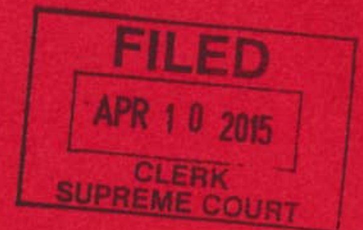
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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000324-D
(2012-CA-002218)

JOHN WESLEY BAYS, APPELLANT

v.

KNOX CIRCUIT COURT
2007-CI-00631, 2008-CI-00371, AND 2009-CI-00246

KRISTIE D. KIPHART, INDIVIDUALLY
AND AS TRUSTEE, OF THE DEMAND
RIGHT IRREVOCABLE TRUST FOR
BRYCE A. BAYS, APPELLEE.

APPEAL FROM DECISION OF THE COURT OF APPEALS
BRIEF ON BEHALF OF APPELLANT,
JOHN WESLEY BAYS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Appellant's Brief was transmitted, all expenses pre-paid, on this the 9th day of April 2015 to the following persons in accordance with CR 76.12(5) and 76.12 (6): Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Robert W. McGinnis, Special Judge, Knox Circuit Court, 775 Johns Road, Butler, KY 41006; Hon. Travis A. Rossman, P.O. Box 209, Barbourville, KY 40906; Hon. Dave R. Collins, 203 Knox Street, Ste. 1, Barbourville, KY 40906; and on the same date an original and nine (9) true and exact copies were transmitted via Federal Express Delivery to the Clerk of the Kentucky Supreme Court, Room 209, State Capitol, 700 Capital Ave., Frankfort, Kentucky 40601-3488. The record on appeal was not withdrawn by the Appellant.

Respectfully submitted,

W. PATRICK HAUSER
P.O. Box 1900
Barbourville, KY 40906
(606) 546-3811
COUNSEL FOR APPELLANT

INTRODUCTION

This case is founded certain acts of Carole Kiphart Bays with the assistance or complicity of her sister, Kristie Kiphart, that constituted fraud on the dower/curtesy rights of John W. Bays, the husband of Carole Bays, contrary to KRS 392.020 and the Kentucky case law interpreting this statute.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant believes that an oral argument could be helpful in assisting the Court in deciding this case.

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STATEMENT OF MATERIAL FACTS

On November 18, 2000 John Wesley Bays, the Appellant herein, and Carole Kiphart, were united in marriage in the State of Indiana. They had one child, Bryce Bays, who was 6 years old when his mother died. John and Carole Bays, executed reciprocal wills on or about August 22, 2001. (Appendices 3, 4).

Carole Kiphart-Bays was diagnosed with cancer in December of 2006 and subsequently died on October 28, 2007. Prior to her death and on or about September 15, 2007, Carole Kiphart-Bays executed a new will without advising her husband, John W. Bays, of her intent to do so. Kristie Kiphart, the sister of Carole Bays and Appellee herein, told John Bays that Carole had executed a new will but he did not learn of the content of the new will until some three (3) weeks after his wife's death.[1] (Appendix 2, Knox Circuit Court Findings of Fact, Conclusions of Law and Judgment, December 21, 2011, p. 2).

The new will of Carole Kiphart Bays, under Item III, left her husband, John Bays, just the following:

> ITEM III:
>
> General Bequest of Personal and Household Effects With A Precatory Memorandum. I give and bequeath all my personally and household effects of every kind including but not limited to furniture, appliances, furnishing, pictures, silverware, china, other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, to my husband, John Wesley Bays, if he shall survive me. . . .

---

[1] Kristie Kiphart testified that she told John Bays about the changes in the will because she did not want him to be "blindsided". Deposition of Kristie Kiphart, March 20, 2009, pages 6-7, Knox Circuit Court, Civil Action No. 08-CI-00371.

On November 29, 2007, Kristie D. Kiphart was appointed executrix of the Estate of Carole Kiphart-Bays and the September 15, 2007 will, with holographic attachments, were probated in the Knox District Court. (Appendix 5).

At the time of her death, Carole Kiphart-Bays was the owner of two life insurance policies. The first in the sum of $750,000.00 with American General Life Insurance Company, (hereinafter "American General") and the second in the sum of $125,000.00 with Prudential Insurance Company (hereinafter "Prudential").[2]

Although not initially purchased for that purpose, these two (2) insurance policies were used to fund the two (2) trusts which Carole Bays also executed on or about September 15, 2007 at the same time and occasion which she executed her new will. The proceeds from American General funded the Demand Right Irrevocable Trust for Bryce Bays and the proceeds from the Prudential policy were designated to fund the Trust Agreement of Carole Kiphart-Bays (Id. p. 4; Appendices 11, 12). The American General policy was paid to the Bryce A. Bays Trust and was invested by its trustee, Kristie Kiphart with Raymond James & Associates on or about January 22, 2008. However, pursuant to an Agreed Order, Prudential paid the proceeds of its policy to the Knox Circuit Court Clerk, where those funds are today.

[2] The American General policy was purchased January 12, 2002 and named John W. Bays as beneficiary. On September 15, 2007 the beneficiary was changed to Demand Right Irrevocable Trust for Bryce A. Bays. The Prudential Insurance policy was purchased December 11, 2000 and named John Bays as beneficiary. The beneficiary was changed on April 16, 2007 to Bryce Bays and on September 15, 2007 it was changed again to the Carole Kiphart-Bays Living Trust dated September 15, 2007. (Appendices 6, 7, 8, 9 and 10).

On December 10, 2007, John Wesley Bays, pursuant to KRS 392.020 through 392.080, properly renounced the will of Carole Kiphart-Bays and elected to take his statutory share of his wife's estate. (Id. p. 4).

On, December 13, 2007 this action was filed by John Wesley Bays, in the Knox Circuit Court seeking a declaration of his rights, with respect to the will of Carole Kiphart-Bays, the specific devisees and legatees of that will, the individuals who received assets of Carole Kiphart-Bays by way of gift prior to her death, and the trusts which were funded by the life insurance policies.

On April 30, 2009 John Bays filed a separate action in the Knox Circuit Court, Civil Action No. 2009-CI-246 seeking to have the September 15, 2007 will declared void. The circumstances surrounding the execution of that will are as set forth below.

On Saturday, September 15, 2007, John Bays took his wife Carole Kiphart-Bays to the Markey Cancer Center in Lexington, **Fayette County,** Kentucky because of her worsening medical condition.[3] At some point after her admission to the hospital on that day, John left the hospital to return to Knox County to be with his son. Later that day, Carole Kiphart-Bays was presented with a will and two (2) trust agreements which she executed in her hospital room.[4] Importantly, the deposition testimony of Kristie Kiphart indicated that only

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3. On September 15, 2007 John Bays and Carole Bays called Kristie Kiphart to advise her that Carole was going to the Markey Cancer Center in Lexington, Kentucky because her condition had worsened. Kristie arrived at the hospital later that day.

4. The testimony is unclear who delivered the documents to Carole Bays at the hospital but it is believed to have been Calvin Rasey. Mr. Rasey was a financial planner and worked with Physicians Financial Services. (Deposition of Kristie D. Kiphart, March 17, 2008, Knox Circuit Court, Civil Action 17-CI-631, p.10).

one witness, Calvin Rasey, was present at the time Carole executed those documents including her will.[5] The second witness and the notary who executed the documents, including Carole's will did so after they were returned to Louisville. The notary certificate on the will indicates that it was witnessed by Calvin Rasey and Helena McDowell and notarized by Ruth Ann Allgen (sic). The notary certificate also indicates that the will was executed in **Jefferson County, Kentucky.** It was upon the presentation of this testimony to the Knox Circuit Court that the will of Carole Kiphart Bays was declared void pursuant to KRS 394.040 by Order of the Knox Circuit Court on November 8, 2009. (Id. p. 6).

A bench trial for Mr. Bays' claims was initially scheduled for March 30, 2011 but did not proceed. However, on that date the Trial Judge, Hon. John Knox Mills, counsel and the parties to this action participated in an exhaustive attempt, without success, to bring the parties to a settlement agreement. A bench trial did go forward in the Knox Circuit Court on August 30, 2011 before Judge John Knox Mills. In addition to the evidence heard at the bench trial, the Court also considered several depositions taken by the parties, discovery documents and pleadings, including briefs filed by all parties, in rendering its findings of fact, opinion and judgment.

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[5] Kristie Kiphart, testified by deposition on March 30, 2009 in the case styled *John Wesley Bays v. Kristie D. Kiphart, Executrix of the Estate of Carole Kiphart Bays,* Civil Action No. 08-CI-000371, Knox Circuit Court, that the will was brought to Carole on September 15, 2007 and it was executed at the Markey Cancer Center of the University of Kentucky Medical Center, Fayette County, Lexington, Kentucky. (pp. 9, 10).

The Trial Court found that John Bays did not consent to, or have knowledge of the change of beneficiary on the two life insurance policies and declared Carole's actions constituted fraudulent inter vivos transfers. The Trial Court also set forth very explicit findings of fact detailing the extent to which Carole Kiphart Bays and her sister, the Appellee, Kiphart, ransacked the decedent's lock box[6] and bank accounts, including a SEP/IRA, transferred a $20,000.00 truck to Kiphart's son, and secreted the decedent's jewelry valued at $11,900.00 all of which was done without the knowledge or consent of John Bays. (Id. pp. 7, 8, 9, 10, 11, 14). The Trial Court found that John Bays was entitled to receive one-half of the value of all of the personalty of the Estate of Carole Kiphart Bays. The Trial Court further found that the values of the insurance policies with American General Life Insurance in the sum of $750,000 and Prudential Insurance Company in the sum of $125,000.*00* ***shall be considered personalty of the estate for the purpose of calculating John Bays statutory share* of his wife's estate.** (Id. p. 16). (Emphasis ours).

On November 26, 2012, Special Judge Robert W. McGinnis entered an Order and Judgment that John W. Bays was entitled to receive and shall have judgment for the sum of $454,093.38 plus interest at the rate of twelve percent per annum until paid. This sum represents his one-half value of all of the personalty of his wife's estate and one-half of the value of the two life insurance policies in effect at the time of her death after an off-set in the amount of

[6] The lockbox was jointly owned by John Bays and Carole Kiphart Bays. The evidence reflects that the only persons who signed to enter this lockbox were Carole Kiphart Bays and Kristie Kiphart as Power of Attorney for Carole prior to Carole's death.

$76,002.62 which was the ownership interest of John Bays and Bryce Bays in the assets of Carole's estate. (Knox Circuit Court, Order and Judgment, November 26, 2012).

The Appellee here, Kiphart, filed a Notice of Appeal to the Court of Appeals on December 26, 2012. On March 21, 2014 the Court of Appeals rendered a split opinion reversing and remanding the case to the Knox Circuit Court for further proceedings consistent with its opinion. (Appendix 1). In his dissent, Judge Vanmeter clearly stated how the Trial Court was correct in its Findings of Fact, Conclusions of Law and Judgment.

On April 7, 2014, the Appellant, John Wesley Bays, filed a Petition for Rehearing. On May 19, 2014, the Court of Appeals denied the petition for rehearing. On June 17, 2014 the Appellant, John Wesley Bays filed a Motion for Discretionary Review with the Supreme Court. On February 11, 2015, the Supreme Court granted John Wesley Bays' motion for discretionary review.

ARGUMENT

I. The Court of Appeals erred by setting aside the Findings of Fact and Conclusions of Law of the Trial Court absent clear error.

A. Pursuant to Civil Rule of Procedure 52.01 Findings of Fact shall not be set aside unless clearly erroneous.

The Appellate Court stated that its review was based upon the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure 52.01 citing to *Coffman v. Rankin*, 260 S.W.3d 767 (Ky. 2008). The Appellate Court goes on to hold "However, because we believe the trial court erred in its characterization of the life insurance proceeds as personalty, ***its finding of fraud is unnecessary and irrelevant***." (Emphasis ours) (Appendix 1, Court of Appeals Opinion, pp. 6,7).

In its review of the record of the Knox Circuit Court the Court of Appeals apparently **overlooked the fact that the basis of John W. Bays' case was a claim of fraud on the statutory interest of the surviving spouse and not simply the interpretation of an insurance policy or policies in an estate setting.** Thus, the Court of Appeals reliance on *Coffman v. Rankin* for guidance on the clearly erroneous standard is of particular interest because the Supreme Court in *Coffman* **reversed** the decision of the Court of Appeals stating that **it erred by substituting its judgment for that of the Family Court**. The Supreme Court explained that *Coffman* was,

> "[V]igorously practiced before the Family Court for nearly two years. . . . After the hearing, the Family Court rendered thorough

> findings of fact and conclusions of law more than sixteen pages long. While reasonable minds may differ as to the proper outcome, it cannot be said the Family Court's decision was unreasonable or unfair. Furthermore, the decision was not clearly erroneous and applied the proper law."

The case at bar was also exhaustively practiced before the Trial Court and, therefore, it had a clear and thorough understanding of the facts and motives in play. For the Court of Appeals to state that the finding of fraud was irrelevant appears to be out of touch and wholly inconsistent with the uncontested findings of fact made by the Trial Court.

B. There was clear and unrebutted evidence of the intent to deprive John Bays of his statutory spousal interest.

This case concerns multiple acts of deception and fraudulent behavior of Carole Kiphart Bays, with the assistance of her sister, Kristie Kiphart, to disinherit her husband, John Wesley Bays. The Appellee has ***never*** offered any evidence to rebut the multiple allegations of fraud in this matter. The Appellee and the Carole Kiphart Bays cleaned out the jointly owned lockbox and bank accounts, including a SEP/IRA valued at $25,643.11, transferred a $20,000.00 truck to Kristie Kiphart's son, made gifts to family members of the Appellee in excess of $58,300.00 and failed to produce jewelry valued at $11,900.00.

It is also obvious that the attorney who drafted the Trusts and Last Will of Carole Kiphart Bays was aware that the documents he drafted were contrary to the statutory rights of John Bays and of the potential statutory claims Mr. Bays

could assert because he included the following provision, ITEM XVI, in her will. That provision reads as follows:

ITEM XVI

Provision Barring Dower and All Statutory Marital Rights. The Provisions made in this Will for my husband are in lieu of and a bar to dower and all statutory marital rights he may have in my estate.

(Last Will and Testament of Carole Kiphart Bays, p. 8)

Likewise, the Trust Agreement of Carole Kiphart Bays which was executed on the same day as her Will and drafted by the same attorney, at ARTICLE XX of that document reads as follows:

ARTICLE XX

Provision Barring Dower and All Statutory Marital Rights.
The provision made in this Trust for the Settlor's husband are in lieu of and a bar to dower and all statutory marital rights he may have in the Settlor's estate.

(Trust Agreement of Carole Kiphart Bays, p. 12).

Although unilateral in nature, the above language is an attempt to limit John Bays' spousal rights under KRS 392.020 and the Appellee has failed to offer any evidence to the contrary.

Mr. Bays claimed and the Knox Circuit Court has found that the act of changing the beneficiaries of the American General and Prudential policies without his consent or knowledge from him to the two (2) trusts constituted **fraud to his statutory share of his wife's estate** and considered **the AIG and**

Prudential insurance policies personalty of the <u>estate for the purpose of calculating John Bays statutory share of his wife's estate</u>. (Emphasis ours) (Appendix 2, Knox Circuit Court Findings of Fact, Conclusions of Law and Judgment entered December 21, 2011, pp. 15, 16).

The Court of Appeals failed to acknowledge that the entire basis of the claim before the Trial Court was fraud on the interest of the surviving spouse. The claim of fraud on his spousal interest prosecuted by John Wesley Bays in the Knox Circuit Court was based on the fact that his wife, prior to her death, aided by her sister, Kristie Kiphart, disposed of nearly **all of her assets to individuals or entities other than her husband.** In its findings, the Trial Court made it clear that Kiphart was complicit in all of the decedent's actions. All of the decedent's transfers and changes were viewed as a whole by the Trial Court in its finding of fraud.

II. Life insurance proceeds should be subject to KRS 392.020.

A. Contrary to the opinion of the Court of Appeals including life insurance proceeds in the calculation of a spousal interest would not create chaos in estate planning or place insurance companies in an untenable position.

With its opinion, the Court of Appeals has carved out an exception to the dower statute (KRS 392.020) to exempt life insurance from being challenged by a surviving spouse as a mechanism to commit fraud on the dower. Such an exception is contrary to KRS 392.020 and the case law as set forth below.

The Court of Appeals stated as follows, "We are of the opinion that to adopt the trial court's rationale would not only create chaos in the realm of estate planning but would also place insurance companies in an untenable position of honoring the contract of an insured in the face of a dower or curtesy claim by a surviving spouse." (Appendix 1, Court of Appeals Opinion, p. 15).

It is difficult to conceive of a situation where an insurance company would be placed in ". . . an untenable position of honoring the contract of an insured in the face of a dower or curtesy claim by a surviving spouse." (Id. p. 15). The surviving spouse's cause of action arises against the transferees or beneficiaries of the inter vivos act or transfers of the testator and not the bank, investment institution or insurance company which paid the monetary value of the asset to the named beneficiary pursuant to contract. **The recipient of the bequest or inter vivos transfer is subject to the spouse's claim if fraud occurs, not the insurance company or other payor of the asset.**

The application of KRS 392.020 to the inter vivos transfer of any assets owned and controlled by a testator has never been used by Kentucky Courts to nullify or void the transfer. However, this statute has been applied when such inter vivos transfers leaves the surviving spouse with less than his or her statutory share of those assets and subsequently a proper and timely action has been initiated by the spouse. Even after such an action has been filed by the surviving spouse seeking his/her spousal share, the fraudulent transfer of the

testator is not voided but rather the transferee is subject to the statutory claim of the spouse. (*See*, KRS 392.070).

Life insurance is an asset like any other personal asset owned by the decedent spouse and does not hold some special protection or status[7] in the event that a surviving spouse seeks his or her statutory share, pursuant to KRS 392.020. **Life insurance should not be immune from being challenged by the surviving spouse when fraud on the interest of the surviving spouse has occurred.** Without fraud there is no issue as to the transfers. Life insurance may not be part of the liquid assets at the time of death but it is an expectation of the proceeds of the estate and is frequently used in estate planning to fund potential taxes as well as other estate expenses.

The life insurance policies were not the only assets of Carole Bays which were brought back into the estate for the purposes of calculating the statutory share of John W. Bays. The trial court also ordered that John Bays shall receive a sum of money equal to one-half of all the personalty of the Estate of Carole Bays identified as Certificate of Deposit at National City Bank in the sum of $90,891.01, jewelry valued at $11,900.00, a Sept IRA valued at $25,643.11, a tractor and 2005 Ford truck with a combined value of $30,000.00.

The only Kentucky case addressing life insurance in the context of fraud on the dower is *Nelson v. Metropolitan Tower Life Ins. Co.*, 4 F. Supp. 2d 683 (E.D. Ky. 1998) which is not dispositive of the issues presented in this case.

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[7] In his dissenting opinion, Justice Vanmeter characterized life insurance as "magic" because of the status given to it by the opinion of the Court of Appeals labeling it as a nonprobate asset. (Court of Appeals Opinion p. 21).

However, guidance can be found from the Court of Appeals of Tennessee in its decision in *Simpson v. Fowler*, (TN Ct. App. W2013-02109-COA-R3-CV, April 22, 2014) (2014 WL 1601137). (Appendix 13). The facts in *Simpson* included the change of beneficiary of policies of life insurance from his spouse, from whom he had been estranged for several years, to Ms. Faye Fowler with whom he had a relationship. The Trial Court found that the change of beneficiary should be set aside and the funds paid into the Court pending administration of the estate[8]. On appeal the Tennessee Court of Appeals addressed the issue of whether the evidence preponderates against the trial court's finding that Mr. Simpson committed fraud with the intent to deny Ms. Simpson her share of the estate by his transfers. The Appellate Court looked to "[W]hether, at the time of the transfers, Mr. Simpson was acting under scienter, i.e., "guilty knowledge," that his actions would deny Ms. Simpson her spousal share of his estate." In reversing the Trial Court, the Court of Appeals held that "[T]he evidence did not suggest that Mr. Simpson changed ownership of his bank account or beneficiary of his life insurance in anticipation of his death, or based upon any clear desire to keep Ms. Simpson from reaching these assets." In *Simpson,* the Court found that there was **no intent** to deny the surviving spouse of her statutory share, therefore, no fraud.

[8] In *Simpson, I,* (TN Ct. App. W2011-02112-COA-R3-CV, Aug. 28, 2012) (2012 WL 3675321), the Trial Court looked to the Tennessee Code Annotated Section 31-1-105 which provides: Any conveyance made fraudulently to children or others, with an intent to defeat the surviving spouse of the surviving spouse's distributive or elective share, is, at the election of the surviving spouse, includable in the decedent's net estate under § 31-4-101(b), and voidable to the extent the other assets in the decedent's net estate are insufficient to fund and pay the elective share amount payable to the surviving spouse under §31-4-101(c).

In the present case it is an uncontested finding by the Trial Court that the transfer of certain assets of the decedent and the changing of the beneficiary of the two life insurance policies **were performed with the intent to commit fraud on the spousal interest of John W. Bays.**

If the Court of Appeals decision is allowed to stand, it essentially sets a guideline for a decedent to disinherit his or her spouse, contrary to the intent of KRS 392.020, by the use of life insurance because of its special status.[9]

B. Insurance policies owned by Carole Kiphart Bays should be used in computing the statutory share of John Bays pursuant to KRS 392.020.

The Court of Appeals in the majority opinion has opined that the insurance proceeds were never possessed by the decedent at the time of her death; therefore, they could not be considered personalty of the estate for the purpose of calculating the statutory share of John W. Bays. This holding appears to have been based upon one sentence in the Trial Court's Findings of Fact and Conclusions of Law which reads as follows: "The insurance policies, not being real estate, are personalty of the estate". (Appendix 2, Knox Circuit Court,

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[9] Judge Vanmeter also posed the following hypothetical in his dissent: "A husband and wife enter into a second marriage for each. The husband has substantial assets, $101 million; but no prenuptial agreement is in force, or perhaps a question exists as to the agreement's enforceability. Husband learns he has a terminal illness and six months to live. He takes most of his assets, $100 million, and buys life insurance, which a life insurance company with full knowledge of his condition agrees to the contract (basically a $1 of premium for each $0.95 of coverage). Husband then sets up an irrevocable trust excluding his wife, and makes the life insurance payable to the trustee. Husband dies, and $95 million is paid into the irrevocable trust. No one would dispute that the husband has engaged in fraud on the wife's spousal share. But, under the majority opinion, the wife has no recourse because of the "magic" of life insurance and its status as a nonprobate asset." (Court of Appeals opinion pp. 22, 23).

Findings of Fact, Conclusions of Law and Judgment, December 21, 2011, p. 15). However, what the Appellate Court did not consider is the final statement in that conclusion wherein the Trial Court further said, "[T]he values of the insurance policies with American General Life Insurance Company in the sum of $750,000 and Prudential Insurance Company in the sum of $125,000.00 **shall be considered personalty of the estate for the purpose of calculating John Bays statutory share of his wife's estate**." (Emphasis ours). (Id. p. 16).

It is a given that any inter vivos gift or transfer of an asset would necessarily not be a part of the decedent's estate due to the fact that the transfer or gift of that asset would have been made prior to the decedent's death. The act of changing the beneficiary on a life insurance policy, without the knowledge or consent of the surviving spouse, is likewise an act of fraud on the surviving spousal interest. Judge Van Meter in his dissent correctly stated that "The one factor, thus, that makes this case unique from all other life insurance change of beneficiary cases **is the trial court's finding that the change was made with the intent to defraud Bays' spousal rights**." (Emphasis ours) (Appendix 1, Court of Appeals Opinion, p. 22).

Kentucky case law has long held that assets that are not technically part of the decedent's estate may be used or "brought back into the estate" for the purposes of calculating the surviving spouse's statutory share. Justice Vanmeter, in a well-reasoned dissenting opinion, correctly pointed out that several Kentucky cases brought property back into the estate that were not

actually part of the decedent's probate estate but which were transferred in fraud of the spousal share. (Id. pp. 18, 19).

It should also be stated that before KRS 392.020 would be used by a surviving spouse, there must have necessarily been a bequest, gift or transfer of assets of the decedent which substantially deprived the surviving spouse of his or her statutory share. In calculating the total assets owned by a decedent prior to his or her death, one may certainly use the following: certificates of deposit, *Harris v. Rock,* 799 S.W.2d 10 (Ky. 1990); gifts of personalty, *Benge v. Barnett,* 217 S.W.2d 782 (Ky. App. 1949); real property placed in another's name, *Redmond's Adm'x vs. Redmond,* 66 S.W.745 (Ky. App. 1902), and *Petty v. Petty* 43 Ky. (4 B. Mon) 215 (1843); and money deposited into a joint account with children, *Anderson v. Anderson,* 583 S.W.2d 504 (Ky. App. 1979). Pursuant to KRS 392.020 the surviving spouse has an absolute right to one-half (1/2) of the personal assets and a one-half (1/2) interest in the real estate[10]. However, this claim **only** comes into play when and **if** the surviving spouse chooses to make a claim under the statute. When the claim is made by the surviving spouse, based upon such transactions having been made without the knowledge or consent of that spouse, a rebuttable presumption of fraud is created. Thereafter, a Court must find that the acts of the testator's transfer or disposition of assets constituted "intent to defraud" the surviving spouse. It is now and has always

[10] In a testate death and the surviving spouse renounces the will, the surviving spouse takes one-third (1/3) of the fee simple real estate of the decedent. KRS 392.080.

been the position of the Appellant that the **insurance policies were personal *assets*** owned and controlled by Carole Bays until her death.

Kentucky courts have refused to honor a testator's intentions when an intent to defraud the surviving spouse of his or her dower interest is found[11]. In *Benge, supra,* the decedent gave cash to his siblings *prior to his death* which the Court of Appeals held the widow was entitled to receive from each donee one-half of the amount of the gifts made to them. In *Anderson v. Anderson, supra,* the decedent transferred approximately $47,000.00 into bank accounts held in joint tenancy with his children, upon his death the widow asserted her marital rights in such property in the hands of the donees. The *Anderson* Court granted summary judgment in her favor and this judgment was affirmed by the Court of Appeals. In *Harris v. Rock, supra,* the decedent, prior to his death, accumulated joint certificates of deposit with each one of his seven children in the approximate amount of $20,000.00 and one with his wife, Rosa, in the amount of $20,000.00. The widow filed an action to recover her dower interest in the joint accounts with his children and the *Harris* Trial Court entered judgment in her favor. The Court of Appeals reversed and the widow sought discretionary review. The Supreme Court reversed the decision of the Court of Appeals holding that,

> "The right of dower is one of long standing. A surviving spouse is entitled to an absolute one-half interest in the surplus personalty of a deceased spouse. . . . The right to dower vests at the time of marriage or at the time of acquisition of subsequently acquired

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[11] *See,* Elizabeth S. Muyskens, Married in Kentucky: A Surviving Spouse's Dower Right in Personalty, Volume 96, Kentucky Law Journal, 99, (2007 – 2008) page 106., Citing, *Martin v. Martin*, 138 S.W.2d 509 (Ky. 1940); *Payne v. Tatem*, 33 S.W.2d 2 (Ky. 1930); *Goff v. Goff's Ex'rs*, 193 S.W. 1009 (Ky. 1917); *Fennessey v. Fennessey*, 2 S.W. 158 (Ky. 1886).(Appendix 14).

> property. . . We have held in many cases that the widow's right to dower cannot be defeated by a gift by her spouse of all, or more than one-half, of his property to another with the ***intent to defeat the claims to dower.*** (*Harris, supra, p. 11*)(*Emphasis ours*).

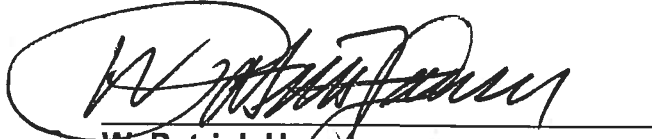
The claims made by John Bays and the Judgment of the Knox Circuit Court are completely consistent with the previous holdings of this Court as set forth in the above cases as to the rights of the surviving spouse.

CONCLUSION

The Trial Court correctly found that the acts of Carole Bays were fraudulent vivos transfers and considered the AIG and Prudential insurance policies personalty of the estate for the purpose of calculating John Bays statutory share of his wife's estate.

For all of the reasons set forth above and the reasoning of Judge Vanmeter in his dissent, the Appellant, John Wesley Bays, requests this Court to reverse the opinion of the Court of Appeals rendered March 21, 2014 with directions to reinstate the Judgment of the Knox Circuit Court entered on December 21, 2011.

Respectfully submitted,



W. Patrick Hauser
P.O. Box 1900
Barbourville, KY 40906
(606) 546-3811
COUNSEL FOR APPELLANT