodians.108

The non-parents eventually attempted to obtain permanent custody but, because of the prior order of joint custody, the mother was found to have never voluntarily and indefinitely relinquished custody.109 Thus, even though the court deemed the mother unfit emotionally and physically due to the abusive relationship with the father, the non-parents had no standing to request permanent custody.110 There had not been a finding that there was “no reasonable expectation of improvement in parental care and protection”111 and thus the requirements for involuntary termination of parental rights had not been met.112 *Forester,* therefore, is an example of a trial court’s attempting to act in the best interests of a child, while also protecting the superior rights of natural parents, but failing. Even if the mother was potentially able to improve her parenting skills and regain permanent custody, was it in the best interest of the child to be placed indefinitely in the temporary custody of presumably loving non-parents only to be removed when the mother has finally become a suitable parent?

103. *Id.*
104. *Forester v. Forester,* 979 S.W.2d 928 (Ky. 1998).
105. *Id.*
106. *Id.* at 928-29.
107. *Id.*
108. *Id.* at 929.
109. *Id.* at 930.
110. *Id.*
111. *Id.*
112. *Id.*
B. The Relevance of the Duration and Nature of Non-Parent Custody to the Statutorily Required “Voluntary and Indefinite Relinquishment” of Parental Rights

Where there has been voluntary relinquishment of parental custody but not explicitly for an “indefinite” period of time, the duration and nature of the non-parent’s physical possession may be crucial in implying a waiver of parental rights. In Woodrum v. Dunn, for example, the mother and father divorced while the father was in the military and the mother and child went to live in the maternal grandparents’ home. This was the only home the eight-year-old child had ever known. After being summoned to court several times for failing to meet child support payments, the father requested and obtained an order granting custody to the maternal grandmother. Several years later, however, when the father attempted to regain custody of his daughter, the request was denied. Quoting George Eliot, the court found a voluntary and indefinite relinquishment of parental rights. In addition, the father’s failure to make child support payments convinced the court that the best interests of the child would be served by maintaining the status quo, non-parent custody.

Woodrum, of course, involved a clear case of voluntary waiver of parental rights, but in Shifflet v. Shifflet, the court had to decide the more difficult question of whether an involuntary waiver might be sufficient. The child in Shifflet was taken into the home of the paternal grandmother soon after birth. The mother was incarcerated and the father had a long history of criminal conduct, including sexual abuse of a child. When the mother sued to regain custody and produced evidence that she had “changed her life,” the trial court

113. See supra notes 98-102.
114. 508 S.W.2d 38 (Ky. 1974).
115. Id.
116. Id. at 38.
117. Id. at 39.
118. Id.
119. “When a man turns a blessing from his door, it falls to him who takes it in.” Id.
120. Id.
121. 891 S.W.2d 392 (Ky. 1995).
122. Id.
123. Id. at 393.
124. Id.
nevertheless awarded custody to the paternal grandmother under a "best interests" standard. The Supreme Court reversed, however, concluding that unless the mother was proven unfit, or it was determined that she had waived her legal rights, she was entitled to custody of her child:

Waiver differs from estoppel primarily because it does not require proof of the other party having been misled. Waiver is essentially unilateral, resulting as a legal consequence from some act or conduct of [the] party against whom it operates, and no act of [the] party in whose favor it is made is necessary to complete it.

In his concurrence, Justice Spain suggested five factors courts might use in determining whether or not waiver may be implied: (1) the length of time the child has been away from the parent; (2) the circumstances of separation; (3) the age of the child when care was assumed by the non-parent; (4) the time elapsed before the parent sought to reclaim the child; and (5) the frequency and nature of contacts, if any, between the parent and the child during the non-parent's custody. A short-term visit or delivery of possession, evidently, will not be seen as implying a knowing and voluntary waiver.

Of course, regardless of the duration of third party custodial possession, psychological bonding between the child and a non-parent will weigh strongly in favor of the non-parent; the loss of parent-child relationships would be of obvious consequence to the child's "best interests." In Manion v. Cofer, a mother attempted to regain custody of her daughter from a stepmother after the custodial father drowned. The lower court granted custody to the mother under the presumption that a surviving parent is entitled to

125. Id.
126. Id. at 394.
127. Id.
128. Id. at 397.
129. Id.
130. Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979). A recent Oregon case also turned on whether the non-parent petitioning for adoption had established a relationship with the child. Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995) (holding grandparents did not have a constitutionally protected liberty interest in the adoption of their grandchildren where they had only minimal contact with the grandchildren and had not developed a familial relationship with them).
131. 459 S.W.2d 76 (Ky. 1970).
132. Id.
custody upon the death of the custodial parent unless it can be shown that the surviving parent is unfit. The Kentucky Court of Appeals reversed, and awarded custody to the stepmother, because the mother had failed to show that the transfer would not be detrimental to the daughter. In doing so, however, the court was forced to seize upon the fact that in the original divorce proceeding the judge had specifically removed the daughter from the mother's custody. The court held that:

When the surviving parent has been deprived of custody by a court of law, in circumstances under which ordinarily such action would not have been taken without a reason pertaining to his or her fitness, then in a suit to regain custody he has the burden of proving that the transfer will not be detrimental to the child.

Thus, while the underlying justification for the decision reasonably might have been a "de facto" parent-child relationship of significant duration, the court was required to contort and assume facts unrelated to this relationship in order to further the child's best interests. Indeed, the finding of maternal unfitness upon which the court relied concerned only one child, and was contradicted by a simultaneous finding of fitness with regard to her other children.

Yet another case of unavoidably contorted reasoning can be found in Middleton v. Middleton. There, a maternal grandmother began raising a two-year-old child after the divorced, custodial mother left her in the grandmother's care. The father, who was awarded custody of their son in the divorce, eventually left him in the care of the paternal grandfather. Because the father failed to make child support payments, the maternal grandmother filed a criminal proceeding against him. He was ordered to provide support but, on

133. Id. at 78.
134. Id. at 80. The court concluded that the daughter was in a healthy environment with the stepmother and that moving her would be detrimental. Id.
135. Id. The court pointed out that the mother did not contest the original custody decree and that the trial court, for reasons known only to that court, must have believed the mother was unfit. Id. at 79.
136. Id.
137. Id. at 80.
138. 261 S.W.2d 640 (Ky. 1953).
139. Id. at 641.
140. Id.
141. Id.
the rare occasions when he did drop off payments, he never played or visited with his daughter.142

When the girl was eight years old, the father petitioned for custody and, even though he was not found unfit,143 the court awarded custody to the grandmother based on a “best interests” standard.144 Custody would not be given to a father who had shown no affection for his daughter and who had to be ordered to support her; the grandmother, on the other hand, had not only raised the child, but had also allowed “great affection [to grow] between the two.”145 Still, out of a reluctance to destroy his natural rights, the court allowed the father visitation, providing that if his affection toward his daughter were to grow he would be entitled to petition for custody in the future.146 It would therefore seem that in Middleton a child was deprived of a sense of permanency in an established parenting relationship solely for the purpose of preserving the parental rights of a clearly disinterested parent. Though well-intentioned, the court focused on the rights of the adults, losing sight of the best interests of the child.

These cases illustrate three problems with the original UMDA statutory language as interpreted in Kentucky: (1) the strained, often irreconcilable interpretive efforts courts must occasionally undertake in order to establish parental “voluntary and indefinite relinquishment” and further the best interests of a particular child; (2) the greater probability that, in an effort to affirm parental “superior rights” as presently required by the statute, children’s best interests will not be furthered;147 and (3) courts are being deflected from the important task of evaluating collective experience and developing appropriate standards with regard to when, and under what circumstances, a child’s “best interests” are served by placement with third parties, and why.

In Shifflet, since the court could not conclude that the mother had voluntarily waived her rights, it was forced to grant the mother custody, notwithstanding the fact that the trial court had determined that custody in the grandmother would be

142. Id.
143. Id.
144. Id.
145. Id.
146. Id.
147. “[I]n more than a few (but certainly not all) contested cases in which the stepparent’s claim seemed especially justified, courts have nonetheless managed, using a variety of often tortured and certainly circuitous routes, to award custody to the stepparent.” Levy, supra note 21, at 194 (citations omitted).
in the child’s "best interests." 148 In Middleton, however, the court was reasonably able to assume that a parent who has shown no interest in his child for six years had voluntarily and indefinitely relinquished his right to custody. 149 Thus, in Middleton, as well as Manion, non-parent custody depended not so much on their relationships with the children but on often weakly supported conclusions that parents had relinquished their parental rights. These conclusions were reached even though it was unclear whether the relinquishments were knowing, voluntary and indefinite. 150 Yet, if the parents had not made these various real or contrived concessions of their rights, knowingly or otherwise, the best interests of the child would not have been served.

Further, opportunities to explore important legal and public policy questions are easily lost in the statutorily required judicial preoccupation with indicia of legal possession based on property notions. 151 This preoccupation tends to detract from a "child-oriented" focus in developing a body of jurisprudence that suggests when, and under what circumstances, custody in a third party is in the best interests of a child. 152 After all, the extent of a child's attachment to and reliance upon a non-parent does not hinge upon property rights or time of...

149. Middleton v. Middleton, 261 S.W.2d 640 (Ky. 1953).
150. Voluntary and indefinite parental relinquishment is the cornerstone of proof of lack of "physical custody" in a non-parent. See, e.g., supra notes 97-102.
151. One example of the problem is found in the following text:

A standing requirement is useful as a rough filter to prevent the filing of petitions by those who have no legitimate interest in the care of a child, but is poorly suited to resolving real disputes between those who do have such an interest. Deciding these cases by a standing requirement is similar to attempting to decide every case by summary judgment. In fact, it is worse because a motion for summary judgment looks to the issues in the case, while the standing requirement of section 601 (b)(2) will result in awards contrary to the best interests of the child. In re Marriage of Houghton, 704 N.E.2d 409, 416 (Ill. App. Ct. 1998) (Cook, J., dissenting).

152. For example, several United States Supreme Court cases have increasingly viewed parental roles and familial relationships not in terms of biological connections, but in terms of emotional relationships. O'Keefe, supra note 8, at 1098; see also, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1976) (concluding that it is unconstitutional for the City of Cleveland to attempt to regulate which members of a family can live together by defining a family in terms of the nuclear family consisting of parents and children only, and indorsing a broader sense of family based on traditional notions of the extended family being involved in all aspects of family life).
THIRD-PARTY STANDING - CHILD CUSTODY

This may be why, at least sub rosa, courts look for “evidence of a mutually close and loving relationship” between the child and the adults in determining the child’s best interests and in granting custody.

C. Explicit Relinquishment of Parental Rights

Courts also recognize explicit agreements relinquishing possession of a child to non-parents as determinative in establishing that the best interest standard should apply. The existence of an agreement between a mother and adoptive parents, as well as the subsequent acts and reliance upon the agreement by both parties, was crucial in affirming the adoptive parents' custody rights in Van Wey 153. See Levine, supra note 3, at 330 (citing Simmons v. Simmons, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992)).

154. See id. (discussing the recent trend which recognizes stepparent standing and custody rights through the doctrine of in loco parentis).

155. This principle, which favors voluntary agreements, was also recognized in Thompson v. Childers, 231 Ky. 179 (Ky. Ct. App. 1929). In Thompson, the two children had lived with the grandparents since birth. Id. at 181. By the time of the custody petition, the oldest child was eight years old. Id. at 179. The court upheld the validity of contracts for third parties to care for the child. Id. at 185. The question was whether or not the father had voluntarily relinquished his parental rights by agreeing to the contract for the grandparents to care for the child:

As long as the person to whom the custody has been surrendered faithfully performs the duties which the father should have performed, good conscience demands that he be estopped from repudiating his agreement to the distress of those having the custody of the children, and the children themselves.

Id. at 184. During the 1950s, the courts seemed to say that in the absence of a voluntary surrender of parental rights, the parent would have to be shown to be unfit. In Crase v. Shepherd, 240 S.W.2d 548, 550 (Ky. Ct. App. 1951), the court stated: “There being no basis for finding a surrender of parental rights, it is clear that the natural parents have a superior right of custody, which must prevail unless they are not suitable, fit, or capable of making reasonably adequate provisions for the child's well being.” Id. The court granted custody to the foster parents based on a determination that the natural father “fail[ed] to meet adequately the required tests of suitably and fitness.” Id. at 552. “Thus before applying the best interests of the child standard in deciding custody in this case, the trial court must first find the father had made a waiver of his superior right to custody, an intentional or voluntary relinquishment of a known right to custody.” Greathouse v. Shreve, 891 S.W. 2d 387, 390 (Ky. 1995). “The parent's superior right of custody is not lost to a non-parent, including a grandparent, simply because a child is left in the care of the non-parent for a considerable length of time.” Shifflet v. Shifflet, 891 S.W.2d 392, 395 (Ky. 1995).
v. Van Wey. The mother in that case agreed to terminate her parental rights in order to allow for the adoption of her newborn baby. She filed a petition to terminate her parental rights and placed the child in the home of the prospective parents. Later, when she attempted to revoke her consent, the court had to decide whether to simply return the child to the mother as a matter of natural rights or proceed to determine the best interests of the child. The court ruled that the actions taken by the mother had legal consequences and required that the best interest of the child be determined.

The resolution of "best interests" questions where there has been an explicit waiver of parental rights is well illustrated in Williams v. Neumann, where a mother signed a consent for adoption when her daughter was four days old. Although there was some dispute as to whether she intended the relinquishment to be permanent, during the first year after the child was placed with the adoptive parents, the mother never visited, contributed support, or gave her gifts. At the time of the proceeding to regain custody, the child was three and one-half years old and the adoptive parents were the only parents she had ever known. The prospective mother was fifty-one years of age, and the prospective father was seventy-three, whereas the natural mother was twenty-five. Both sets of parents would be able to provide a comfortable home for the child, yet the court granted custody to the adoptive parents, concluding

156. 656 S.W.2d 731, 735 (Ky. 1983) (stating the child's legal situation has changed and the "best interests" of the child shall be considered paramount). The right of a neutral parent to reclaim the child is not gone but the superior right is waived. Id. In North Carolina, as well, courts will not give a parental preference to parents when they have previously agreed to relinquish custody to a non-parent. See Price v. Howard, 484 S.E.2d 528 (N.C. 1997). In such cases, however, the agreement does not terminate a parent's custody rights; the courts still must determine whether the agreement surrendered custody of the child to the non-parent temporarily or permanently. Id.

157. Id.
158. Id. at 732.
159. Id.
160. Id. at 735.
161. 405 S.W.2d 556 (Ky. 1966).
162. Id.
163. Id. at 557.
164. Id. at 556.
165. Id. at 557.
166. Id.
167. Id.
THIRD-PARTY STANDING - CHILD CUSTODY

that:

[w]here that situation exists, and the parent has agreed that his or her child might be adopted and has executed such consent or offer in the manner pointed out by the statutory regulations of the particular jurisdiction which has been acted on by the proposed adopter, then such consent or agreement, in the absence of fraud or duress in its procurement, plus the vastly increased opportunities of the adopted child, creates a case where there is no alternative but to sustain the adoption applied for.168

Thus, in Williams and Van Wey, de facto nurturing relationships had developed with the adoptive parents but they retained custody only because (1) the mother had explicitly agreed to the condition she now wished to alter, and (2) the adoptive parents had expended time, devotion, and money in reliance on the mother’s consent to adoption.169 In the absence of implied or explicit relinquishment agreements, the best interest standard is barred.

For example, in Hill v. Poole,170 parents asked friends to keep their child until their marital separation was settled.171 The friends eventually asked the parents to remove the child because they were becoming too attached,172 but the parents responded by agreeing to consent to adoption by the friends.173 The father was not sworn before he signed the consent form, however, and it was not signed in the presence of a notary,174 so roughly a year later the father filed a response to his friends’ petition for adoption stating that because the consent was not sworn, his parental rights were not properly terminated.175 The court agreed and held that because he had never voluntarily relinquished legal custody of his son, the father was entitled to custody.176 Even though the adoptive couple had cared for the child for more than a year and had most likely become his “psychological parents,” the court ruled that the father had superior rights.177

It would seem, therefore, that in attempting to rely primarily on expressed (though often fortuitous and ambiguous) parental agreements to relinquish, share

168. Id. at 558.
169. Id.
170. Hill v. Poole, 493 S.W.2d 482 (Ky. 1973).
171. Id.
172. Id.
173. Id.
174. Id. at 483.
175. Id.
176. Id. at 484.
177. Id.
or terminate custody, rather than on the nurturing relationships that have
developed between children and their caregivers, Kentucky courts are faced with
the same underlying problem as when relinquishment must be implied. In both
situations, courts may too easily preclude further relationships with those who
are often the only “parents” children have known, relationships which are
obviously in their ultimate best interests to maintain.

IV. THE IMPACT OF THE RECENT “DE FACTO GUARDIAN” AMENDMENT

Since 1998, however, if a non-parent can prove by clear and convincing
evidence that she is a “de facto guardian,” she will have the same standing as a
natural parent and the court will proceed directly to a “best interests”
determination as between non-parent and parent. To be found to have this
status, the non-parent must show that: (1) she is the primary caregiver and
financial supporter of the child; and (2) the child is under three, and has resided
with the non-parent for at least six months, is over three and has resided with the
person for at least one year, or has been placed with the non-parent by the
Department of Social Services. This legislation should serve to advance the
interests of many “psychological parents” by (1) offering the alternative of
standing based simply on proof of acceptance of parental responsibility, and by
(2) significantly minimizing the former requirement that such relationships be of
sufficient duration to imply waiver of parental rights. The “de facto guardian”
provision should allow courts to more readily clarify the nature of those existing
parent-child relationships likely to further the “best interests” of children in
custody disputes by answering, for example, the question of how one determines
that non-parents have been the primary custodians.

Although the phrase “de facto guardian” had not often been found in
decisions prior to this recent amendment, courts have often used strained
reasoning to protect those who, in effect, were de facto guardians. In order to
preserve these relationships, facts have been creatively construed so as to allow
for the conclusion that non-parents had succeeded to the rights of parents.
Kentucky’s recent codification should ease the path and provide standing for

Expense, 58 MONTANA L. REV. 599, 603 (1997) (Courts often allow estranged fathers to have
custody of children after the mother dies, disregarding the fact that the mother’s new husband has
cared for the child as his own for several years.).
179. KY. REV. STAT. ANN. § 403.270(1)(b) (Michie 1997).
180. KY. REV. STAT. ANN. § 403.270(1)(a) (Michie 1997).
those who, previously, first had to prove voluntary and indefinite relinquishment. In *Middleton*,\(^{181}\) for example, the father's "lack of interest" in his child had to be "construed" as a voluntary and indefinite waiver of his superior rights before the grandmother could obtain custody.\(^{182}\) Yet that grandmother met all the requirements of the recently enacted "de facto guardian" provision.\(^{183}\) She was the child's primary caregiver and financial supporter, the child had lived with her for over one year, and she should not have been compelled to rebut the parent's "superior rights" before showing that the child's best interests lie in custody with her. She would not have been forced to do so under the recent "de facto guardianship" amendment.

Actually, the notion of "de facto guardianship" did surface in the reasoning of at least one "pre-guardianship amendment" custody decision. In *Lewis v. Lewis*,\(^{184}\) parents resided with the paternal grandparents when the father left for military duties.\(^{185}\) After the father returned from overseas, the mother left him and her son at the grandparents' home.\(^{186}\) When the parents divorced, custody of the child was placed in the mother, but with the condition that the child continue to be raised in the grandparents' home.\(^{187}\) In the ensuing years, however, the mother kept in touch with her son through letters, gifts, and visits,\(^{188}\) and it would have been reasonable for the court to conclude that she eventually intended to be reunited with her child.\(^{189}\) Moreover, she had remarried, and was now able to provide a good home as well as an opportunity for her son to attend college.\(^{190}\) Ordinarily, this would have been insufficient evidence of "voluntary" or "indefinite" waiver of parental rights; indeed, the mother's conduct could not have been more exemplary under the circumstances. Yet, on the other hand, the child had lived happily with his grandparents for over eleven years, was involved in athletics and church activities, and had expressed a desire to remain with his grandparents.\(^{191}\) Consequently, custody was awarded

\(^{181}\) For a discussion of *Middleton*, see *supra* notes 137-141.

\(^{182}\) *Id.*

\(^{183}\) See *supra* notes 194-195 and accompanying text.

\(^{184}\) *Lewis v. Lewis*, 343 S.W.2d 146 (Ky. 1961).

\(^{185}\) *Id.* at 147.

\(^{186}\) *Id.*

\(^{187}\) *Id.*

\(^{188}\) *Id.*

\(^{189}\) *Id.*

\(^{190}\) *Id.*

\(^{191}\) *Id.* at 149.
to the grandparents because it was in the child’s best interests to remain in the only home he had ever known, a home where he was “well-settled and happy,” rather than be removed to the new home of his mother and stepfather, who was a stranger to him. While the court did not explicitly refer to the grandparents as “de facto guardians,” it nevertheless applied a “best interests” standard because the grandparents had been the child’s primary caregivers for more than one year.

The legislature has now explicitly recognized the important psychological attachments that may form between children and third party custodians and the minimal amount of time such attachments often take to develop. Previously, judicial consideration of these attachments could only occasionally be inferred from judicial opinions, and such considerations were too often intermingled with or overshadowed by focus on proof of parental waiver of rights. Now that “de facto guardians” have the same standing as parents, courts may now proceed directly to a “best interests” analysis without first finding that natural parents are unfit or unsuitable, or that both parents have waived those rights, which was formerly required by Kentucky’s statutory presumption of “superior rights.” Step-parents, however, may still have problems. Establishing the primacy of their care-giving in light of what are usually joint parenting efforts during marriage to custodial parents will most often be insurmountable.

V. ANALYSIS

Section 420.020 of the Kentucky Revised Statutes formerly imposed what has been called an “adult-centric perspective” in child custody matters. In

192. Id.

193. Id. The court noted that “the severance of home ties of long standing is an important and delicate consideration.”

194. Id.

195. The present requirement under KY. REV. STAT. ANN. § 403.270(1)(a) (Michie 1997).

196. KY. REV. STAT. ANN. § 403.270(2) (Michie 1997).

197. “Law defines parenthood from a curiously adult-centric perspective that gives little currency to the ability of children to recognize and claim their mothers and fathers.” Barbara Bennett Woodhouse, Hatching the Egg: a Child-Centered Perspective on Parents’ Rights, 14 CARDOZO L. REV. 1747, 1795 (1993) (discussing the importance of nurturing parenthood rather than biological parenthood). In this article, the author relates the story of Horton Hatches the Egg, where the mother bird leaves her egg to be taken care of by an elephant. The elephant nurtures the egg and protects it, yet right before the egg hatches, the mother bird returns. She attempts to take the egg
interpreting that section, Kentucky courts have been obliged to define the term “parent” in terms of quasi-property rights that had long been held to flow from biology, adoption, or marriage. In doing so, many courts focused on parents’ constitutional or “natural rights,” rather than on children’s important interests in maintaining relationships with non-parents who have provided support, care, and nurturing that parents have refused or have been unable to provide. This approach deprecated the interests and role of those adults who, by reason of consistent nurture and day-to-day care, had become “psychological parents.”

Children develop unique attachments to adults they perceive as parents, and the failure to maintain a child’s relationship with “psychological parents” can have a devastating effect. Yet, such relationships do not necessarily develop simply because a non-parent has had sufficiently adverse physical possession of a child vis-a-vis a parent. In jurisdictions that retain third party standing requirements, courts continue to focus on quasi-property considerations in an effort to protect the superior rights of parents. These courts demand (1)
proof of consensual and indefinite parental relinquishment of custody, or such relinquishment as may be implied from "abandonment" of parental rights, as well as (2) sufficient duration of "adverse possession" by those third parties before non-parents' demands for custody may be considered in terms of the best interests of the child. In pursuing the best interests of children through this approach, however, courts are often forced to sidestep canons of statutory construction, or to contrive legal fictions such as interpreting the otherwise plain words "physical custody" to mean not "physical possession," but "legal custody." Evidence is often selectively "interpreted" in order to find, or not find, where the judges find it appropriate, voluntary and indefinite relinquishment of parental rights, while at the same time failing to establish useful precedent regarding the more important question of which sorts of caregiving relationships ought to justify third party custody, and why.

Kentucky has now taken an arguably more flexible approach to third party custody. In the past, courts used an elevated standard of proof for non-parents opposing parental custody, one which required evidence of parental unfitness or voluntary and indefinite relinquishment of rights before a non-parent could be evaluated on an equal basis with parents. While the normal custody dispute between parents is decided by determining in whose custody lies the best

205. "Absent legislative action, it is in the [unpredictable] hands of the courts to interpret custody jurisdiction statutes in a way that protects both the stepparent and the stepchild who have established close emotional bonds." Levine, supra note 3, at 343-45 (suggesting, some time ago, the "in loco parentis" doctrine as a means of protecting stepparent relationships in states with UMMA-derived custody jurisdiction statutes, such as Kentucky). See also, e.g., In re Marriage of Allen, 626 P.2d 16 (Wash. Ct. App. 1981) (defining stepparents as "parents" under the Washington custody jurisdiction statute); Stockwell v. Stockwell, 775 P.2d 611 (Idaho 1989).

206. Often, this problem [of failure to further children's best interests] cannot be avoided without contorting principles of statutory construction, such as the "plain meaning rule," or creating irreconcilable precedent. Joy McMillen, Note, Begging the Wisdom of Solomon: Hiding Behind the Issue of Standing in Custody Disputes to Treat Children as Chattel Without Regard for Their Best Interests, 39 ST. LOUIS U. L.J. 699, 709 (1995) ("Ironically, the same courts which purport to recognize this presumptive right to custody are also receptive to ignoring it where they deem appropriate or they extricate themselves from a predetermined judicial conclusion by using the rubric of 'extraordinary circumstances.'").

207. See supra notes 82-85 and accompanying text.

208. See, e.g., supra notes 112-194 and accompanying text.

209. See supra notes 61-66 and accompanying text.
THIRD-PARTY STANDING - CHILD CUSTODY

interests of the child, if the dispute is between a parent and a third party, the non-parent must first prove parental unfitness or voluntary waiver of rights before the court will reach this question. In 1998, however, the Kentucky General Assembly amended section 420.020 to allow “de facto guardians” to bring custody proceedings. This new provision does not necessarily require for third party standing a showing of either lengthy “adverse possession” or consent to a child’s “residence” with the third party. The duration of time in exclusive or non-exclusive possession is now minimal, but reasonable, in terms of current understandings of adult-child attachments, and the notion that primary care-giving is de facto parenthood is now explicit, rather than only occasionally implied from case law.

Third parties now have standing equal to parents in custody matters if 1) they are the primary caregivers and financial supporters of children, and 2) a child or children under three resided with them for at least six months, children over three resided with them for at least one year, or the children were placed with them by the Department of Social Services. Of course, the provision still requires that third parties show actual “physical possession” in the sense of “residence,” but possession as against natural parents is no longer required; a “de facto guardian” does not have to prove surviving parents are unfit before proceeding to a best interests determination.

However, while the new provision has given courts more flexibility, and is an important step in the right direction, some problems in this area remain. For example, if “residence” has been with a non-parent and a parent jointly at or just prior to the time the non-parent petitions for custody, it may be difficult to show that the primary care-giving has been from the non-parent caregiver. In this situation, it must still be shown that all parents - including surviving non-custodial parents - have voluntarily relinquished parental rights in favor of the

210. See supra note 64.
211. See supra notes 61-66 and accompanying text.
212. KY. REV. STAT. ANN. § 403.270(1)(a) (Michie 1997).
213. Id.
214. Id.
215. Id.
216. Id.
217. Levine, supra note 3, at 329. The author suggests, as alternative criteria for standing for third parties including stepparents, a showing that they: 1) accepted the child into the home; 2) supported the child emotionally and financially; 3) involved themselves in the day-to-day care of the child; and 4) intend to assume the burdens and duties of a parent. Id. at 328-29.
non-parent. This will often be difficult to accomplish. Moreover, even if a deceased custodial parent had adequately relinquished physical custody at some point, the surviving non-custodial parent is still free to later assert superior rights. It would therefore seem that the statute still does not adequately address the interests of stepparents involved in a divorce who no longer live with the child. These care-givers may not be able to establish independent "residence," but still may have been the primary caregivers and continue to have interests in those relationships. If a third party cannot prove she was a primary caretaker - because she did not live independently with the child - her psychological bonding with stepchildren will simply be ignored. Under these circumstances, the stepparent must still endeavor to prove actual or implied waiver of parental rights before being allowed to proceed to a best interests determination. Deference to parents' natural rights, therefore, continues to obscure the important interrelationships that may exist between step-parents, children and their best interests.218

Certainly, parents who have maintained relationships with their children, have not shown themselves to be unfit, and have not knowingly encouraged or acquiesced in quasi-parental relationships with third parties should enjoy a preference in custody determinations.219 The best interests of most children, however, would seem to require that those who have become "psychological parents" should at least be able to request custody on an equal footing with


Under contemporary approaches to child custody decisionmaking, the decision of who qualifies as a parent clearly affects the outcome of the application of the best interest of the child standard. Although the rhetoric remains centered on the child, the focus in child custody decisionmaking is, in actuality, displaced from the child's best interests to the parents' rights.

Id.

219. See Kaas, supra note 17, at 1117 ("The only ground sufficient to overcome the preference in favor of a capable parent [, even in a reunification case, should be] proof that a change in custody [back to the parent] will cause the child significant and long-term psychological harm."). However, "the closer the bond between the non-parent and the child, the more likely the court will be to find that a move will cause emotional trauma to the child." Id. at 1119. "This emphasis on the impact of changed custody on the child is not a novel concept. Justice Joseph Story recognized long ago that the question [is] 'whether [returning the child to the parent] will be for the real, permanent interests of the infant.'" United States v. Green, 26 F. Cas. 30, 31 (C.C.D. R.I. 1824) (No. 15,256).
natural or adoptive parents.220 The recent "de facto guardianship" amendment allows for this to only a limited extent. The situation of non-parents to whom children essentially have been "abandoned" is improved; but stepparents have not necessarily benefited even though this could easily be accomplished by simply enacting reasonable statutory criteria calculated to assure that petitioning stepparents have had a significant impact on the life of a child,221 regardless of whether they were primary care-takers or financial providers.

Several other states award custody to persons other than parents based solely on the "best interests" of children.222 Other states, such as California, consistently deny standing even to stepparents who have accepted the role of

220. See supra notes 130-134. Actually, those cases in which the child is living with a non-parent as a result of the formation of a second family and the subsequent absence of the biological parent (the situation of stepparents) "is one of the few third-party custody cases in which a best interests approach is constitutionally permissible." Kaas, supra note 17, at 1098.

221. Susan L. Brooks, A Family Systems Paradigm For Legal Decision Making Affecting Child Custody, 6 CORNELL J. L. & PUB. POL'Y 1, 11 (1996) (citing GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 90-91 (1986)). Legislatures might deter the bringing of frivolous claims by imposing reasonable requirements which must be met before granting standing to stepparents, such as that stepparents have resided with the child for a certain length of time, that they have assumed partial or primary financial responsibility for the child, that the relationship began with the consent of the custodial parent, that the child wants to continue the relationship, and that doing so would not be detrimental to the child. See Kristine L. Burks, Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve, 24 GOLDEN GATE U. L. REV. 223, 256-57 (1994). Courts might do the same by granting standing after making findings of in loco parentis where the stepparent accepted the child into the household to establish a relationship, supported the child financially and emotionally, was involved in the day-to-day care of the child, and intended to establish a parental relationship. Levine, supra note 3, at 329-31.

parent in every aspect of the child's life. One approach, attempted in a few states, has been the use of an "equitable parent" doctrine. These efforts have largely been rejected. For example, the Wisconsin Supreme Court has held that the "equitable parent" doctrine - based on a theory of equitable estoppel - could not be used to create rights to custody or visitation because the non-parent/domestic partner in that case may have assumed parent-like responsibilities, but at no time did she or the adoptive mother believe she had the legal status of parent. Therefore, the non-parent had no equitable claim, and most likely, neither would such a petitioner in Kentucky under the recent "de facto guardian" amendment. Michigan Courts have allowed stepparents standing under the "equitable parent" doctrine if "[stepparents desire] recognition [as parents] and [are] willing to support the child as well as [want] the reciprocal rights of custody. . . afforded to a parent." Michigan's notion of equitable estoppel may, by analogy, have some utility for similarly situated stepparents in Kentucky.

Many legislatures have attempted to overcome "parental rights" impediments to third party custody by redefining the concept of "parent" altogether. Connecticut, allows standing to any individual who is interested in intervening in child custody proceedings. In a similar approach, states such

225. Id. at 213.
226. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987). However, in Van v. Zahorik, 575 N.W.2d 566 (Mich. Ct. App. 1997), a Michigan court held that it would be contrary to the public policy which favors the institution of marriage to extend the doctrine to cases in which the stepparent was not married to the parent at the time the child was borne or conceived. Id. at 569 (recognizing equitable parents should be done with the utmost care, and preferably with direction from the legislature).

227. CONN. GEN. STAT. ANN. § 46b-57 (West 1995); see also N.H. REV. STAT. ANN. § 458:17 (VI) (1992 & Supp. 1995) (stating "the court . . . may allow any interested third party or parties to intervene upon motion" and an award of custody may be made to a stepparent if the court determines that such an award is in the best interest of the child; the presumption in favor of the parent can be rebutted by "showing that it would be detrimental to the child to permit the parent to have custody"); N.D. CENT. CODE § 14-09-06.1 (1991) (same); HAW. REV. STAT. § 571-46 (1985) (establishing best interests standard for third party custody cases). These and other states dissatisfied with the parental preference standard, have made the best interest standard the sole test in all third-party custody disputes. See David R. Fine & Mark A. Finc, Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies, 97 DICK. L. REV. 49, 56
as Oregon have provisions that define the parental relationship solely in terms of the nurturing and support an individual has given the child, regardless of "residence" or time in physical possession.228 These approaches, several of which were suggested earlier,229 might fruitfully be considered by the Kentucky legislature should there be growing sentiment in favor of providing greater rights for stepparents. In Buness v. Gillen,230 for example, the Alaska Supreme Court held that a stepfather who had lived with a child's natural mother but who had never married her had standing to petition for custody.231 The child had developed a strong emotional bond with him because he had been the primary caregiver and "father figure,"232 so he was treated like a "parent" under the common law notion of in loco parentis.233 The benefit of this approach is that it is "child-centric" rather than "adult-centric," because it views custody decision-making from the perspective of a child's interests. No arbitrary "time in residence" limit is set on those who may seek custody. Petitioners need only have established parent-child relationships and no proof is required of intent on the part of parents to relinquish custody.

The Wisconsin Supreme Court recently developed a modified in loco parentis approach similar to Kentucky's "de facto guardian" notion but which may be even more helpful to stepparents than is Kentucky's. To have standing to request custody, third parties in Wisconsin must now meet a "two pronged" test.234 They must establish: 1) that they had a parent-like relationship with the child, and 2) that some triggering event occurred which threatens the

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228. The statute defines a parent-child relationship as:

[A] relationship that exists or did exist . . . within the six months preceding the filing of an action . . . and in which relationship a person having physical custody of a child or residing in the same household . . . supplies . . . food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay, and mutuality, that fulfilled the child's psychological needs for a parent, as well as the child's physical needs.


229. See, e.g., supra notes 218, 223-225, 232-233 and accompanying text.


231. Id.

232. Id. at 988.

233. Id.

continuation of that relationship. 235 In order to meet the “parent-like relationship prong,” a petitioner must show: (a) that the biological or adoptive parent consented to, and fostered, the petitioner’s relationship with the child; (b) that the petitioner and the child lived together in the same household; (c) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing toward the child’s support, without expectation of financial compensation; and (d) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. 236

There is greater focus in Wisconsin on the de facto parent-child relationship because there is no minimum required time of possession. The “consented to or fostered” provision in the Wisconsin law, however, may be less helpful to third parties who are not stepparents when compared to Kentucky’s de facto guardianship provision. Moreover, by continuing to insist on proof of parental “consent” Wisconsin’s law still diverts judicial attention from the relative value competing adult attachments may have for the best interests of children. By establishing quite minimal time in possession requirements, on the other hand, Kentucky’s de facto guardianship provision also protects parents from custody challenges by total strangers, while allowing for only somewhat greater stepparent access to court.

Colorado (unlike Wisconsin, but like Kentucky) was one of seven states that originally adopted the UMDA’s third party standing provision. 238 Colorado’s provision is nearly identical to Kentucky’s except that Kentucky imposes different duration-in-possession requirements based on the age of the child while Colorado does not. In Colorado, custody proceedings may be commenced “[b]y

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235. Id. at 436.
236. Beth Neu, Family Law – Visitation – Wisconsin Brings Child Visitation Out of the Closet By Granting Standing to Nonparents in Custody of H.S.H.K., 37 TEX. L. REV. 911, 920 (1996) (citing H.S.H.-K, 533 N.W.2d 419, 435-36 (Wis. 1995)) (emphasis added). The second prong, that some triggering event occurred which threatens the continuation of the parent-like relationship, sets a timetable for the claims of non-parents. Id. at 951. Under this prong, non-parents must make their claims when the threat occurs or within a reasonable amount of time thereafter. Id.
237. Levine, supra note 3, at 328.
238. Eight states have adopted the UMDA third party custody provisions, according to at least one scholar: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington. See Kaas, supra note 17, at 1069 n. 102. It is not clear, however, that Minnesota should be included. See supra note 81; MINN. STAT. ANN. § 518.156 (West 1996).
a person other than a parent who has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody." 239 This provision, therefore, is no more supportive of stepparents than is Kentucky’s, but at least it does not make matters worse for them as in some other UMDA jurisdictions. 240 In Illinois, for example, a recent amendment to the Illinois custody statute which was ostensibly passed to improve the rights of stepparents, 241 ironically imposes standing requirements on stepparents that are far more restrictive than existing case law. 242

Finally, it could be argued that, given the diverse and important relationships adults may have with children, it would seem helpful to allow anyone with claims to such a relationship to argue that custody in them would be in a child’s best interests. After all, rather than as a result of minimal time in legal possession, third party standing should exist primarily because a parent-child relationship has developed. 243 To some extent, Kentucky’s new minimal “time in possession” requirements for “de facto” guardianship status move the law in this direction. There is less concern than previously over the adequacy of parental waivers of quasi-property rights and it is now easier for courts to act in

240. Colorado’s Public Act 90-782 (S.B.1328) amended the IMDMA by adding § 601(b)(3). It states that, in addition to 601(b)(2), which gives standing to one “other than a parent” if the child “is not in the physical custody of one of his parents,” a child custody proceeding may be commenced if all of the following circumstances are met: (A) the child is at least 12 years old; (B) the custodial parent and stepparent were married for at least 5 years during which the child resided with the parent and stepparent; (C) the custodial parent is deceased or is disabled and cannot perform their duties of a parent to the child; (D) the stepparent provided for the care, control, and welfare to the child prior to the initiation of child custody proceedings; (E) the child wishes to live with the stepparent; and (F) it is alleged to be in the best interests and welfare of the child to live with the stepparent as provided in Section 602 of this Act.

Id.

243. See, e.g., Ellison v. Ramos, 502 S.E.2d 891, 894 (N.C. Ct. App. 1998); see also supra notes 131-150.
the best interests of a child, allowing children to remain with an expanded number of non-parents who have assumed responsibility for them. Nevertheless, any continuing requirements of "adverse" physical custody now found in most UMDA jurisdictions tend to perpetuate adult-centric considerations of relative property rights while diverting courts from the primary goal of furthering the best interests of children.

In non-UMDA jurisdictions not saddled with the "not in the physical custody of a parent" requirements, a different and perhaps more enlightened approach has been possible, one which allows all third parties with claims to de facto parenthood to vie for custody. This approach is more likely to allow for more open and diverse approaches toward making and sustaining custody claims and is also likely to permit greater judicial flexibility in discerning which custodian might best serve a child's best interests.

In Ellison v. Ramos, for example, a North Carolina court interpreted that state's statute which allows "[a]ny parent, relative, or other person [claiming] the right to custody of a minor child [to] institute an action or proceeding for the custody of such child..." In that case, a father's former companion sued for custody of his diabetic daughter. The companion alleged that during her relationship with the father she, instead of the father, had been responsible for rearing and caring for the child, that the father wanted to take the child to Puerto Rico to live with her paternal grandparents, and that the grandparents were incapable of meeting the child's special needs. The father responded with a motion to dismiss based on lack of standing and failure to state a cause of action.

The Ellison court first noted that "the goal [is] to "promote the best interests of the child in all custody determinations." The statute's "broad grant of

244. See, e.g., Matter of Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995), cert. denied, 516 U.S. 837 (Colo. 1995) (granting non-parents "physical custody" because the natural mother voluntarily relinquished physical custody of child to them the day after he was born, mother and child were separated from one another during the crucial bond-forming time of infancy, and the child had been in their home under their control for six months). Minnesota, another of the § 401 states, also differs from the original § 401 in that, when a non-parent commences a custody proceeding, that person does not have to prove that the child is not in the physical custody of one of his parents.

245. Ellison, 502 S.E.2d at 893.
247. Ellison, 502 S.E.2d at 893.
248. "What is in the best interests of the child is now considered to be the most important, overriding factor in a court's decision awarding custody." LEGAL RIGHTS OF CHILDREN 38 (Donald
standing" does "not convey an absolute right upon every person who allegedly has an interest in the child to assert custody;"\(^{249}\) the "relationship between the third party and the child is the relevant consideration."\(^{250}\) The court found that the petitioner had alleged such a relationship and had standing. As for whether, given the "constitutionally mandated presumption that, as between a natural parent and a third party, the natural parent should [continue to] have custody," the court said:\(^{251}\)

The parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. (Conduct) inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the 'best interests of the child' test without offending the Due Process Clause.\(^{252}\)

The motion to dismiss was denied,\(^{253}\) therefore, because allegations of "'a period of voluntary non-parent custody' constituted 'conduct inconsistent with a parent's protected status' where the parent did not indicate [that] the period of non-parent custody was intended to be temporary."\(^{254}\) Otherwise, "[the] natural

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\(^{249}\) Ellison, 502 S.E.2d at 894.

\(^{250}\) Id. at 896. "Accordingly, [though we believe it would be unwise to draw a bright line at this time], we hold that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." Id. at 894-95.

\(^{251}\) Ellison, 502 S.E.2d at 896 (emphasis added). The right of a parent to custody of his or her child in a dispute with a third party has a constitutional basis. See In re Custody of Townsend, 427 N.E.2d 1231, 1237 (Ill. 1981). The United States Supreme Court has recognized "a fundamental liberty interest of natural parents in the care, custody, and management of their child." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

\(^{252}\) Ellison, 502 S.E.2d at 896. The due process clause is not offended by the application of the best interest test to recognize a family already in existence. Quillen v. Walcott, 434 U.S. 246, 250-51 (1978).

\(^{253}\) Id.

\(^{254}\) Id. at 897.
parent presumption [would have defeated the claim as a matter of law]. This approach seems to allow third parties greater opportunities to be heard and a broader range of options in justifying claims to custody, yet permits third party custody only if the petition indicates the inappropriateness of continuing to protect parental rights.

VI. CONCLUSION

Notwithstanding a third party custody provision originally promulgated to maintain the "superior rights" doctrine, Kentucky courts have been able to allow standing and ultimate grants of custody to third parties where the ultimate best interests of children would seem to require it. However, these courts have been able to do so, in appropriate circumstances, only by contorting legal reasoning or straining to fit available facts into quasi-property notions of proper relinquishment of parental rights. In states that retain UMDA third party standing requirements unmodified, courts have been effectively forced to accommodate the best interests of children not through an explicit analysis of the comparative characteristics of potential custodians, but in terms of quasi-property notions such as "abandonment," "constructive possession," or "adverse possession." In the process, courts granting third party custody have tended to only infrequently illuminate the nature of acceptable inter-relationships

255. Id.
256. See supra notes 11-13 and 21.
257. The continuing use of presumptions favoring parents indicates that third-party custody decisions are not so much based on the best interests of the child as they are on claims to the ownership of property "of the sort resolved by Solomon." Erin E. Wynne, Children's Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes, 11 CONN. J. INT’L. L. 367, 370 (1996). See also supra notes 86-99, 133-153, 191-206 and accompanying text.
258. "[T]he common law tradition of viewing fathers as entitled to do what they wished with their children has made a contemporary reappearance in doctrines recognizing the rights of biological parents over a child’s relationships with significant others." Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, at 1113-14 (1992). The continuing use of presumptions favoring biology indicates that third-party custody decisions are not so much based on the best interests of the child as they are on claims to the ownership of property "of the sort resolved by Solomon." Erin E. Wynne, Children’s Rights and the Biological Bias: A Comparison Between the United States and Canada in Biological Parent Versus Third-Party Custody Disputes, 11 CONN. J. INT’L. L. 367, 370 (1996).
between third party caregivers, children, and their "best interests."

Kentucky's recent "de facto guardians" amendment is a significant improvement, however, in that it facilitates the state's ability to more quickly place abandoned children among a wider scope of potential caregivers. Also, by substantially minimizing the duration in possession that third parties must demonstrate in order to maintain a claim for custody, the new law allows non-parents to whom children have essentially been abandoned to more expeditiously form permanent families. Indeed, this latter advance is consistent with the long held understanding of child developmental professionals that young children often form important attachments to caregivers within one to two years.259

On the other hand, stepparents may never have had possession apart from or adverse to one or both parents. They may often nurture children longer and to a greater extent than do other, more temporary caregivers. Yet, in states that retain the UMDA standing requirement that "physical custody" is not in parents, anyone who has had custody adverse to a parent, even for just a year, is in a better position to petition for custody than stepparents, who usually maintain joint parenting relationships for long periods of a child's life. Because both the stepparent and the child have lived together with the parent, they will continue to have difficulty asserting the independent nature of their relationship and their often important interests in maintaining that relationship. Therefore, regardless of the new minimal duration of possession required of "de facto guardians" in Kentucky, the "primary care-taking" provision may still be problematic, and change may still be needed where the rights of stepparents are concerned.260

The Kentucky General Assembly, therefore, may eventually wish to consider amending the custody jurisdictional provisions, as several non-UMDA states have done, in favor of a broader, more practical concept of "parent," one which avoids judgments about the primacy of care and the degree to which that care was provided independent or apart from the natural parent. In the first place, a more expansive definition of parent - one simply related to some demonstrable level of psychological bonding and care - would allow for greater judicial flexibility in choosing custodians in the best interests of children.

259. See Goldstein, et al., supra note 6.
260. "The incoherent pattern of outcomes and the murky and inconsistent discussions of the governing rules almost certainly reflect our society's conflicting and unresolved attitudes about stepparents, even when loving, and about biologic parents, even when indifferent." David L. Chambers, Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce, in Divorce Reform at the Crossroads, 122 (Stephen D. Sugarman and Herma Hill Kay, eds. 1990).
Second, revisions of this nature would tend to reduce subjective decision-making about the sufficiency of parental waivers of quasi-property rights. Third, broadening standing or jurisdiction to allow for claims by greater numbers of potential custodians might encourage greater judicial focus on the nature of "de facto" parenting most likely to serve children's interests. Finally, even with such innovations, as long as parents' natural rights are not clearly forfeited or relinquished, the preferences they are customarily afforded will continue to have a place in ultimate custody determinations.
EXECUTION IMPACT EVIDENCE IN KENTUCKY: IT IS TIME TO RETURN THE SCALES TO BALANCE

by Tad Thomas

“It is the poor, the sick, the ignorant, the powerless and the hated who are executed.”

INTRODUCTION

Whenever one sees a picture or statue of Lady Justice, she is always toting the scales of justice. These scales symbolize that justice may only be dispensed properly by a system which weighs equally the interests of all parties involved. Over the last ten years, jurisdictions across the country have followed the tide of popular opinion and added weight to the state's side of the scales in death penalty cases, ostensibly in the name of “victim's rights.” Whether or not this judicial advocacy in favor of victims' rights is proper is a difficult discussion for another time. The elementary laws of physics, however, tell us that as weight is added to one side of the scale, an imbalance occurs. To return the scales to balance, an equal amount of weight must be applied to the opposing side.

In 1991, the Supreme Court of the United States severely tipped the scales against capital defendants by allowing prosecutors to admit “victim impact testimony” during the sentencing phase of capital murder trials. Prosecutors can now introduce emotionally charged testimony from the victim's family and

1. The author, a full-time student at the Salmon P. Chase College of Law, wishes to thank Professor Henry L. Stephens for supervising the research for this article.
friends showing the effect the crime has had on those individuals.\textsuperscript{5}

In arguing for admissibility of victim impact evidence, prosecutors most often state that this type of testimony is necessary to allow the jury to make a fully-informed decision when determining the penalty to be assessed against a capital defendant.\textsuperscript{6} However, defense attorneys argue that such evidence is irrelevant and inflammatory, and that it causes juries to rely on emotion rather than logic and reason in assessing penalties.\textsuperscript{7} Nevertheless, following the lead of the United States Supreme Court in \textit{Payne v. Tennessee}, many state courts have held that the admission of victim impact evidence does not violate a defendant's right to due process or to a fair trial.\textsuperscript{8} Only a few states have declined to extend the court's reasoning to their own constitutional law.\textsuperscript{9}

On the opposing side of victim impact evidence is "execution impact" testimony, which is seldom permitted by state and federal courts.\textsuperscript{10} Execution impact testimony is introduced by defense attorneys during the penalty phase of a capital trial.\textsuperscript{11} In the course of introducing other mitigating evidence, testimony is elicited from a third party witness indicating what effect an execution would have on the defendant's family and friends.\textsuperscript{12} The Supreme Court of Kentucky expressly excluded this type of evidence in 1987 in \textit{David Smith v. Commonwealth}, or \textit{Smith I},\textsuperscript{13} prior to the United States Supreme Court's holding in \textit{Payne}. The court held as follows:

It was not error for the trial judge to refuse to allow testimony with regard to the impact of the death penalty on Smith’s family and friends as well as the victims' families. The exclusion of this kind of testimony did not deprive him of a fair and rational sentencing. [\textit{Lockett v. Ohio}] provides that nonstatutory mitigating evidence must be admitted only if it is relevant to the defendant's character, record or any of the circumstances of the offense. The evidence proffered by

\textsuperscript{5} Id. at 846 (Marshall, J. dissenting).
\textsuperscript{7} See id. at 615-16.
\textsuperscript{8} See cases cited supra note 3.
\textsuperscript{11} Id. at 1194.
\textsuperscript{12} Id. at 1193.
\textsuperscript{13} 734 S.W.2d 437 (Ky. 1987).
avowal is similar to the emotional evidence disapproved in *Ice v. Commonwealth* . . . and *McQueen v. Commonwealth* . . . The statements constituted an improper comment on the consequences of a verdict. *Payne v. Commonwealth*, . . . The impact statements of the victims' families were also properly excluded.14

This article asserts that, in light of later decisions of both the Supreme Court of Kentucky and the United States Supreme Court and relevant actions by the Kentucky General Assembly in allowing victim impact testimony, the court's holding in *Smith I* should be reconsidered. The admissibility of execution impact testimony is necessary to regain a balance in the scales of justice so long as courts continue to permit victim impact testimony.15

Part I of this article discusses the background of the death penalty since it was declared unconstitutional in 1972. Part II is a discussion of the admissibility under federal and state law of certain mitigating evidence at the penalty phase of a capital trial, following the introduction of the bifurcated method. It includes a discussion of holdings by other state courts on the issue of the admissibility of execution impact evidence. Part III discusses the current state of Kentucky law regarding the admissibility of mitigating factors. Finally, Part IV sets forth three arguments in favor of the admissibility of "execution impact" evidence in Kentucky courts.

I. THE BIFURCATED METHOD OF IMPOSING THE DEATH PENALTY

The United States Supreme Court declared the death penalty unconstitutional in the 1972 landmark decision, *Furman v. Georgia*.16 In the Per Curiam opinion, the Court held that the capital defendants' Eighth Amendment rights against cruel and unusual punishment were violated in a manner which was arbitrary and capricious.17

It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689,

14. Id. at 451-52 (citations omitted).
15. There is no evidence that either the United States Supreme Court or the Supreme Court of Kentucky intend to reverse their positions on the admissibility of victim impact testimony.
17. Id. at 239-40.
from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.\textsuperscript{18}

Justice Douglas, in his separate concurring opinion, stated that the Eighth Amendment required state legislatures to pass laws that were "even handed, non-selective, and nonarbitrary."\textsuperscript{19}

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly violate this mandate, as would a law that in its terms said that blacks, those who never went beyond the fifth grade in school, those who made less that $3000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.\textsuperscript{20}

A mere four years after the Supreme Court's holding in \textit{Furman}, the court reinstituted the death penalty when it upheld a Georgia statute setting forth a new procedure for conducting death penalty cases.\textsuperscript{21} In \textit{Gregg v. Georgia}, the new state statute provided for bifurcated trials where the trier of fact, either the judge or a jury, would first determine guilt beyond a reasonable doubt.\textsuperscript{22} This first trial has become more commonly known as the "guilt phase" of a capital trial.\textsuperscript{23}

If the defendant is found guilty during the "guilt phase," the second phase, the "penalty phase," begins and the prosecutor is permitted to introduce additional evidence and testimony in favor of the state's penalty recommendation.\textsuperscript{24} Under the statute at issue in \textit{Gregg}, the state can introduce additional evidence of "aggravating factors" which, if proven beyond a reasonable doubt, would increase the defendant's penalty.\textsuperscript{25} The defendant, in turn, is entitled to introduce evidence of statutorily prescribed "mitigating factors," which would serve to decrease the penalty.\textsuperscript{26}

This method of conducting capital murder trials and other felony trials has
been adopted by most states, although many states have tailored their statutes to include different mitigating and aggravating factors.\(^{27}\) Unfortunately, juries often construe mitigating factors such as “incapacity due to intoxication” as an aggravating factor, because of the stereotypical view of alcohol or drug use.\(^{28}\)

II. AGGRAVATING AND MITIGATING FACTORS IN A CAPITAL MURDER TRIAL

With the institution of the bifurcated trial in death penalty cases, a new body of law had to be developed to set forth what type of evidence may or may not be admitted in the penalty phase. Certain evidence admitted during a penalty trial would be deemed irrelevant or highly prejudicial, and therefore excluded during the guilt phase according to Federal Rules of Evidence 401, 402, or 403, or pursuant to the corresponding state equivalent of those rules.\(^{29}\)

In \textit{Lockett v. Ohio}, the United States Supreme Court held that state statutory schemes must allow consideration of all aspects of the defendant's character.\(^{30}\)

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, [should] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as


\(^{29}\) FED. R. EVID. 401-403. “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. 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. \textit{Id.} Evidence which is not relevant is not admissible. FED. R. EVID. 402. 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.

a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.31

In the same judicial session, the Court reversed another death penalty case by striking down a state statute which precluded the jury from considering facts proffered as mitigating circumstances.32 In Bell v. Ohio, the United States Supreme Court held that the Ohio statute did not permit the type of individualized consideration of mitigating factors as required by the Eighth and Fourteenth Amendments.33

In 1982, the United States Supreme Court reversed a death sentence, finding a sentencing court’s failure to allow consideration of the defendant’s turbulent family history as a mitigating factor to be unconstitutional error.34 Similarly, the Court reversed a death penalty case where the jury was instructed that they might only consider mitigating factors set forth in the state statute.35 The Court held that the failure to allow consideration of non-statutory mitigating factors is unconstitutional.36

The United States Supreme Court held in the 1993 decision, Booth v. Maryland, that a jury in a capital case must decide whether the defendant deserves the capital penalty based only on his character and the circumstances of the crime.37 Further, the Court stated that any additional considerations

31. Id. at 604-05.
33. Id. at 642.
36. Id. at 399.
EXECUTION IMPACT EVIDENCE

prescribed by state law must have some bearing on the convict's personal responsibility or moral guilt.\textsuperscript{38} If not, there is a risk that a capital sentence will be based upon facts that are irrelevant or constitutionally impermissible to consider.\textsuperscript{39}

In \textit{Payne v. Tennessee}, the United States Supreme Court partially reversed its holding in \textit{Booth}, stating that a capital sentencing jury may consider “victim impact” evidence.\textsuperscript{40} Victim impact evidence includes testimony by the family and friends of the deceased which describes the emotional effect of the crime on those closely related to the victim.\textsuperscript{41} The Court held that a prosecutor may argue such evidence during the sentencing phase, without violating the defendant's Eighth Amendment rights.\textsuperscript{42} Only four years prior, in \textit{Booth}, the Supreme Court held that a Maryland state law which allowed jurors in a capital sentencing hearing to consider “victim impact statement[s]” violated the defendant's Eighth Amendment rights as guaranteed by the Fourteenth Amendment.\textsuperscript{43} Such penalty phase testimony, the Court stated, would give rise to an opportunity for the jury to divert its attention from the crucial information provided by the defendant, such as the convict's background and his status as a “uniquely individualized human being.”\textsuperscript{44}

Justice Rehnquist, writing for the majority in \textit{Payne}, stated:

The misreading of precedent in \textit{Booth} has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' \textit{Mills v. Maryland}, 486 U.S., 367, 397, 108 S. Ct. 1860, 1876, 100 L. Ed. 2d 384 (1988)( Rehnquist, C.J., dissenting), or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.\textsuperscript{45}

Justice Rehnquist's statement is inaccurate as to the lack of “limits” placed on a capital defendant when introducing evidence at trial. The clearest example of this fact is execution impact evidence itself, which is inadmissible in most

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} 501 U.S. 808, 827 (1991).

\textsuperscript{41} Aida Aiaka, \textit{supra} note 6, at 602.


\textsuperscript{44} \textit{Id.} at 504-05.

\textsuperscript{45} \textit{Payne}, 501 U.S. at 822.
While the majority argued that the interpretation of Booth unfairly weighted the scales against the prosecution, the decision failed to acknowledge that the prosecution is now able to admit evidence that is off limits to the defendant's counsel.

Much has been written criticizing the Court's position in Payne. Some critics of the decision point to the Court's apparent disdain for stare decisis, while others express concern that capital cases have now become a battle of character between the defendant and the victim.

Nevertheless, it is now time for the Supreme Court to right the imbalance by allowing execution impact evidence to be presented on behalf of the capital defendant. Because the Supreme Court has not yet addressed the issue of the admissibility of execution impact evidence, arguments for admissibility of victim impact evidence must be made from dicta in existing opinions. Only a few states have addressed the admissibility of execution impact evidence, and a majority of those have held that such evidence is irrelevant, and is therefore inadmissible in the sentencing phase. In fact, at the time of this writing, only Oregon has held that execution impact evidence is admissible.

In 1997, the Supreme Court of Florida affirmed a lower court decision excluding execution impact testimony, while it allowed the admission of similar victim impact evidence. The defendant sought to admit testimony by the defendant's sister and two daughters regarding the effect an execution would

49. Id.
52. Burns v. State, 699 So. 2d 646 (Fla. 1997).
have on them. However, the court held as follows:

While we agree that Burns' family relationships and the support he provided his family are admissible nonstatutory mitigation regarding Burns' character, this was not the focus of the proffered testimony. The proffered testimony went to establish that death was not an appropriate penalty because of the impact the execution would have on Burns' family. We find that the trial court did not abuse its discretion in excluding this testimony concerning the sentence Burns should receive.

In the same case, the court explicitly stated that it was only concerned with excluding the statements by the defendant's family about how their lives would be affected by the execution of the defendant. By contrast, the same court expressly held testimony by the victim's family to be admissible.

In a similar decision, the Supreme Court of Mississippi held in Wilcher v. State that while execution impact testimony is irrelevant and inadmissible, victim impact evidence is admissible under the rule set forth in Payne. The defendant in Wilcher argued that the trial was fundamentally unfair because the judge allowed victim impact evidence, yet excluded testimony of the defendant's family explaining the impact a potential sentence would have on their lives. The court held that unless the victim's family members were asked what sentence the defendant should receive, the defendant's family did not have the right to give their subjective impressions. The court also stated that "the jury was entitled to know exactly who [the victim] was and what impact her death had."

To date, only the Supreme Court of Oregon has specifically held that execution impact evidence is admissible in the sentencing phase of a capital trial. In State v. Stevens, the defense attorney offered testimony of the defendant's wife, which included her subjective statements of what effect a possible sentence would have on herself and their daughter. The state objected

53. Id. at 654.
54. Id.
55. Id. at 654 n.16.
56. Id. at 653.
57. Wilcher v. State, 697 So. 2d 1123, 1134 (Miss. 1997).
58. Id. at 1133.
59. Id. at 1134.
60. Id.
62. Id. at 163-64.
to the testimony on grounds of relevance, and the trial court judge sustained the objection.\textsuperscript{63} On appeal, the Supreme Court of Oregon held that execution impact evidence is relevant and admissible under the state's statutory scheme and in light of rulings by the United States Supreme Court regarding the admissibility of mitigating evidence and victim impact testimony.\textsuperscript{64}

In order to determine whether the testimony proffered by the witness in this case is relevant to defendant's character or background, we must examine defendant's offers of proof. Clearly, not everything to which the witness testified in the offers of proof is relevant. Nonetheless, the standard contained in \textit{[Oregon Rules of Evidence]} 401 'is a very low threshold that evidence must cross to be considered relevant.'\textsuperscript{65}

The court went on to say:

While the witness's testimony may not offer any direct evidence about defendant's character or background, it does offer circumstantial evidence. A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background. Put differently, \textit{a rational juror could infer that there are positive aspects about defendant's relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others.}\textsuperscript{66}

One dissenting Justice reiterated the trial court's opinion, which argued that a mother's subjective feelings on the best interests of her child are irrelevant to the defendant's character, and therefore, inadmissible in the sentencing phase.\textsuperscript{67}

\section*{III. KENTUCKY LAW OF MITIGATING AND AGGRAVATING FACTORS}

In 1986, the Kentucky General Assembly passed what is commonly known as a "truth in sentencing law,"\textsuperscript{68} which was intended to provide a jury with more accurate information concerning the defendant on trial.\textsuperscript{69} As part of a revised

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 165.
\item \textsuperscript{64} \textit{Id.} at 167-68.
\item \textsuperscript{65} \textit{Id.} at 167 (citations omitted).
\item \textsuperscript{66} \textit{Id.} at 168 (emphasis added).
\item \textsuperscript{67} \textit{Id.} at 169-73 (Van Hoomissen, J., dissenting).
\item \textsuperscript{69} Huff v. Commonwealth, 763 S.W.2d 106, 107 (Ky. 1988); see also Commonwealth v.
version of the law, the Kentucky General Assembly adopted Kentucky Revised Statute § 532.055, which codified the rule of bifurcated trials approved in Gregg. 70

Kentucky Revised Statute § 532.055 authorizes the Commonwealth to introduce relevant aggravating evidence at the penalty trial. 71 In 1998, the

Bass, 777 S.W.2d 233, 234 (Ky. 1989) (stating that the policy was to provide full and accurate information to a sentencing jury).

70. In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. KY. REV. STAT. ANN. § 532.055 (Michie 1999).

71. KY. REV. STAT. ANN. § 532.055 (Michie 1999). The statute provides:

(2) Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the courts hall conduct a sentencing hearing before the jury, if such case was tried before a jury.

In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.

(a) Evidence may be offered by the Commonwealth relevant to sentencing including:

1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;

2. The nature of prior offenses for which he was convicted;

3. The date of the commission, date of sentencing, and date of release from confinement or supervision from all prior offenses;

4. The maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses;

5. The defendant's status if on probation, parole, conditional discharge, or any other form of legal release;

6. Juvenile court records of adjudications of guilt of a child for an offense that would be a felony if committed by an adult. Subject to the Kentucky Rules of Evidence, these records shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that same person. Juvenile court records made available pursuant to this section may be used for impeachment purposes during a criminal trial and may be used during the sentencing phase of a criminal trial; however, the fact that a juvenile has been adjudicated delinquent of an offense that would be a felony if the child had been an adult shall not be used in finding the child to be a persistent felony offender based upon that adjudication. Release of the child's treatment, medical, mental, or psychological records is prohibited unless presented as evidence in Circuit Court. Release of any records resulting from the
Kentucky General Assembly made textual changes, which are discussed in Section IV(A) herein. Before those changes were made, the statute permitted the defendant to introduce mitigating evidence and “evidence which negates evidence introduced by the Commonwealth.”

The Supreme Court of Kentucky has spoken liberally regarding the evidence which is admissible under this statute. For example, *Johnny Marshall Smith v. Commonwealth*, or Smith II, held that a trial court is not limited by the statutory definition of mitigating circumstances, but rather, is permitted to consider all evidence which would tend to excuse or alleviate a defendant's responsibility. This follows the rule set forth seven years earlier by the United States Supreme Court in *Hitchcock v. Dugger*. However, the Supreme Court of Kentucky has not yet rendered any decisions approving the admissibility of evidence not

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73. Id.
74. Huff v. Commonwealth, 763 S.W.2d 106, 107 (Ky. 1988); see also Commonwealth v. Bass, 777 S.W.2d 233, 234 (Ky. 1989) (stating that the policy was to provide full and accurate information to a sentencing jury).
75. 599 S.W.2d 900, 911 (Ky. 1980).
specifically mentioned in the statute.\textsuperscript{77}

In \textit{Robert Smith v. Commonwealth}, or \textit{Smith III}, the Supreme Court of Kentucky held that the failure to give an instruction regarding mitigation violates a defendant's due process rights,\textsuperscript{78} citing language from \textit{Lockett}.\textsuperscript{79} In its holding, the court stated that evidence about the defendant's background and character is relevant because of the belief that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.\textsuperscript{80}

Originally, the Commonwealth was prohibited from introducing victim impact evidence in capital cases.\textsuperscript{81} However, in 1984, the Supreme Court of Kentucky held that it was not improper for the trial court to allow a victim's father to testify that his daughter was 22 years of age at the time of her death, that she had graduated from a university, and that she was working to secure funds to complete a master's degree.\textsuperscript{82} The court explained that the Commonwealth had the right to bring to the attention of the jury that the victim was "more than just a nameless void left somewhere on the face of the community."\textsuperscript{83} This type of "victim impact" testimony is sometimes excluded because of its tendency to inflame the jury and cause a decision to be made based on emotion rather than logic and reason.\textsuperscript{84}

As late as 1991, the Supreme Court of Kentucky held that admitting victim impact testimony in the guilt phase violated the defendant's Eighth Amendment rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{85} In \textit{Clark v. Commonwealth}, the court held that the prosecutor's closing argument in the guilt phase of the trial was charged with emotional statements engendering sympathy for the victim and his family.\textsuperscript{86} The court disapproved of this type of

\textsuperscript{78} 845 S.W.2d 534, 538 (Ky. 1993).
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} (citing California v. Brown, 479 U.S. 538 (1987) (O'Connor, J., concurring)).
\textsuperscript{81} Brown v. Commonwealth, 780 S.W.2d 627, 630 (Ky. 1989).
\textsuperscript{82} McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} Ice v. Commonwealth, 667 S.W.2d 671, 675-76 (Ky. 1984); see also Smith v. Commonwealth, 734 S.W.2d 437, 451-52 (Ky. 1987).
\textsuperscript{85} Clark v. Commonwealth, 833 S.W.2d 793, 796 (Ky. 1991).
\textsuperscript{86} \textit{Id.}
"sensationalizing tactic," which pressured the jury into a verdict based on evidence irrelevant to the defendant's culpability. 87

The Supreme Court of Kentucky reversed its position on victim impact testimony in Foley v. Commonwealth, after the United States Supreme Court announced its decision in Payne. 88 In Foley, the court held that testimony of the victims' relatives regarding the victims' birthdays, employment, and family status, did not deny the defendant a fair trial. 89 The court found that the testimony was permissible because the relatives testified for only five minutes each and were not overly emotional, condemnatory, accusative or demanding vindication. 90

The Foley decision followed Bowling v. Commonwealth, where the court held that evidence of a murder victim's peaceful nature was relevant to the nature of the crimes and gave rise to the "logical inference" that the crimes were unnecessary and cold-blooded. 91

IV. EXECUTION IMPACT EVIDENCE SHOULD BE ADMISSIBLE IN KENTUCKY UNDER TWO DISTINCT THEORIES

The controlling authority of Smith I should no longer apply in Kentucky for several reasons. First, the evidence in question should be admissible under Kentucky Revised Statute § 532.055 to negate the Commonwealth's evidence, and in support of leniency under the new version of the statute. Second, execution impact evidence should be admissible as proof of the defendant's character, in light of relevant decisions of the Kentucky and United States Supreme Courts and Kentucky Revised Statute § 532.055.

A. Execution impact evidence should be admissible under K.R.S. 532.055 as evidence in support of leniency.

In the 1998 legislative session, the General Assembly made some textual adjustments to Kentucky Revised Statute § 532.055, 92 which appear to make

87. Id. at 797 (citing Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989)); see also Sanborn v. Commonwealth, 754 S.W.2d 534, 543 (1988).
89. Id.
90. Id.
92. See sources cited supra note 72.
the statute more general, thus allowing more types of mitigating evidence. 93 The General Assembly removed the text that explicitly permitted the defendant to introduce evidence to negate the Commonwealth's evidence, but added a clause allowing the admissibility of evidence in favor of leniency. 94 The Supreme Court of Kentucky has held that Kentucky Revised Statute § 532.055 should be interpreted liberally, thus allowing the introduction of non-statutory mitigating evidence. 95 That rule, in addition to the fact that the statute itself is non-specific, suggests that penalty phase evidence should be excluded only if it is irrelevant under Kentucky Rule of Evidence 401, or if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, misleading of the jury, or other factors under Kentucky Rule of Evidence 403. 96

Execution impact evidence is relevant to the sentencing of a capital defendant for several reasons. First, on many occasions, the prosecution is attempting to instill in the jury the assumption that the defendant has no redeeming qualities and that he should be put to death because he lacks the ability to beneficially contribute to the society which is prosecuting him. 97 In light of this prosecution tactic, evidence of the effect the defendant's execution would have on those close to him is relevant to show the defendant has value as a human being. For example, consider the earlier version of the Kentucky statute, which specifically allowed evidence that contradicted the evidence introduced by the Commonwealth. 98 Execution impact evidence introduced on behalf of the defendant directly contradicts the Commonwealth's portrait of the defendant as an evil individual with no redeeming qualities and with no hope for rehabilitation.

Second, such evidence is relevant because it fits squarely within the express parameters of Kentucky Revised Statute § 532.055, which allows evidence in support of leniency. 99 The definition of "lenient" includes the terms "merciful"

93. Id.
94. Id.
95. Huff v. Commonwealth, 763 S.W.2d 106, 107 (Ky. 1988); see also Commonwealth v. Bass, 777 S.W.2d 233, 234 (Ky. 1989) (stating that the policy was to provide full and accurate information to a sentencing jury).
96. See sources cited supra note 29.
98. See sources cited supra note 77.
99. See sources cited supra note 71.
A defendant who can show that he has worth to his family and friends in any manner can create a reason for a jury to be merciful, with hopes that the defendant can in some way continue to be of assistance or inspiration to those individuals despite his incarceration.

Consider a child whose father is imprisoned for life as a result of a murder conviction. That child still may be able to have some type of parental interaction, even while the defendant remains incarcerated. Once the defendant has been executed, however, there is no possibility for that defendant to give parental aid or advice. If the jury is permitted to hear evidence from the defendant's child at the sentencing phase, the jury will be able to determine if there is such a possibility and thus, could conclude that the evidence supports the idea of leniency upon the defendant.

Some may argue that execution impact evidence should be excluded under Kentucky Rule of Evidence 403 as unduly prejudicial to the prosecution's case, and because it creates the possibility of confusion of the issues by the jury. However, once the prosecution has obtained a conviction for capital murder, it is difficult to imagine how the case could be prejudiced by the introduction of this type of evidence, which merely tries to prevent a defendant with mitigating evidence from being punished by death. To be excluded under Kentucky Rule of Evidence 403, the probative value of evidence must be substantially outweighed by the danger of undue prejudice. Allowing the testimony of the defendant's family and friends regarding the effect the defendant's execution would have on their lives hardly creates undue prejudice upon the prosecution's case, and juries should be given the opportunity to make a fully informed decision based upon the whole of the evidence.

Further, execution impact evidence is far less prejudicial to the prosecution's case than victim impact evidence is to the defense. According to the Supreme Court's holding in Payne, the prosecution is permitted to draw the conclusion that because the victim's family was tragically impacted by the crime, the

100. WEBSTER'S NEW WORLD DICTIONARY 773 (3d ed. 1988).
101. KY. R. EVID. 403 (Michie 1999). Rule 403 provides that "[a]lthough relevant, evidence may be excluded 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." Id.
102. Id.
defendant should be given a sentence of death despite any mitigating factors. 104 It follows that the defense should be able to offer evidence that the defendant's family would be tragically impacted by his execution, and that in the interest of public policy and societal values, the defendant should be spared the death sentence. Nevertheless, the determination of relevance or prejudice should be made by the trial court according to the individual circumstances of that case, and should not be a blanket prohibition as it currently stands.

B. Execution impact evidence should be admissible as mitigating evidence of the defendant's character.

Execution impact evidence should also be admissible as mitigating evidence that is relevant to show aspects of the defendant's character. The United States Supreme Court declared in Lockett that a defendant in a capital trial must be able to present evidence of his or her character as evidence in mitigation. 105 The Supreme Court of Oregon has held that execution impact evidence should be admissible under the court's holding in Lockett as indirect evidence of the defendant's character. 106 The Oregon court found that a jury could reasonably conclude that the effect the defendant's execution has on his family and close friends goes to indirectly show the defendant's character. 107

The Supreme Court of Kentucky has held differently, finding that the testimony by third persons does not go to the defendant's character or culpability for the crime. 108 When the time comes to reconsider the admissibility of execution impact evidence, the court should consider its decision to allow victim impact evidence in Bowling 109 and the liberal rule of admissibility of mitigating evidence set forth in Lockett and Kentucky Revised Statute § 532.055. The Bowling court found that the prosecution was allowed to present evidence of "victim humanization" through the victim's relatives, 110 who testified about the effect that the murder had on them. 111 The court also stated that the testimony

107. Id.
110. Id.
111. Id.
was related to the victim's character, and that it gave balance to the modern criminal sentencing process.\textsuperscript{112}

The Supreme Court of Kentucky should consider this in light of its decision to exclude the same evidence when it is offered by the defendant. If victim impact evidence is evidence of the victim's character, it certainly stands to reason that execution impact evidence is evidence related to the defendant's character. In both circumstances, it is a statement by a third party regarding the character of another person, which is arguably relevant in both instances. The Supreme Court of Kentucky has emphasized one difference between victim impact and execution impact evidence: while the jury can observe the defendant in the courtroom, it does not have the opportunity to observe the victim.\textsuperscript{113} It is important to note that this distinction is flawed, because it ignores the fact that in most cases, the defendant exercises his Fifth Amendment privilege by choosing not to testify.\textsuperscript{114} In effect, the jury will not hear from the defendant at all, and it must rely upon the testimony of third parties to determine the character of the defendant.

Finally, in its decision to exclude execution impact testimony, the Supreme Court of Kentucky relied upon the fact that victim impact testimony was not admissible at the time the opinion was rendered.\textsuperscript{115} In light of the substantial change in the law of victim impact testimony, the court should reconsider its decision and truly achieve its desire for more balanced sentencing.

CONCLUSION

In \textit{Payne}, Justice Rehnquist quoted the highly respected Justice Cardozo, who once stated that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."\textsuperscript{116} In order to keep the balance true, the Supreme Court of Kentucky must reconsider its decision to exclude execution impact evidence. To promote fairness and equality in our courts, it is

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} U.S. CONST. amend. V (providing that a defendant shall not be "compelled in any criminal case to be a witness against himself. . .").
  \item \textsuperscript{115} David Smith v. Commonwealth, 734 S.W.2d 437, 451-52 (Ky. 1987).
  \item \textsuperscript{116} Payne v. Tennessee, 501 U.S. 808, 887 (1991) (citing Snyder v. Massachusetts, 291 U.S. 97 (1934)).
\end{itemize}
necessary to allow both the prosecution and the defense to put forth all relevant evidence, including that of character, and to provide juries with the opportunity to render a decision based upon the totality of evidence. By excluding evidence for the defendant that would normally be admitted for the prosecution, the court is allowing the scales to remain out of balance, which heavily tilted against the capital defendant. It is time for the Supreme Court of Kentucky to reconsider its decision and to rebalance the scales of justice.
COMMONWEALTH, TRANSPORTATION CABINET, BUREAU OF HIGHWAYS V. ROOF:1
WHEN SHOULD THERE BE A REQUIREMENT TO REDUCE AWARDS AT THE BOARD OF CLAIMS FOR BENEFITS RECEIVED FROM COLLATERAL SOURCES?

by Michael A. Galasso

I. INTRODUCTION

This note explores a statutory provision2 in Kentucky’s limited waiver of sovereign immunity that allows the Commonwealth to reduce awards at the Board of Claims3 for benefits received by the claimant from certain enumerated sources found in the statute. The note begins with a brief overview of sovereign immunity both generally and in Kentucky, then proceeds to examine the case of Commonwealth, Transportation Cabinet, Bureau of Highways v. Roof.4 Finally, the note concludes with a proposed rule that would abandon the distinction between sources enumerated in the statute and unenumerated sources, thereby allowing the Commonwealth to reduce amounts received by the claimant from collateral sources from the amount of the total value of the legal claim, as opposed to reductions from the maximum statutory amount recoverable. This rule would be consistent with both the language of the statute and the objectives

1. 913 S.W.2d 322 (Ky. 1996).
2. KY. REV. STAT. ANN. § 44.070(1) (Banks-Baldwin 1999) provides in part:

   A Board of Claims ... is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth ... Furthermore, any damage claim awarded shall be reduced by the amount of payments received or right to receive payment from workers’ compensation insurance, social security programs, unemployment insurance programs, medical, disability or life insurance programs, or other federal or state or private program designed to supplement income or pay claimant’s expenses or damages incurred.

   Id.
3. The Board of Claims is created by statute and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to person or property as a result of the negligence of the Commonwealth. KY. REV. STAT. ANN. § 44.070 (Banks-Baldwin 1999). The administrative regulations concerning the Board of Claims are found at 108 KY. ADMIN. REG. 1:010 (1999).
4. 913 S.W.2d 322 (Ky. 1996).
of the General Assembly.

II. SOVEREIGN IMMUNITY IN KENTUCKY

The doctrine of sovereign immunity, which is said to stem from the ancient notion "that the king can do no wrong," bars suits by citizens against the state. It was first recognized on the purely procedural basis that the federal government could not be sued without its consent. But with the passage of time, the idea of substantive sovereign immunity began to appear in court decisions, until Gibbons v. United States explicitly held that the federal government was immune from all liability in tort. The immunity of state governments from liability in tort has the same origin as that of the federal government, with most state governments adopting statutes or constitutional provisions that required legislative consent for the state to be liable in tort.


6. The most common justification for sovereign immunity is the following quote from Justice Holmes: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

7. 75 U.S. 269 (8 Wall.) (1868).

8. PROSSER ET AL., supra note 5, at 621 n.1.

9. PROSSER ET AL., supra note 5, at 621 n. 2; see also RESTATEMENT (SECOND) OF TORTS § 895B (1982). The modern attitude toward sovereign immunity can be summarized with the following passage:

Today many courts regard the issue of governmental immunity not so much in terms of its historical background as in terms of its reasoned approach to the policies involved. In many respects, the issue at the legislature is a purely practical one. If the state and its geographical subdivisions are subjected to tort liability, they may incur heavy financial drain. There has been fear that judgments will be large and the governments will woefully short of funds. On the other hand, there is an injured party who would have to bear the loss without any compensation at all, although he would have been able to recover if the tortfeasor had been a private person. A government is in the position to shift the loss to the taxpayers as a whole; the injured party cannot shift it.
Today, almost all states have waived sovereign immunity to some extent.\textsuperscript{10} Kentucky did so in 1946, with the passage of the Board of Claims Act, in which the General Assembly finally consented to a limited form of liability.\textsuperscript{11} Before that time, a party injured by the negligence of a state agent could only gain redress by asking the General Assembly, which meets only once every two years, to pass a resolution granting the injured party permission to sue.\textsuperscript{12} Thus, the odds were generally against the claimant. For example, at the 1946 session of the General Assembly, 185 such resolutions were introduced, yet only 16 became law.\textsuperscript{13}

Litigation under the modern Board of Claims Act shows a marked increase in the number of suits against the Commonwealth. In 1992, there were 1,255 claims made to the State Board of Claims, representing $10,428,738.38 in demands.\textsuperscript{14} Of those claims, 539 awards were made for a total sum of $1,351,053.29.\textsuperscript{15} Even with the modern limited waiver of sovereign immunity, judicial attitudes toward sovereign immunity have lingered. Courts have remained attached to the doctrine, as exemplified through the following comment: "While the result might be harsh in many instances, that is the nature of sovereign immunity. Immunity has been expressly maintained in the Commonwealth by its [C]onstitution. It is the prerogative of the General Assembly, not the courts, to waive immunity when and if it so chooses."\textsuperscript{16}

The liability of the Commonwealth under the Board of Claims Act is subject to many limitations. As an initial matter, liability is limited to acts of

\begin{quote}
\textsuperscript{10} Prosser \textit{et al.}, supra note 5, at 622 n.7.
\end{quote}

\begin{quote}
\textsuperscript{11} The Board of Claims Act is codified at KY. REV. STAT. ANN. § 44.070-44.160 (Banks-Baldwin 1998).
\end{quote}

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\begin{quote}
\textsuperscript{13} Id. (citing Richardson, \textit{Kentucky Board of Claims}, 35 KY. L.J. 295 (1947)).
\end{quote}

\begin{quote}
\textsuperscript{14} Id.
\end{quote}

\begin{quote}
\textsuperscript{15} Id.
\end{quote}

\begin{quote}
\textsuperscript{16} Poole Truck Line, Inc. v. Commonwealth of Ky., Transp. Cabinet, Dep't of Highways, 892 S.W.2d 611, 615 (Ky. Ct. App. 1995); see also Withers v. University of Ky., 939 S.W.2d 340 (Ky. 1997) (stating that sovereign immunity is deeply implanted in the law of the Commonwealth through the state constitution, and once it has been determined that sovereign immunity is applicable, a court has no right to merely refuse to apply it or to abrogate the legal doctrine).
\end{quote}
negligence, while actions for intentional torts\(^\text{17}\) or strict liability claims\(^\text{18}\) are not permitted. Damages based upon pain and suffering or damages based upon loss to another are not recoverable.\(^\text{19}\) All claims must be filed with the Board of Claims within one year from the time the claim for relief accrued, and no action can be brought beyond two years from the date the alleged negligent act occurred.\(^\text{20}\) The most notable limitation is that claims are limited to $100,000 per claim or $250,000 per negligent act, with a single award to be apportioned among all claimants.\(^\text{21}\)

A party to a Board of Claims judgment has a right to appeal to the circuit court so long as the judgment exceeds $500, but the circuit court must give full faith and credit to any decision reached by the Board of Claims.\(^\text{22}\) No new

\(^{17}\) See Calvert Inv., Inc. v. Louisville and Jefferson County Metro. Sewer Dist., 805 S.W.2d 133 (Ky. 1991).


\(^{19}\) Ky. REV. STAT. ANN. § 44.070(1) (Banks-Baldwin 1999); see also Cooke v. Board of Claims, 743 S.W.2d 32 (Ky. Ct. App. 1987) (holding that the legislation creating the Board of Claims specifically disallows liability for pain and suffering).

\(^{20}\) Ky. REV. STAT. ANN. § 44.110 (Banks-Baldwin 1995); see also Commonwealth, Transp. Cabinet, Dept. of Highways v. Abner, 810 S.W.2d 504 (Ky. 1991) (holding one year statute of limitations in Board of Claims Act, as opposed to two year statute of limitations in Motor Vehicle Reparation Act, governs action by motorist injured by vehicle belonging to the state).

\(^{21}\) Ky. REV. STAT. ANN. § 44.070(5) (Banks-Baldwin 1999).

\(^{22}\) Ky. REV. STAT. ANN. § 44.140 (Banks-Baldwin 1998) provides in part:

\(\text{(1)}\) Appeals may be taken by a state agency from all awards of the board where the amount in controversy, exclusive of interests and costs, is more than five hundred dollars ($500). Appeals shall be taken to the Circuit Court of the county wherein the hearing was conducted ... the method of appeals shall follow as nearly as may be the rules of civil procedure...

\(* \; * \; *\)

\(\text{(5)}\) On appeal no new evidence may be introduced, except as to fraud or misconduct of some person engaged in the hearing before the board. The court sitting without a jury shall hear the cause upon the record before it, and dispose of the appeal in a summary manner, being limited to determining: Whether or not the board acted without or in excess of its powers; the award was procured by fraud; the award is not in conformity to the provisions of KRS 44.070 to 44.160; and whether the findings of fact support the award.

*Id.*
evidence may be introduced, and the reviewing court is restricted to the evidence available to the Board of Claims.23

III. BACKGROUND

A. The Facts of the Case and the Decision of the Board of Claims

On June 6, 1987, Teresa Lynn Roof was operating her automobile in rural Grayson County, Kentucky.24 As she approached a bridge crossing a creek, she slowed her vehicle to about twenty miles per hour, despite the fact that the posted speed limit was fifty-five miles per hour.25 On the bridge, her vehicle struck the retaining guardrail, which gave way without much resistance and allowed her vehicle to fall about ten feet into the creek.26 As a result of the accident, Roof incurred personal injury damages in the amount of $314,602.90.27

Roof filed a claim with the Board of Claims in which she alleged that the Commonwealth, through the Transportation Cabinet, negligently constructed and maintained the guardrail and that this negligence was the proximate cause of her injuries.28 She sought the maximum available recovery of $100,000.29 The Transportation Cabinet answered by asserting that it was Roof’s negligence which caused the accident and not the negligence of the Transportation Cabinet.30

23. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.; see also KY. REV. STAT. ANN. § 44.070(5) (Banks-Baldwin 1999) (providing that recovery in the Board of Claims is limited to $100,000 in any single claim and $250,000 when multiple claims arise out of a single act of negligence).
30. Roof, 913 S.W.2d at 323-24 n.1. The Board of Claims summarized the Transportation Cabinet’s position as follows:

[It contends that it cannot be held liable for the damages to the plaintiff because the guardrail system in question was not defective; that alternatively, if the guardrail system was defective, the Cabinet of Highways had no knowledge of a defect or again, alternatively, if constructive knowledge of the defect is imputed, it had taken reasonable
The Board of Claims found that the guardrail was of such a substandard nature, both in design and maintenance, that it permitted Roof's automobile to plunge into the creek bed resulting in her injuries. The Board also determined that the negligence of the Transportation Cabinet was the predominant cause of Roof's injuries.

B. The Holdings of the Circuit Court and the Court of Appeals, and the Supreme Court's Grant of Discretionary Review

On appeal, the Hardin County Circuit Court reversed the Board of Claims and held that the Transportation Cabinet had no duty to construct or maintain guardrails at the accident site, therefore Roof alone was at fault for her injuries. The Court of Appeals affirmed in part, and reversed in part, holding that the Transportation Cabinet had waived the question of legal duty by not raising it at the Board of Claims. As such, the Court of Appeals reinstated the judgment of the Board of Claims. More significantly for purposes of this note, the Court of Appeals also held that the sum of $10,000 paid to Roof as basic reparation benefits must be offset against the $100,000 awarded by the Board of Claims, thereby reducing her recovery to $90,000.

The Supreme Court of Kentucky granted discretionary review to resolve two issues. The first issue was whether the Transportation Cabinet waived the right to rely on the absence of legal duty by its failure to raise it at the Board of

steps to warn the traveling public of the defective condition by posting a curve sign. Additionally, the Cabinet of Highways strongly argues that Ms. Roof negligently operated the automobile resulting in the accident and further, negligently failed to wear a seat belt causing her injuries, if not the increased severity of her injuries.

Id. (citing Findings of Fact, Conclusions of Law and Order, Board of Claims at 2.)

31. Id. at 324.
32. Id.
33. Id.
34. Id. The question of legal duty was first raised in the opinion of the circuit court. Id. Counsel for the Commonwealth acknowledged this fact with the following statement: "The Cabinet acknowledges that it did not specifically argue "duty," but it hastens to add that its failure to do so does not prevent the Circuit Court from considering the legal conclusion as drawn by the Board in its Findings of Fact, Conclusions of Law and Judgment." Id.
35. Id.
36. Id.
37. Id.
IV. THE OPINION AND REASONING OF THE SUPREME COURT

A. The Majority Opinion

As to the first issue, the court found that the Transportation Cabinet had waived its right to question whether a legal duty was owed, due to its failure to raise the issue at the Board of Claims. Although the issue was not found to be an affirmative defense which must be specifically plead, the court would not allow the Transportation Cabinet to raise it three and one-half years after the Cabinet had failed to raise it in its answer. The question of duty was held to be fact intensive and therefore it must have been presented during the fact-finding process. Without the benefit of the adversarial production of evidence and argument, the fact-finder would be unable to answer the question of liability. Reliable fact-finding demands that any challenge to the existence of a legal duty be made in a timely manner.

As to the second issue, whether the Board of Claims award of $100,000 was properly reduced by the amount of basic reparation benefits received by Roof

38. Id.
39. Id.
40. The court acknowledged that, as a general rule, the Commonwealth is under no duty to erect guardrails along every mile of state highway, however there can be exceptions to this general rule. The duty in this area was generally summarized in Commonwealth v. Automobile Club Ins. Co., 467 S.W.2d 326 (Ky. 1971), where the Court held that duty of a public authority having control over a highway is to keep it in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. Id. at 325.
41. The court found that the Transportation Cabinet virtually conceded that it had a duty and practiced the case exclusively on the question of which party was negligent. Roof, 913 S.W.2d at 324. It declined to assert that it had no duty until the issue proved to be dispositive to the circuit court. Id. Only thereafter did the question of legal duty become significant to the Transportation Cabinet. Id.
42. Id.
43. Id.
44. Id. at 325.
from her insurer, the court found that the award was properly reduced.\textsuperscript{45} As an initial matter, the court relied on the fact that the Commonwealth is under no obligation to make payments to injured parties because of the doctrine of sovereign immunity.\textsuperscript{46} It was recognized that the General Assembly may waive sovereign immunity totally or provide a maximum statutory cap in any amount, regardless of the actual loss incurred.\textsuperscript{47}

The General Assembly has decided to limit damage awards in the Commonwealth under Kentucky Revised Statute § 44.070(1), which provides in part:

\textit{Any damage claim awarded shall be reduced by the amount of payments received or right to receive payment from workers’ compensation insurance, social security programs, unemployment insurance programs, medical, disability or life insurance programs, or other federal or state or private program designed to supplement income or pay claimant’s expenses or damages incurred.}\textsuperscript{48}

In Cooke v. Board of Claims,\textsuperscript{49} the court applied the statutory reduction of damages provided for in Kentucky Revised Statute § 44.070(1). Cooke was injured when the automobile she was driving slammed into the rear of a dump truck owned and operated by the Transportation Cabinet which was parked on the roadway.\textsuperscript{50} She filed a claim against the Commonwealth in the Board of Claims pursuant to Kentucky Revised Statute Chapter 44.\textsuperscript{51} The Board found that the Transportation Cabinet had negligently caused Cooke’s injuries and awarded her $19,255.10 for medical expenses, property damage, and lost

\begin{footnotes}
\footnotetext{45}{\textit{Id.}}
\footnotetext{46}{\textit{Id.} (relying on Section 231 of the Kentucky Constitution which provides that the “General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.”). However, query the accuracy of the court’s statement in light of the fact that the Commonwealth is indeed under an obligation to compensate injured parties although such obligation derives from the General Assembly’s waiver of sovereign immunity through legislation. Such a statement seems tantamount to stating that the Commonwealth is under no obligation to confer a discretionary benefit, such as unemployment compensation, despite legislation to the contrary.}
\footnotetext{47}{\textit{Id.}}
\footnotetext{48}{KY. REV. STAT. ANN. § 44.070(1) (Banks-Baldwin 1999).}
\footnotetext{49}{743 S.W.2d 32 (Ky. Ct. App. 1987).}
\footnotetext{50}{\textit{Id.} at 33.}
\footnotetext{51}{\textit{Id.}}
\end{footnotes}
wages. However, in observing Kentucky’s basic reparations benefits section of its Motor Vehicle Reparations Act, the Board reduced Cooke’s recovery by $10,000 to $9,255.10.

On appeal, the Court of Appeals agreed with the decision of the Board of Claims and the Jefferson County Circuit Court holding that the basic reparations benefits section correctly applies to reduce awards at the Board of Claims. The court rejected Cooke’s argument that if the portion of the Motor Vehicle Reparations Act that reduces her award applies, then so should the section which would allow her to increase her award for pain and suffering. This is so because Kentucky Revised Statute § 44.070(1) specifically disclaims liability for pain and suffering in the Board of Claims.

In Roof, the court rejected the plaintiff’s attempt to distinguish Cooke v. Board of Claims. Roof claimed that the Cooke decision could be distinguished on the ground that the injuries therein were fully compensated while Roof’s recovery, even at the maximum award of $100,000, would still fall short of the

52. Id.
53. Ky. Rev. Stat. Ann. § 304.39-060(2)(a) (Banks-Baldwin 1998) (providing in pertinent part that “[t]ort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is abolished for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are payable therefor ...”).
56. Id.
57. Ky. Rev. Stat. Ann. § 44.070(1) (Banks-Baldwin 1999). The Act provides in part: [T]he Commonwealth or any of its cabinets, departments, bureaus, or agencies, shall not be liable for collateral or dependent claims which are dependent on loss to another and not the claimant, damages for mental distress or pain and suffering, and compensation shall not be allowed, awarded, or paid for said claims for damages.
Id. It should be recognized, however, that even while liability for pain and suffering is specifically disclaimed by the statute, claims for loss of affection and companionship by parents of minor children have been found not to be claims for pain and suffering and therefore not excluded under the Board of Claims Act. See Department of Educ. v. Blevins, 707 S.W.2d 782 (Ky. 1986); Commonwealth, Transp. Cabinet, Bureau of Highways v. Thurman, 897 S.W.2d 597, 600 (Ky. Ct. App. 1995).
$314,602.90 actually incurred in damages by Roof.\textsuperscript{59} The Court, although stating that the argument appeals to their sense of equity, rejected this on the basis that the intent of the General Assembly was evident from the statute and the intent was to reduce claims compensated by other collateral sources.\textsuperscript{60} The Court felt bound as a matter of statutory construction to the words chosen by the General Assembly.\textsuperscript{61}

Roof also urged the court to determine that “award” means the Board of Claims finding as to damages as opposed to the amount actually awarded.\textsuperscript{62} Under this interpretation, the $10,000 no-fault benefit would be reduced from the $314,602.90 in damages, leaving Roof’s $100,000 award intact.\textsuperscript{63} The Court similarly rejected this contention, again on the premise that they are constrained by the language of the General Assembly, and found that only damages actually awarded were within the contemplation of the legislature.\textsuperscript{64} Thus, the reduction must be made from the award and not from the finding.\textsuperscript{65}

\textbf{B. The Dissent}

Justice King authored a dissent in which Justice Stumbo joined.\textsuperscript{66} The dissent argued that the intent of the damages reduction in Kentucky Revised Statute § 44.070(1) was to preclude the injured party from receiving a double recovery and thus being unjustly enriched.\textsuperscript{67} The majority’s opinion was thought to lead to an unjust and unduly harsh result.\textsuperscript{68} Under this theory of legislative intent, the collateral source benefits would be applied against the total damages sustained and not against the statutory limitation of liability.\textsuperscript{69} The dissent also found the Cooke case inapplicable to the Roof case because the Cooke decision was meant to avoid double recovery and unjust enrichment,

\begin{itemize}
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Id. at 326. The majority opinion was authored by Chief Justice Stephens and was joined by Justices Graves, Lambert, Reynolds, and Wintersheimer. Justices King and Stumbo dissented.
  \item \textsuperscript{67} Roof, 913 S.W.2d at 326 (King, J., dissenting).
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Id.
\end{itemize}
whereas there was no possibility of double recovery in the Roof case.  

The dissent found the reasoning in *Truman v. Kentucky Board Of Claims* to be persuasive. In *Truman*, the Court of Appeals held that the comparative fault negligence doctrine applied to the damages sustained rather than to the statutory limitation on recovery. The result of this holding was that where the total damages were stipulated as being $100,000 and the Commonwealth was fifty percent at fault, the Commonwealth was liable for the full statutory amount of damages, which at the time was $50,000, even though it was only fifty percent at fault for causing the injuries. In reaching this conclusion, the Court of Appeals in *Truman* stated:

This language clearly deals with the limitation on the amount of money one can recover on a claim. There is no logical relationship between such limitation and damages which are proven by a party in a law suit . . . . The comparative negligence doctrine applies to damages rather than to limitation of recovery.

The dissent emphasized that a statute should not be construed to work an inequality and hardship when such a construction is not mandatorily required by the language employed. The rule proposed by the dissent comes into focus with the following hypothetical: The inequities of the procedure required by the majority’s opinion are apparent when viewed in the context of common experience. Consider the claims of those who sustain damages in the form of medical expenses, lost wages and future impairment of income in the collective sum of $200,000.00. If fault is equally allocated against the Commonwealth and a second defendant, the Commonwealth must pay $100,000.00 even though only fifty percent at fault. Where the claimant and Commonwealth are both fifty percent at fault, again the Commonwealth must pay $100,000.00. But when a citizen has the foresight to purchase healthcare and wage continuation benefits paying her $100,000.00, even though the Commonwealth is exclusively at fault.

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70. *Id.*
71. 726 S.W.2d 312 (Ky. Ct. App. 1987).
72. In *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), the Supreme Court of Kentucky abandoned the doctrine of contributory negligence in favor of the modern doctrine of pure comparative negligence which holds each actor liable for the amount of harm caused.
74. *Roof*, 913 S.W.2d at 326-27 (King, J., dissenting).
75. *Truman*, 726 S.W.2d at 313.
76. *Roof*, 913 S.W.2d at 327 (King, J., dissenting) (citing *Martin v. Gage*, 134 S.W.2d 966 (Ky. 1939); *City of Covington v. Sohio Petroleum Co.*, 279 S.W.2d 746 (Ky. 1955)).
for the claimant's injuries, under today's decision, the Commonwealth escapes liability.\textsuperscript{77}

The dissent felt that "fault should be followed by liability" and "[w]hen responsible citizens purchase protection against anticipated losses they do so for their protection and not to bestow upon the Commonwealth a windfall."\textsuperscript{78}

V. ANALYSIS

In fashioning a rule to apply to the \textit{Roof} case, it is appropriate to return to the underlying objectives of damage awards as they have developed through the common law. Justice Leibson recently espoused this view in the Board of Claims context by supporting the position that claimants should "get paid exactly what they have coming to them, no more and no less."\textsuperscript{79} To this end, he advocated a return to the objectives of \textit{Hilen v. Hays},\textsuperscript{80} in which the Supreme Court of Kentucky, by judicial fiat, adopted the concept of apportioning liability purely by fault.\textsuperscript{81} Justice Leibson advocated a return to the fundamental fairness found in the principles of joint and several liability.\textsuperscript{82}

A proposal consistent with this idea is that the reduction of awards at the

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Central Ky. Drying Co. v. Commonwealth, Dept. of Housing, Buildings, and Constr., 858 S.W.2d 165, 170 (Ky. 1993) (Leibson, J., dissenting). Although this case involved the reduction of damage awards at the Board of Claims, the reductions, unlike the \textit{Roof} case, were for setoff amounts paid by a settling joint tortfeasor. In describing the common law concept of damages Justice Leibson stated:

We have gotten away from the age-old logic of the common law, which is to decide the plaintiff's total damages and award compensation accordingly, to a different system wherein a plaintiff, who settles with one defendant and proceeds against another, is either overcompensated or undercompensated depending on how the fact-finder later apportions fault. This is Russian Roulette, not the comparative negligence doctrine espoused in \textit{Hilen v. Hays}....

\textit{Id.} at 170 (Leibson, J., dissenting).

\textsuperscript{80} 673 S.W.2d 713 (Ky. 1984).

\textsuperscript{81} The General Assembly subsequently validated the court's adoption of comparative fault in 1988 by its enactment of House Bill 551, which has been codified as Kentucky Revised Statute § 411.182.

\textsuperscript{82} \textit{Central Kentucky Drying Co.}, 858 S.W.2d at 170 (Leibson, J., dissenting).
Board of Claims for benefits received from collateral sources should be deducted from the total amount of the damage claim, as opposed to being deducted from the statutory maximum. In cases where the total damage claim does not exceed the statutory maximum, the deduction would be made from the amount awarded. This rule would prevent any possibility of double recovery, while carrying out the purpose of damage awards, which is to make the plaintiff whole. Further, the rule would effectuate the principles of *Hilen v. Hays* by apportioning liability in relation to fault.

The proposed rule has been applied previously in Kentucky in the context of sums received from co-tortfeasors. In *Commonwealth, Department of Highways v. Begley*, the plaintiff suffered severe injuries when the bridge on which her automobile was traveling collapsed. The bridge was in poor condition due to its previous use by heavy equipment exceeding the posted weight limits. The bridge collapsed under the weight of the plaintiff’s vehicle combined with an overloaded truck. The plaintiff obtained a judgment of $66,000 against the owner of the truck, of which $12,500 was actually collected. The Board of Claims found the truck driver and the Commonwealth to be jointly liable and awarded the plaintiff $10,000, the maximum statutory amount at the time. The Board then proceeded to reduce the award by $12,500, the amount paid by the co-tortfeasor, thereby precluding any recovery from the Commonwealth.

The Lee Circuit Court reversed and reinstated the full $10,000 award and the Court of Appeals affirmed, finding that the reduction of the award by the Board of Claims rested upon a misinterpretation of the applicable principles of damages. Specifically, the court felt that although only one recovery could be had by the injured party, the joint tortfeasors remained jointly and severally liable. Therefore, the payment of any sums by co-tortfeasors should be

83. 673 S.W.2d 713 (Ky. 1984).
84. 376 S.W.2d 295 (Ky. 1964).
85. *Id.* at 296.
86. *Id.*
87. *Id.* at 296-97.
88. *Id.*
89. *Id.* at 297.
90. *Id.* The Board reduced the claim in reliance on Kentucky Revised Statute § 44.070, the same statute used to reduce the claim in *Roof*. *Id.*
91. *Id.* at 297-99.
92. *Id.* at 298.
93. *Id.*
credited against the value of a full legal compensation. 94 Although this case was decided before the adoption of comparative negligence, the principles upon which the damage awards were based are consistent with contemporary Kentucky law. 95 It is because these principles remain important that Kentucky has adopted the doctrine of comparative negligence. An application by analogy of the rule in Begley would allow the plaintiff's damage award in Roof to be reduced from the value of full legal compensation instead of the statutory maximum recovery.

Instead of applying the rule that there is no deduction from the amount of the award for the Commonwealth for sums received from co-tortfeasors, the Supreme Court of Kentucky has created a fictional distinction. That fiction is that there is a difference between collateral benefits received from sources enumerated in the statute and those not enumerated. 96 For example, in Central Kentucky Drying Co. v. Commonwealth, Department of Housing, Buildings, and Construction, 97 the issue before the court was whether set-offs 98 against

94. Id.
95. The basic principle of recovery is to provide compensation. RONALD W. EADES, KENTUCKY LAW OF DAMAGES § 1-4 (1985). To this end, the courts have stated that:

Compensation is always the aim of the law. It is the 'bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position is the purpose of allowing a money equivalent of his property which has been taken, injured, or destroyed.'

Id. (citing Hughett v. Caldwell County, 230 S.W.2d 92, 96 (Ky. 1950)).

Along with the basic principle of providing recovery, Kentucky also recognizes the "collateral source" rule which states that a defendant is not entitled to a defense or set-off for money received by the plaintiff from a collateral source such as insurance or free medical treatment. RONALD W. EADES, KENTUCKY LAW OF DAMAGES § 2-7 (1985); see also Taylor v. Jennison, 335 S.W.2d 902 (stating that damages recoverable for a wrong are not diminished by the fact that the injured party has been wholly or partly indemnified for his loss by insurance to whose procurement the wrongdoer did not contribute).

96. The enumerated statutory sources for which an award shall be reduced are: workers' compensation insurance; social security programs; unemployment insurance programs; medical, disability or life insurance programs; or other federal or state or private program designed to supplement income or pay claimant's expenses or damages incurred. KY. REV. STAT. ANN. § 44.070(1) (Banks-Baldwin 1999).
97. 858 S.W.2d 165 (Ky. 1993).
98. A set-off is the reduction of a claim by the amount awarded on a counterclaim. 1 COMPARATIVE NEGLIGENCE MANUAL § 9:21 (3d ed. 1995). It has been suggested that set-offs
damages were properly allowed by the Board of Claims for amounts paid by a settling joint tortfeasor.\textsuperscript{99} The court explicitly ruled that the lower court was correct in allowing a damage award against the Commonwealth to be reduced by the amount paid by sources enumerated in the statute, but that a joint tortfeasor was not enumerated in the statute.\textsuperscript{100} In reliance on this rule, the court avoided a windfall for the Commonwealth and stated that once an apportionment of fault is made each party is then liable for an amount equal to his degree of fault, no more and no less.\textsuperscript{101}

The rule proposed in this note effectuates the strong public policy in Kentucky against double recovery for the same elements of loss.\textsuperscript{102} At the same time, the rule also complies with the collateral source rule that "damages recoverable for a wrong are not diminished by the fact that the injured party has been wholly or partly indemnified by insurance," an asset wholly unprocured by the wrongdoer.\textsuperscript{103} In the \textit{Roof} case, however, the Commonwealth is enjoying a should always be barred when damages are paid in fact by a liability insurance company. \textsc{VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE} (3d ed. 1994).

\textsuperscript{99} Central Kentucky Drying Co. v. Commonwealth, Department of Hous., Bldgs., and Constr., 858 S.W.2d 165 (Ky. 1993); see also Transportation Cabinet, Dept. of Highways, Commonwealth of Ky. v. Thurman, 897 S.W.2d 597 (Ky. Ct. App. 1995).

\textsuperscript{100} \textit{Id.} at 168. In fact, Justice Lambert found that the reduction of liability for sums paid as compensation by other sources was "... perfectly consistent with the limitation on total damages allowable and the types of actions which may give rise to liability via the Board of Claims." \textit{Id.} at 169 (Lambert, J., dissenting in part). He cited with approval the majority opinion below by Judge Stumbo which stated "KRS 44.070(1) clearly shows the legislative intent that no claimant be unjustly enriched at the Commonwealth's expense." \textit{Id.} at 170. The rule proposed in this note would clearly carry out this legislative intent by only permitting reductions to made from the total damage claim when it exceeds the statutory maximum.

\textsuperscript{101} \textit{Id.} (citing Stratton v. Parker, 793 S.W.2d 817 (Ky. 1990)).


\textsuperscript{103} Taylor v. Jennison, 335 S.W.2d 902, 903 (Ky. 1960); see also Burke Enter., Inc. v. Mitchell, 700 S.W.2d 789 (Ky. 1985). In Ohio, the courts have typically disallowed the enforcement of subrogation clauses in insurance policies where the result would be that the insured receives less than full compensation. See Porter v. Tabern, No. 98-CA-26, 1999 WL 812357 at *3 (Ohio Ct. App. 2nd Dist. Sept. 17, 1999) (relying on Central Reserve Life Ins. Co. v. Hartzell, No. 94AP120094 (Ohio Ct. App. 5th Dist. Nov. 30, 1995) and Moellman v. Neihau, No. C-971113 (Ohio Ct. App. 1st Dist. Feb. 5, 1999)). Although this is in the context of private insurance, the principle applies by analogy; there is no danger of double recovery and the plaintiff must be made whole.
windfall at the expense of a plaintiff who cannot be made whole for her injuries due to an inextricable twist of logic by the court, namely that an intent to reduce damages awarded by the Board of Claims by sums received from private insurance means the “reduction must be from the award not the finding.”  104 Why should the Commonwealth obtain the benefit from the claimant’s purchase of private insurance if normal tortfeasors are not permitted to do so? Why must the claimant receive a lower compensation benefit for having the foresight to purchase insurance? This is particularly troublesome when considering that liability insurance is mandated by the General Assembly in Kentucky.  105

Obviously, crucial to the court’s finding was the language used by the legislature. The court felt that only damages actually awarded by the Board of Claims were within the contemplation of the legislature without regard to the total damages.  106 The key language to be interpreted in Roof is “any damage claim awarded shall be reduced,”  107 which should be interpreted as a reduction of the “claim” and not the “award.”  108 A statute should not be construed to work an inequality and a hardship when such a construction is not mandated by the language employed.  109 The result in Roof not only works an inequality as to the under-compensated plaintiff, but also sets a precedent that will bar an entire class of claims against the Commonwealth.  110 This creates a gaping hole in Kentucky’s limited waiver of sovereign immunity.

VI. CONCLUSION

105. KY. REV. STAT. ANN. § 304.39-110 (Banks-Baldwin 1999). Although Kentucky requires only that a minimum level of liability tort insurance be in place, one would expect that purchasers of insurance would opt for coverage for themselves either through the suggestion of the insurance agent or through their own initiative. Regardless of the reason for adopting such insurance coverage, there are potential scenarios where the insurance benefits payments would serve to bar a potential claim against the Commonwealth.
106. Roof, 913 S.W.2d at 326.
107. KY. REV. STAT. ANN. § 44.070(1) (Banks-Baldwin 1999).
108. It should be noted that no principles of statutory construction were applied by the majority opinion, rather the majority relied on “the clear language of the statute.” Commonwealth, Transp. Cabinet, Bureau of Highways v. Roof, 913 S.W.2d 322, 325 (Ky. 1996).
109. Roof, 913 S.W.2d at 327 (King, J., dissenting) (citing Martin v. Gage, 134 S.W.2d 966 (Ky. 1939); City of Covington v. Sohio Petroleum Co., 279 S.W.2d 746 (Ky. 1955)).  
110. See supra text accompanying note 81.
The Supreme Court of Kentucky has adopted the fundamentally sound doctrine of comparative fault.\textsuperscript{111} The policy underlying this doctrine is to apportion liability according to fault.\textsuperscript{112} The rule laid out by the Court in \textit{Roof} rests upon a flawed premise which creates a whole new class of claimants who may be uncompensated for their injuries despite the fact that the General Assembly has followed the modern trend\textsuperscript{113} by adopting a limited form of sovereign immunity. The holding of \textit{Roof} is inconsistent with the principles of comparative fault otherwise embraced by Kentucky.

A more equitable result would be achieved by deducting amounts received from collateral sources from the actual amount of damages rather than the statutory maximum award. It makes little sense to allow the reduction to be made from the actual amount of damages for amounts received from co-tortfeasors only because they are not enumerated in the statute. The statute does not explicitly mandate this result, nor is it mandated by the fact the doctrine of sovereign immunity is limited in nature. The General Assembly remains free to amend the statute to effectuate its intent if it so desires. Until then, it is of little solace to the uncompensated or undercompensated claimant that this distinction was drawn merely by virtue of the fact that the Commonwealth need not consent to be sued at all.

\begin{itemize}
\item \textsuperscript{111} See Hilen v. Hays, 673 S.W.2d 713 (Ky. 1987); see also KY. REV. STAT. ANN. § 411.182 (Banks-Baldwin 1999).
\item \textsuperscript{112} \textit{Id.} See generally \textsc{Henry Woods} \& \textsc{Beth Deere}, \textsc{Comparative Fault} (3d ed. 1996).
\item \textsuperscript{113} See supra note 9.
\end{itemize}
I. INTRODUCTION

A teacher may believe that reporting suspected child abuse to her principal is the proper course of action. The reality in Kentucky, however, is that a report made to a supervisor is inadequate to relieve a teacher from criminal liability for failure to report such abuse to proper authorities.1 The recent decision of Commonwealth v. Allen2 makes this reality clear and should open the eyes of Kentucky's teachers. In Allen, the Supreme Court of Kentucky held that, under Kentucky's child abuse reporting statute,3 an individual is not relieved of her statutory duty to report suspected child abuse to proper authorities, even if she properly reports the suspected abuse to her supervisor or principal.4 The court stated that this merely imposed an additional duty upon the supervisor to report the suspected child abuse.5 The dual responsibility imposed upon both the supervisor and the reporting subordinate helps to insure that the abuse is properly reported, and to assure an investigation by state authorities.6

1. See KY. REV. STAT. ANN. § 620.030(1) (Michie 1990). The proper authorities are specifically identified by the reporting statute as a local law enforcement agency, the Kentucky State Police, the Cabinet for Families and Children or its designated representative, the Commonwealth's Attorney or the county attorney. Id.
2. 980 S.W.2d 278 (Ky. 1998).
3. KY. REV. STAT. ANN. § 620.030(1) (Michie 1990). The statute states as follows:
(1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise. Any supervisor who receives from an employee a report of suspected dependency, neglect, or abuse shall promptly make a report to the proper authorities for investigation. If the cabinet receives a report of abuse or neglect allegedly committed by a person other than a parent, guardian, or person exercising custodial control or supervision, the cabinet shall refer the matter to the Commonwealth's attorney or the county attorney and the local law enforcement agency or the Kentucky State Police. Nothing in this section shall relieve individuals of their obligations to report.

Id.
4. Allen, 980 S.W.2d at 281.
5. Id.
6. Id. at 280.
decision represents a strict adherence to Kentucky's child abuse reporting statute, because in addition to holding that the statutory language clearly states that an individual cannot be relieved of her duty to report, the court also imposed an additional, heightened duty upon supervisors.  

This note reviews the decision in Allen and examines the court's reasoning in a case that "could prove seminal for mandatory abuse reporting in Kentucky."  

II. BACKGROUND

A. Facts

In Allen, the court considered whether a school employee should be held criminally liable for failing to report suspected child abuse to proper authorities, despite making a report to her supervisor. Appellees Betty Allen and Pamela Cook were employees of the Bullitt County School System. During the 1992-93 school year, the two were notified by students that another teacher had engaged in sexual conduct with other students. In response, Allen, a teacher, and Cook, a guidance counselor, reported these allegations to the school's principal. The suspected child abuse was never reported to authorities, and subsequently, another child was abused. Allen and Cook were charged with Class B misdemeanors for failing to report the suspected child abuse to the proper authorities. Allen and Cook contended that they had fulfilled their statutory obligation by reporting the suspected abuse to their supervisor, and as a result should be granted immunity from prosecution pursuant to Kentucky statute.

7. Id. at 281.
9. Allen, 980 S.W.2d at 279.
10. Id.
11. Id.
12. Id.
13. Id. at 282.
14. Id. at 279; see also KY. REV. STAT. ANN. § 620.990(1) (Michie 1990) (providing that any person intentionally violating the provisions of chapter 620 shall be guilty of a class B misdemeanor).
15. Allen, 980 S.W.2d at 279; see also KY. REV. STAT. ANN. § 620.050(1) (Michie 1990). This
The Bullitt District Court originally dismissed the charges for lack of intent to violate the statute.\(^{16}\) However, the Bullitt Circuit Court reversed the dismissal and remanded to the district court.\(^{17}\) On remand, the district court was satisfied that the report was sufficient and dismissed the charges on immunity grounds.\(^{18}\) On appeal, the circuit court reversed the dismissal, finding that whether a proper report was made and whether immunity was available was a decision for the jury.\(^{19}\) The Kentucky Court of Appeals granted discretionary review, and held that the report to a supervisor was a proper report entitling appellees to immunity, thereby reversing the circuit court’s decision.\(^{20}\) The Supreme Court of Kentucky granted discretionary review.\(^{21}\)

B. History Regarding The Duty to Report Suspected Child Abuse

In the early 1960’s, the first mandatory reporting laws were advocated by a group of physicians led by Dr. C. Henry Kempe.\(^{22}\) The initial effort focused on promulgating a model law that would require physicians to report injuries sustained other than accidental means.\(^{23}\) This effort led to the implementation of mandatory reporting laws in all fifty states by 1967.\(^{24}\)

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statute provides in relevant part:

Anyone acting upon reasonable cause in the making of a report or acting under K.R.S. 620.030 to 620.050 in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or action. However, any person who knowingly makes a false report and does so with malice shall be guilty of a Class A misdemeanor.

\(^{16}\) Allen, 980 S.W.2d at 279.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id.


\(^{23}\) Id.

\(^{24}\) Id. at 153-54.
initial reporting laws were greatly expanded in the years to follow by requiring other professionals to report and increasing the types of injuries to be reported. Presently, each state except North Carolina, which repealed its reporting statute in 1999, has enacted a mandatory reporting law that requires certain professionals and other individuals to report suspicions of child abuse.

The *Allen* court was given a great opportunity to shape the law surrounding the duty to report suspected child abuse in the Commonwealth. Kentucky law, however, offered little guidance, as this specific issue had only been addressed in cursory fashion. In *Barber v. Florida*, a foster care counselor was held criminally liable for failing to report suspected child abuse, despite the fact that a report had already been made to the proper authorities. In *Barber*, like *Allen*, the Florida statutes did not relieve an individual from reporting known or

25. *Id.* at 154.
28. *Id.* at 335.
suspected abuse, even when the abuse had already been reported to the proper authorities. The court in Barber stated that such a requirement provided substantiation to reports and provided more assurance that an investigation would occur. In Fugate v. Fugate, the Kentucky Court of Appeals held that a judge presiding over a child custody proceeding was not relieved of the statutory duty to report known or suspected child abuse.

In determining the proper application of Kentucky's reporting statute, the Allen court referred to statutory provisions from Wyoming and Indiana to support its holding that an individual is not relieved of her duty to report, even if she made a report to a supervisor. The Wyoming and Indiana statutes expressly relieve an individual from her duty to report known or suspected child abuse if a report was made or was going to be made. In Allen, the court reasoned that if the legislature had intended to relieve an individual from her duty to report as with the Wyoming and Indiana statutes, it would have provided an express statement to that effect. However, the legislature expressly provided that nothing relieves an individual of her duty to report.

Also relevant to the decision in Allen is the precedent established by Lane v. Commonwealth. In Lane, the Supreme Court of Kentucky imposed an affirmative duty upon a mother to prevent an assault upon her child. This duty

29. Id.
30. Id.
32. Id. at 623.
33. Commonwealh v. Allen, 980 S.W.2d 278, 280 (Ky. 1998); see also WYO. STAT. ANN. § 14-3-205(b) (Michie 1999) (stating in relevant part: "[n]othing in this subsection is intended to relieve individuals of their obligation to report on their own behalf unless a report has already been made or will be made"); IND. CODE ANN. § 31-33-5-3 (West 1999) (stating as follows: "[t]his chapter does not relieve an individual of the obligation to report on the individual's own behalf, unless a report has already been made to the best of the individual's belief").
34. Allen, 980 S.W.2d at 280.
35. Id.
36. Id.; KY. REV. STAT. ANN. § 620.030(1) (Michie 1990) (providing that nothing in the statute shall relieve individuals of their duty to report).
37. 956 S.W.2d 874 (Ky. 1997).
38. Id. at 876.
was implemented through Chapter 620 of the Kentucky Revised Statutes. The clear legislative intent of Chapter 620 is to protect children from abuse. The Lane court went further and permitted accomplice liability when an individual failed to perform her statutory duty. In his concurring opinion, Justice Cooper observed that allowing a charge of complicity pursuant to Chapter 620 means that any individual who fails to report known or suspected child abuse could potentially be indicted and convicted as an accomplice to that abuse. When viewing Allen in this light, the result takes on much greater significance. If Justice Cooper's reasoning were taken to its logical end, it would be possible that a sitting judge, as in Fugate, or a teacher, as in Allen, could be charged as an accomplice to abuse.

C. Holding By The Supreme Court Of Kentucky In Commonwealth v. Allen

The Allen court faced two controversial issues: first, whether a report of suspected child abuse to a supervisor was a proper report pursuant to Kentucky's child abuse reporting statute; and second, whether such report was sufficient to confer immunity from criminal liability upon those who reported the suspected abuse to their supervisors.

Due to the minimal amount of case law regarding the issue, the Allen majority relied primarily on the relevant statutory provisions regarding the duty to report suspected child abuse and the interpretation of those statutes. In addition, because Kentucky courts had not addressed this specific issue, the Allen court analyzed case law and statutory provisions from other jurisdictions.

1. Majority Rationale: A report of suspected child abuse to a supervisor is improper and does not relieve the subordinate of her duty to report to proper authorities.

While there is no express statutory provision which excuses an individual

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39. Id.
40. Id. at 875.
41. Id. at 876.
42. Id. at 877 (Cooper, J., concurring).
43. Commonwealth v. Allen, 980 S.W.2d 278, 279 (Ky. 1998).
44. Id. at 281.
45. See id. at 279-82.
46. See id. at 280-82.
from reporting suspected child abuse to authorities, Allen and Cook contended that they were relieved of their reporting requirement by reporting their suspicions to their supervisor. Allen and Cook argued that it would be inconsistent to impose a duty to report upon a supervisor if a subordinate had an independent duty to report. However, the majority flatly rejected this contention and reasoned that this argument might have validity in a world where every person performed her legal duty, but that we do not live in such a place, and therefore it was more logical for the legislature to require such a dual responsibility. The majority reasoned that a dual requirement is used to demonstrate the severity of the situation to authorities and to allow proper investigation of the situation. Due to the sensitive nature of the situation, which might require an individual to report a colleague to authorities, the court determined that by imposing such a dual requirement on both supervisor and subordinate, the legislature provided more assurance that suspicions of abuse would be reported and investigated. Chief Justice Lambert, who wrote the majority opinion, stated that the intent of the legislature was unequivocal, in that it imposed an additional duty on a supervisor, rather than relieving a subordinate of her duty. If the legislature had intended to create an exception for a report made to a supervisor, it could have created such an exception like other states. However, the Kentucky General Assembly chose not to include such an exception, as evidenced by the clear language of the reporting statute. The relevant portion of the statute reads: “Nothing in this section shall relieve individuals of their obligations to report.” The majority distinguished the Kentucky provision from statutes used in Wyoming and Indiana, which

47. Id. at 279.
48. Id.
49. Id.
50. Id. at 280.
51. Id. (citing Barber v. Florida, 592 So. 2d 330, 335 (Fla. Dist. Ct. App. 1992)).
52. Id.
53. Id.
54. Id.
55. Id.
expressly relieve an individual of her duty to report if a report has been made or will be made.57

The majority noted that the rules of statutory construction required the court to determine the intent of the legislature, taking into consideration the evil to be remedied.58 In determining the legislative intent, the court must utilize the words that enacted the statute, rather than trying to determine what may have been intended, but was not expressed in the statute.59 Further, the court noted that a statute must be interpreted consistently with its stated language.60 In following these canons of statutory interpretation, the majority determined that the language of the reporting statute was clear and unambiguous.61 The statute clearly required all individuals, with knowledge or a reasonable belief of suspected child abuse, to report such abuse.62 A supervisor has an additional duty, since he must report not only on his own behalf, but also any reports received from subordinates.63 The clear and definitive language of the statute, which states that no individual is relieved of her obligation to report, supports this conclusion.64

2. Majority Rationale: Because the report to a supervisor is insufficient, a subordinate is not entitled to immunity from prosecution for making such a report.

After considering the second issue, the court rejected the assertion that Allen and Cook were entitled to immunity from prosecution because they had reported their suspicions to their supervisor.65 This was based on the court's determination that a report to a supervisor is not a report to authorities within the meaning of the reporting statute.66 In order to qualify for immunity from prosecution, the report must have been made pursuant to the reporting statute, and because it did not qualify under that statute, Allen and Cook were not

57. Allen, 980 S.W.2d at 280.
58. Id.
59. Id.
60. Id.
61. Id. at 281.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
entitled to immunity.67

D. The Concurring Opinion

Justices Cooper and Stumbo agreed with the majority opinion, but wrote separately to dispel the suggestion that no harm resulted from Allen and Cook's failure to report, and to address the assertion that school protocol allowed Allen and Cook to report to their principal rather than the proper authorities.68

If Allen and Cook had obeyed their statutory duty and reported the suspected abuse to the proper authorities, then a third student would have been spared from sexual abuse.69 However, they reported to their principal, who failed to report the suspected abuse to authorities.70 The concurring opinion noted that this was a perfect example of why a report only to a supervisor was insufficient, and why the statute requires that suspected child abuse be reported directly to a local law enforcement agency, the Kentucky State Police, the Cabinet for Families and Children or its designated representative, the Commonwealth's attorney, or the county attorney.71

Justice Cooper, who wrote the concurring opinion, found no support in the assertion that school "protocol" required a report to be filed with the principal.72 The Bullitt County Public Schools Guidelines stated that the principal should be the first source of any information in the school.73 Justice Cooper rejected this notion, and found that this more appropriately designated the principal as the source of the information, rather than the recipient.74 Justice Cooper also took issue with the fact that all individuals within the Central Office who were designated to handle certain affairs were listed by name, except for the individual designated to address child abuse, who was identified only as "Social Worker".75 This absence of name and identification led Justice Cooper to
believe that the individual was not an employee of the school system, but of the Cabinet for Families and Children.76 The concurrence supported the majority en toto, and specifically rejected the assertions that no harm was committed by the failure to report and that school protocol required a report with the principal rather than proper authorities as provided by statute.77

E. The Dissenting Opinion

The dissenting opinion began by pointing out that Allen and Cook reported the suspected abuse to their principal immediately, and that such reporting conformed to school protocol.78 The dissent agreed with the majority that in construing a statute, the court must determine and carry out the intent of the legislature, taking into consideration the evil to be remedied.79 Justice Johnstone, who wrote the dissent, stated that the intent of the statute was clearly to impose a legal obligation upon any individual who has knowledge or reasonable belief of possible child abuse.80 However, the dissent took issue with the majority's determination that an additional responsibility is imposed upon a supervisor, rather than relieving the subordinate that reported the abuse.81

Justice Johnstone argued that the adoption of such a requirement was contrary to Johnson v. Frankfort & Cincinnati Railroad,82 which established a well-recognized rule of statutory construction.83 Johnson provided that in determining legislative intent, a court should avoid a construction that is unreasonable and absurd, in favor of one that is reasonable, rational, sensible, and intelligent.84 The dissent wrote that it is not reasonable to believe that the legislature intended to hold educators criminally liable when they make a report to a supervisor.85 The dissent would have granted Allen and Cook statutory immunity from prosecution, because their report was made in good faith.86

76. Id.
77. Id.
78. Id. (Johnstone, J., dissenting).
79. Id. at 283.
80. Id.
81. Id.
82. 197 S.W.2d 432 (1946).
83. Allen, 980 S.W.2d at 283 (Johnstone, J., dissenting).
84. Johnson, 197 S.W.2d at 434.
85. Allen, 980 S.W.2d at 283 (Johnstone, J., dissenting).
86. Id.
Justice Johnstone believed that a failure to provide immunity in this situation would cause an absurd result that was not intended by the legislature. Further, he felt that the decision reached by the court "defies logic and good common sense." 

III. ANALYSIS

The court's opinion in *Allen* represents an attempt to extend greater protection to Kentucky's children. The *Allen* decision should encourage prompt reporting of potential child abuse because those who fail to uphold their statutory duty will be prosecuted. Following the *Lane* decision, the result in *Allen* is a natural progression toward providing children with more protection from potential child abuse.

In refusing to provide an exception for the duty to report suspected child abuse, the court strictly adhered to the language of the statute. The creation of exceptions in these situations has the potential of allowing suspected child abuse to go unreported, thus the failure to create an exception for a report made to a supervisor provides better assurance that suspected abuse will be reported. In strictly construing the reporting statute, the court found it necessary to utilize principles of statutory interpretation to insure that the legislative intent of the statute was carried out. The legislative intent of the statute was determined to be unequivocal in negating the creation of an exception for the duty to report. The court's analysis in each of these areas represents a trend toward extending liability in order to assure that suspected child abuse is reported.

Additionally, the court's holding in *Lane*, although not addressed in *Allen*, could have potentially significant ramifications on the failure to report suspected child abuse. When an individual fails to report under *Allen*, she could possibly be charged with accomplice liability for that abuse pursuant to the court's holding in *Lane*. The court's reasoning and decision in *Allen*, coupled with the holding in *Lane*, represents a strong public policy towards giving Kentucky's children added protection from potential child abuse.

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87. *Id.* at 284.
88. *Id.*
89. See *id.* at 280-81.
90. See *id.* at 280.
91. *Id.*
However, the court's holding in Allen provided the Kentucky legislature with an opportunity to modify the current reporting statute if it so chooses, because the court outlined exactly what would have been acceptable in its analysis of reporting statutes from Indiana and Wyoming. If the legislature does not create an exception in the reporting statute, the Allen decision has potentially far reaching ramifications throughout the Commonwealth of Kentucky. These aforementioned areas will be examined in the following analysis along with potential solutions to prevent future occurrences of the Allen result.

A. Strict Adherence to Statutory Language Negates The Creation of a Valid Exception in the Duty to Report

"Nothing in this section shall relieve individuals of their obligations to report." This statement in Kentucky's reporting statute clearly demonstrates that nothing will relieve an individual of her duty to report, not even a report made to a supervisor. The language creating the duty to report, when compared to other reporting statutes, indicates that an individual is not to be relieved of her duty to report suspected child abuse. Wyoming's reporting statute is similarly drafted, yet it goes further and relieves an individual from her duty to report if a report has already been made or will be made. Arguably, the Wyoming statute is difficult to apply because it requires an individual to determine whether a report has been made or will be made. If an individual is required to determine the status of a report, it would behoove her to file a report to eliminate her liability for failing to report. The statute requires an individual to second guess whether a report has been made or will be made, which could dramatically increase the number of complaints that must be investigated by already overburdened social workers. Similarly, Indiana's reporting statute relieves an individual when a report has been made to the best of the individual's belief. Each of the statutes places a duty upon the individual to determine

92. Id.
94. Allen, 980 S.W.2d at 280.
95. WYO. STAT. ANN. § 14-3-205(b) (Michie 1999) (stating in relevant part: "[n]othing in this subsection is intended to relieve individuals of their obligation to report on their own behalf unless a report has already been made or will be made.").
96. Id.
97. IND. CODE ANN. § 31-33-5-3 (West 1999) (stating as follows: "[t]his chapter does not relieve an individual of the obligation to report on the individual's own behalf, unless a report has already
whether a report has been made or will be made in order to be relieved from liability. These provisions require an individual to put her own liability in the hands of another, who may or may not make a report.

As a practical matter, it would make more sense for an individual to make a report directly rather than trying to determine if a report has been made or will be made. The exceptions provided by the statutes from Wyoming and Indiana seem to cloud the issue of whether a report needs to be made. The focus should be upon the making of a report, not by whom it is made. If a report is made promptly rather than after a debate over who has made a report or who is obligated to do so, the report could be filed sooner, which could allow the proper authorities to begin an investigation. The failure to create an exception greatly increases the likelihood that suspicions will be reported, because any individual with knowledge is required to report. As a result, an additional duty now exists for the supervisor to report. 98 Since the statute expressly refuses to relieve an individual of her duty to report, it is clear that the statute imposes a heightened duty on supervisors. 99 This dual responsibility is clearly supported by the language of the reporting statute. 100 The first sentence of the reporting statute requires individuals to report abuse suspected or known to them. 101 In addition, the second sentence requires that a supervisor make a report of any suspected or known abuse that is received from a subordinate. 102 Therefore, because the statute expressly states that nothing will relieve an individual of her duty to report, both the teacher and the supervisor have a responsibility to report suspected child abuse to the proper authorities. 103 By imposing such a dual responsibility, and failing to create an exception to the duty to report, the Kentucky General Assembly provided better assurance that suspected abuse would be reported to the authorities. 104 This dual responsibility approach is utilized in several other states. 105 These states, unlike Kentucky, require that a

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98. Allen, 980 S.W.2d at 280.
99. Id. at 281.
100. KY. REV. STAT. ANN. § 620.030(1) (Michie 1990).
101. Id.
102. Id.
103. Allen, 980 S.W.2d at 281.
104. Id. at 280.
105. See HAW. REV. STAT. ANN. § 350-1.1(b) (1993); MO. ANN. STAT. § 210.115(2) (West 1996);
subordinate notify her supervisor of suspected child abuse and the supervisor
becomes responsible for making a report as well.106 The statute in each of these
states specifically provides that the subordinate is not relieved of her duty to
report by notifying her supervisor.107 The Missouri reporting statute is an
excellent example of this dual responsibility:

Whenever such person is required to report pursuant to sections 210.109 to
210.183 in an official capacity as a staff member of a medical institution, school
facility, or other agency, whether public or private, the person in charge or a
designated agent shall be notified immediately. The person in charge or a
designated agent shall then become responsible for immediately making or
causing such report to be made to the division. Nothing in this section, however,
is meant to preclude any person from reporting abuse or neglect.108

Although Kentucky does not require a report to be made to a supervisor,
one the supervisor has been notified, the Kentucky statute imposes the same
dual responsibility as the Missouri statute.109 At least three states require that
notification be made to a supervisor, who then has the legal obligation for
making a report of the suspected abuse.110 A few state statutes recognize that
internal procedures may be used to facilitate reports of child abuse, but expressly
state that such internal procedures will not relieve an individual of her duty to
report to the proper authorities.111 The Oklahoma reporting statute is an
excellent example of how to address such internal procedures in conjunction
with the reporting statute:

Internal procedures to facilitate child abuse or neglect reporting and inform
employers, supervisors and administrators of reported suspected child abuse or
neglect may be established provided that they are not inconsistent with the
provisions of this section and that such procedures shall not relieve the
employee or such other person from the individual reporting obligations

N.Y. SOCIAL SERVICES LAW § 413(1) (McKinney 1992); W. VA. CODE § 49-6A-2 (Michie 1999).
106. Id.
107. Id.
109. See Allen, 980 S.W.2d at 280.
110. ME. REV. STAT. ANN. tit. 22 § 4011(1)(A) (West 1992); MASS. GEN. LAWS ANN. ch. 119, §
51A (Law. Co-op. 1994); 23 PA. CONS. STAT. ANN. § 6311(c) (West 1991).
111. ALASKA STAT. § 47.17.020(g) (Michie 1992); CAL. PENAL CODE § 11166(h) (West 1992);
required by this section.\footnote{112}

When compared to the language of other reporting statutes and by expressly refusing to relieve an individual of her duty to report, the \textit{Allen} decision is proper based upon the current language of the reporting statute.

\subsection*{B. Statutory Interpretation Supports Court's Holding}

In determining legislative intent, a court must refer to the "words in enacting the statute rather than surmising what may have been intended, but was not expressed."\footnote{113} In \textit{Allen}, the court's decision not to create an exception to the duty to report is well supported by this rule of construction. The language used in the reporting statute clearly states that nothing will relieve an individual of her duty to report.\footnote{114} The additional requirement placed upon a supervisor to make a report received from a subordinate is set forth in the statute.\footnote{115}

Justice Johnstone argued in the dissent that imposing a dual responsibility upon a supervisor is an unreasonable and absurd result that is unsupported by statutory interpretation.\footnote{116} He wrote that it was absurd to believe that educators should be held criminally liable for reporting only to their principal.\footnote{117} Yet, the court refused to "interpret a statute at variance with its stated language."\footnote{118}

The \textit{Allen} court's interpretation of the reporting statute was consistent with the stated language. The reporting statute imposed a separate duty upon individuals and those persons in a supervisory role, and in addition, expressly refused to relieve any individual of her duty to report.\footnote{119} Similar to Florida and Minnesota, the Kentucky General Assembly has chosen to provide criminal liability for a failure to report suspected child abuse.\footnote{120} In \textit{Minnesota v.}\footnote{See \textsc{Ky. Rev. Stat. Ann.} §620.030(1) (Michie 1990).}

\footnotesize{
113. \textit{Allen}, 980 S.W.2d at 280 (citing \textit{Flying J Travel Plaza v. Commonwealth}, 928 S.W.2d 344, 347 (Ky. 1996)).
114. \textit{Id.} at 281.
116. \textit{Allen}, 980 S.W.2d at 283 (Johnstone, J., dissenting).
117. \textit{Id.}
118. \textit{Id.} at 280 (citing \textit{Layne v. Newberg}, 841 S.W.2d 181, 183 (Ky. 1992) and \textit{Gateway Constr. Co. v. Wallbaum}, 356 S.W. 2d 247 (1962)).
120. \textit{Allen}, 980 S.W.2d at 281.
}
The court addressed a Minnesota statute similar to that of Kentucky. The Minnesota Supreme Court recognized the legislative prerogative in providing criminal liability for a failure to report. The court would not discuss the wisdom of the statute and stated that the legislature must have felt it necessary to attach criminal liability in order to motivate compliance with the statute. Similarly, the court in Allen refused to assess the wisdom of the General Assembly's law as not within the purview of the court, and that the language of the reporting statute was clear and unambiguous.

C. Potential Ramifications Pursuant to Lane: Accomplice Liability

The most significant aspect of the Allen decision is its future application, especially in light of the court's decision in Lane. Lane involved a parent's failure to prevent her boyfriend's assault on her daughter. The court used Chapter 620 of the Kentucky Revised Statutes to link accomplice liability and child abuse. The Lane court found that Chapter 620 created an affirmative duty to prevent physical injury to children. As a result, Lane held that the parent could be convicted for complicity to commit assault for not fulfilling that duty. Justice Cooper's concurring opinion in Lane summarized the potential effects of that decision, that together with the Allen decision, could lead to charging any individual who fails to report suspicions of child abuse with complicity to commit abuse. In Lane, Justice Cooper stated that if the reporting statute was a source of a legal duty which supports accomplice liability for failure to report known or suspected child abuse, then any teacher, doctor, social worker, or other professional would be subject to indictment and conviction as an accomplice to that abuse. Justice Cooper believed the

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121. Grover, 437 N.W.2d 60 (Minn. 1989).
122. Allen, 980 S.W.2d at 281.
123. Grover, 437 N.W.2d at 65.
124. Id.
125. Allen, 980 S.W.2d at 281.
126. Commonwealth v. Lane, 956 S.W.2d 874 (Ky. 1997).
127. See id. at 875-76.
128. Id. at 876.
129. Id.
130. See id. at 877.
131. Id.
General Assembly did not intend such a result when it enacted the reporting statute.\textsuperscript{132}

However, while he agreed with the majority in \textit{Allen} and concurred separately, Justice Cooper failed to mention the fears he articulated in \textit{Lane}.\textsuperscript{133} The facts of \textit{Lane}, where a mother knew of abuse and failed to take action,\textsuperscript{134} can be contrasted to the situation in \textit{Allen}, where a teacher had suspicions of abuse based upon reports received from students.\textsuperscript{135} The former involves a parent, with a special relationship to the victim, who is directly involved in the abuse, albeit passively.\textsuperscript{136} The latter focuses on a school employee who has received reports of suspected abuse from other students.\textsuperscript{137} While the failure to take action in either situation is reprehensible and each failure should result in consequences, the \textit{Lane} situation merits stronger punishment.

In most cases, an analysis of the situation and the facts will determine that accomplice liability is not warranted in a situation such as \textit{Allen}, but with the \textit{Lane} decision looming in the background, the possibility exists for accomplice liability for failure to report suspected child abuse. The potential for such a charge for failure to report suspected child abuse should serve as a strong deterrent in most cases. In some cases it could have little effect, but the majority of the individuals who have a duty under the reporting statute fear prosecution because of the consequences to their jobs and lives. This fear encourages compliance with the law, perhaps for more reasons than because it is the right thing to do.

\textbf{D. An Opportunity for the Legislature?}

In \textit{Allen}, the court focused primarily on its inability to read anything into the reporting statute that was not present.\textsuperscript{138} In evaluating the reporting statute, the court reviewed similar statutes from Wyoming\textsuperscript{139} and Indiana,\textsuperscript{140} which provide

\begin{itemize}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Commonwealth v. Allen}, 980 S.W.2d 278, 282 (Ky. 1998).
  \item \textsuperscript{134} \textit{Lane}, 956 S.W.2d at 874-75.
  \item \textsuperscript{135} \textit{Allen}, 980 S.W.2d at 279.
  \item \textsuperscript{136} \textit{Lane}, 956 S.W.2d at 874.
  \item \textsuperscript{137} \textit{Allen}, 980 S.W.2d at 279.
  \item \textsuperscript{138} See \textit{id.} at 280-81.
  \item \textsuperscript{139} \textit{Wyo. Stat. Ann.} § 14-3-205 (Michie 1999).
\end{itemize}
express exemptions from prosecution for individuals who report their suspicions to a supervisor. Because the Kentucky General Assembly did not create an exception, the court could not create an exception, since this would be contrary to the unequivocal intent of the legislature.141 The court noted that “[i]f the Kentucky legislature had intended to create an exception to the mandatory reporting duty, it could have done so, following the lead of other state statutes.”142 This language arguably is intended to encourage the General Assembly to clarify the language of the reporting statute and to possibly create an exception to the duty to report. The situation in Allen may never have been contemplated when the reporting statute was enacted. If this is the case, the court has given the legislature the perfect opportunity to consider such a situation. However, the severity of the harm intended to be prevented by the reporting statute may persuade the legislature to keep the reporting statute intact in consideration of the public policy of preventing child abuse.

E. The Results of Allen Can Be Avoided in the Future

If Allen and Cook had made a report to proper authorities, they could have avoided liability because civil and criminal immunity is granted to an individual who reports in good faith.143 By granting immunity to those who report in good faith, the General Assembly is encouraging individuals to report any suspected child abuse so that it may be investigated. When immunity is received for making a report in good faith, an individual does not have to wait for recurring signs of abuse before making a report.144 A proper report not only allows the authorities to begin an investigation that can prevent future abuse, but it relieves the reporting individual from liability associated with making that report. Arguably the importance of granting immunity to reporters is the fact that every state with a mandatory reporting statute confers some type of immunity for reports made under the statute.145 Some states go so far as to confer absolute immunity for mandatory reports under the statute.146

140. IND. CODE ANN. § 31-33-5-3 (West 1999).
141. Allen, 980 S.W.2d at 280.
142. Id.
143. See KY. REV. STAT. ANN. § 620.050 (Michie 1990).
144. See id.
146. Id. at 196. Those states which confer absolute immunity for mandatory reporting are
An additional matter of concern that can insure that the Allen result is not duplicated in the future is an increased awareness among educators concerning the duty to report suspicions of child abuse. In a study conducted within a Kansas school system, every teacher knew they were required to report, but the majority did not know the proper procedure. Of additional significance is that most teachers would report the suspicions to their principal, rather than the proper authorities. This indicates that the result in Allen is not just an isolated incident, but rather a problem that exists on a much larger scale. The Allen situation may never arise again because most supervisors will take the initiative to protect the children they are entrusted with educating. However, to insure that it does not occur again, a procedure should be implemented within the school system so that each employee is made aware of the proper method for addressing suspicions of child abuse. The existence of potential child abuse is an issue that many people do not want to believe, but proper awareness regarding the duty to report can prevent possible abuse and immunize the reporting individual from liability. If this potential issue can be addressed, and educators are made aware of their legal requirements, not only can future abuse be prevented, but also the result in Allen can be avoided.

Adequate protection from potential liability can be achieved through proper compliance with the reporting statute. Thus, as a practical matter, school administration and practitioners alike should advise absolute fulfillment of the statutory requirements concerning the duty to report suspected child abuse.

IV. CONCLUSION

Justice Johnstone, writing for the dissent, stated that the purpose of the reporting statute is obvious. The General Assembly intended to make it clear

Alabama, California, Ohio, and New Jersey. Id.


148. Id.

149. See KY. REV. STAT. ANN. § 620.050 (Michie 1990). Although good faith has yet to be articulated by a court, the statute provides that a report made upon reasonable cause shall be conferred civil and criminal immunity. Id. In addition, a report that is knowingly false and made with malice is a misdemeanor. Id.

that any person with reasonable suspicions or knowledge of child abuse has a legal obligation to make a report to the proper authorities so that the child may be properly protected.\textsuperscript{151} Justice Johnstone asserted that this purpose was satisfied in \textit{Allen}.\textsuperscript{152} However, a third child was assaulted because Allen, Cook, and their principal did not report the abuse to the proper authorities.\textsuperscript{153} The proper authorities were finally notified of the abuse in March of 1993, nearly four months after Allen and Cook received complaints from students.\textsuperscript{154} If the purpose of the reporting statute is to insure the prompt protection of a child from potential abuse, it is clear that the purpose of the statute was not fulfilled in the \textit{Allen} situation. If it had been fulfilled, a proper report would have been made and the abuse of a third victim could have been prevented.

The \textit{Allen} decision supports the intent of the reporting statute because a report made to the proper authorities will allow an investigation to begin, and allow authorities to take the proper precautions in an effort to prevent further potential child abuse. This decision, following the decision in \textit{Lane}, represents a trend toward extending greater protection to potential victims of child abuse in Kentucky. At the same time, it should serve as an eye opener to the teachers of Kentucky regarding their duty to report suspected child abuse.

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 282 (Cooper, J., concurring).
\textsuperscript{154} \textit{Id.}