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Kentucky's Doctrine of Advancements: A Time for Reform*

BY CAROLYN S. BRATT**

INTRODUCTION

The act of giving a gift is accomplished so easily that the legal consequences often escape the donor. Even when a donor stops to contemplate the legal significance of her or his act, a parental donor probably is unaware that a gift to a child may affect the child's inheritance rights in the parent's estate. Kentucky is among the minority of states which continue to presume that a parental gift is intended as an advancement to the child donee.¹ Moreover, Kentucky is one of only two states which make the presumption irrebutable.² The value of the gift is charged against the child's share of the parent's intestate estate even if the parent expressly states a contrary intention.³

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¹ The states are: Georgia (GA. CODE ANN. § 53-4-50 (1981)), Kansas (KAN. STAT. ANN. § 59-510 (1983)), Louisiana (LA. CIV. CODE ANN. art. 1227 (West 1952)), Mississippi (MISS. CODE ANN. § 91-1-17 (1972)), Pennsylvania (PA. STAT. ANN. tit. 20, § 2109 (Purdon 1975)), South Carolina (S.C. CODE ANN. § 21-3-60 (Law. Co-op. 1976)), Tennessee (TENN. CODE ANN. § 31-5-102 (1984)), Virginia (VA. CODE § 64.1-17 (1980)), and West Virginia (W. VA. CODE § 42-4-1 (1982)).

² The other state is South Carolina. S.C. CODE ANN. § 21-3-60.

³ KY. REV. STAT. ANN. § 391.140 (Baldwin 1984) [hereinafter KRS] provides:

(1) Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undivided estate of the parent or grandparent. The person to whom the property or money was given or devised shall receive nothing further from the estate until the shares of the other descendants are made proportionately equal with his, according to his descendable and distributable share of the whole estate, real and personal, devised and undevise. The advancement shall be estimated according to the value of the property when given. The

Kentucky's highest court has recognized that although application of Kentucky's advancement doctrine may work an injustice, the fault lies with the advancement statute and not with the court's interpretation and application of that statute.⁴ Because Kentucky's highest court has indicated its unwillingness to reconsider its interpretation and application of the advancement statute to a parental decedent's intestate property and because the statute as presently construed can cause unexpected, unintended and unfair results due to the public's lack of familiarity with the advancement concept, the time to reform Kentucky's advancement statute has come.

This article begins with a short historical overview of the advancement concept. The overview is followed by an in-depth analysis of Kentucky's advancement caselaw. Finally, the author proposes remedial legislation to correct the problems with Kentucky's current advancement statute.

I. HISTORY AND GENERAL NATURE OF KENTUCKY'S DOCTRINE OF ADVANCEMENTS

The prototype for contemporary advancement legislation in this country was the English Statute of Distribution.⁵ Blackstone identified the Roman law doctrine of *collatio bonorum*⁶ as well as the ancient customs of London, York, and Scotland as possible sources of the advancement concept found in the Statute of Distribution.⁷ The Statute of Distribution provided for the equalization of intestate shares taken by the decedent's children

maintaining or educating or the giving of money, to a child or grandchild without any view to a portion or settlement in life, shall not be deemed an advancement.

(2) Advancements made to distributees shall not be taken as a part of the decedent's personal estate in estimating the distributable share of the widow or widower in the estate.

⁴ See, e.g., *Remmele v. Kinstler*, 298 S.W.2d. 680, 683 (Ky. 1957).

⁵ 22 & 23 Car. 2, ch. 10, § V (1670).

⁶ Under this doctrine, emancipated children who received a dowry were permitted to claim a child's share in the estate of their father. Before taking a child's share, however, an emancipated son had to account for all property he had accumulated and a daughter was required to account for the value of her dowry. Elbert, *Advancements: I*, 51 MICH. L. REV. 665, 666-67 (1953).

⁷ 1 COOLEY'S BLACKSTONE 517 (1872).

when some of those children had received *intervivos* gifts of land or personalty from their parent in anticipation of the amount to which they would be entitled as one of the parent's intestate takers.⁸ Regardless of the precise source of the advancement concept, the American laws on advancements are purely statutory.⁹

A typical statute defines an advancement as an *intervivos* gift by a parent to a child intended by the donor as an anticipation of the donee's intestate share of the donor's estate.¹⁰ Absent directions from the testator, the doctrine is not applicable when the donor dies wholly testate.¹¹ In most jurisdictions, the advancement concept does not apply to estates of donors who die only partially intestate.¹²

Kentucky's advancement statute departs from the typical statute in a number of ways. The statute does not limit advancements merely to gifts by a parent to a child but also includes gifts of real or personal property from a grandparent to a descendant.¹³

If the donor dies totally testate, Kentucky follows the majority rule that the advancement doctrine is not applicable unless the testator affirmatively provided in the will that the doctrine should apply.¹⁴ Kentucky's advancement statute expressly mandates its application when the decedent dies partially testate¹⁵ by providing that property "given or devised by a parent or grand-

⁸ The statute requires that:

[N]o child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. *Id.*

⁹ 6 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 55.1, at 301 (1962).

¹⁰ *Id.*

¹¹ T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 723 (2d ed. 1953).

¹² *Id.* at 724.

¹³ KRS § 391.140(1) (Baldwin 1984).

¹⁴ *Sandidge v. Kentucky Trust Co*, 402 S.W.2d 105, 107 (Ky. 1966); *McPherson v. Black*, 284 S.W. 413, 415 (Ky. 1926); *Jones v. Jones' Ex'rs*, 250 S.W. 92, 94 (Ky. 1923); *Melton v. Sellars*, 181 S.W. 346, 347 (Ky. 1916); *Gulley v. Lillard's Ex'r*, 141 S.W. 58, 59 (Ky. 1911).

¹⁵ *Stiff's Ex'r v. Stiff*, 290 S.W. 718, 719 (Ky. 1927); 250 S.W. at 94; *Owsley v. Owsley*, 77 S.W. 394, 397 (Ky. 1903).

parent to a descendant, *shall* be charged to the descendant . . . in the division and distribution of the undevise estate."¹⁶ For example, in the case of partial testacy, an intestate taker who received a will gift is charged with an advancement equal to the value of the will gift when the decedent's intestate property is distributed.

The decedent in *Walters v. Neafus*¹⁷ died partially testate. The will provided for one of the decedent's intestate takers but expressly excluded any portion for another. Not only did the excluded intestate taker share in the undevise property, but the intestate taker who was provided for in the will was charged with an advancement equal to the value of the will gift.¹⁸

Until the moment of death, a parent or grandparent who has made an intervivos gift to a descendant has the power to prevent application of the advancement statute by disposing of all her or his property by will. Thus, property given to a donee is not technically an advancement as long as the donor is alive.¹⁹

As with any gift, the donee must accept an advancement before the gift is complete. Usually acceptance can be presumed. If the donee does not accept the proffered gift, however, the gift cannot be charged against the donee as an advancement.²⁰ In one case,²¹ prior to death, the parent moved a piano into the home of one of the parent's children. The child tendered the piano to the parent's estate after the parent died and disclaimed any title to it. Because the child never accepted the piano as a gift, its value was not counted as an advancement against the child's share in the distribution of the parent's intestate estate.²²

In ascertaining which transfers constitute advancements, the majority rule is that an advancement is any gift which the donor

¹⁶ KRS § 391.140(1) (emphasis added).

¹⁷ 125 S.W. 167 (Ky. 1910).

¹⁸ *Id.* at 170.

¹⁹ 77 S.W. at 396. *Cf.* *Stevenson v. Martin*, 74 Ky. (11 Bush) 485, 493 (1875) (gifts by grandparent to grandchild while parent is still alive are mere gratuities at the time they are made and are chargeable neither to the grandchild nor the parents and subsequent death of the parent during the lifetime of the grandparent does not change the gifts' legal character).

²⁰ *Isgrigg v. Isgrigg*, 200 S.W. 478, 480 (Ky. 1918).

²¹ *Oliver v. Crewdson's Adm'r*, 77 S.W.2d 20 (Ky. 1934).

²² *Id.* at 22.

intends to be charged against the donee in the distribution of the donor's intestate estate.²³ In Kentucky, however, since 1852, the donor's intent regarding whether a transfer should be chargeable against the donee's intestate share is irrelevant in determining whether the transfer constitutes an advancement.²⁴ The principle of Kentucky's advancement statute is strict financial equality among all of the decedent's intestate takers in the distribution of the undivided property of the decedent.²⁵ If a parent dies totally or partially intestate and some of the children received *inter vivos* or testamentary gifts from the deceased parent, there have been statutory advancements. The donor's intestate property will be used to equalize the disfavored and favored children as far as possible by prohibiting the favored children from sharing in the decedent's intestate property unless, and until, the disfavored children are first made their financial equals.²⁶

Even if the donor clearly expressed the intention that the donee should not be charged with an advancement, the donee will still be charged if the gift is a gratuitous transfer falling within the statutory definition of an advancement.²⁷ If, however, the transfer to an intestate taker was made for valuable consideration, it is not chargeable as an advancement because it is a sale not a gift.²⁸ The real nature of the transaction controls rather than the donor's intention no matter how clearly one can show that the donor did not intend the transaction to result in an advancement to the donee.²⁹

In *Ecton v. Flynn*,³⁰ a father conveyed land to three of his five children. The deed expressly provided that the conveyance was "not in the nature of an advancement," but was an "ab-

²³ T. ATKINSON, *supra* note 11, at 718.

²⁴ *Bowles v. Winchester*, 76 Ky. (13 Bush) 1, 11 (1877).

²⁵ *Popplewell v. Flanagan*, 244 S.W.2d 445, 450 (Ky. 1951); *Gossage v. Gossage's Adm'r*, 136 S.W.2d 775, 777 (Ky. 1940); *Weddle v. Waddle's Adm'r*, 87 S.W.2d 383, 384 (Ky. 1935); *Erdman's Adm'r v. Erdman's Ex'r and Trustee*, 16 S.W.2d 756, 757 (Ky. 1929).

²⁶ *Ecton v. Flynn*, 17 S.W.2d 407, 410 (Ky. 1929).

²⁷ See note 3 *supra*. *Thomas v. Thomas*, 398 S.W.2d 231, 232 (Ky. 1965); *Farmers' Exch. Bank of Millersburg v. Moffett*, 75 S.W.2d 1063, 1065 (Ky. 1934); *Day v. Grubbs*, 32 S.W.2d 327, 329 (Ky. 1930); *McCray v. Corn*, 182 S.W. 640, 643 (Ky. 1916).

²⁸ 32 S.W.2d at 329-30.

²⁹ 136 S.W.2d at 777; 200 S.W. at 479.

³⁰ 17 S.W.2d 407 (Ky. 1929).

solute gift" to the donees.³¹ Because the consideration for the conveyance was love and affection, not valuable consideration,³² the conveyance was a gift rather than a sale. Therefore, the donees were charged with advancements because the statute provides that any property *given* by a parent to a child is an advancement. The result reached by the court was obviously unfair.³³ The donor's only option was to die totally testate and thereby avoid the operation of the statute.³⁴

A donor's unilateral intention to make a transaction that is not under the statute into an advancement is also ineffectual.³⁵ The advancement statute provides that a gift made to a descendant is chargeable only to the actual donee or to those claiming a share of the decedent's intestate estate through the donee.³⁶ When a decedent gives a gift to a grandchild, the gift is not charged against the grandchild's parent's share of the decedent's estate³⁷ because the grandchild's parent did not actually receive the gift and does not claim an intestate share in the donor's estate through the grandchild. Even if the donor intended the gift to the grandchild to be considered an advancement to the parent, it cannot be charged to the parent unless the donee's parent consented that the gift be made directly to the grandchild on the parent's account.³⁸

Some Kentucky advancement cases refer to the donor's intention, appearing to contradict the rule that the advancement statute, not the intention of the donor, regulates the question of advancements. These cases do not, however, contradict the rule. Many of these cases deal with the advancement concept in the context of will interpretation. By an affirmative will provision, when will beneficiaries have received *intervivos* gifts from the testator, the testator may adopt the advancements doctrine to equalize distribution among the beneficiaries.³⁹ The polestar of

³¹ *Id.* at 409.

³² *Id.* at 411.

³³ *Remmele v. Kinstler*, 298 S.W.2d 680, 683 (Ky. 1957).

³⁴ See note 14 *supra* and accompanying text.

³⁵ *Talbott's Ex'r v. Goetz*, 151 S.W.2d 369, 371 (Ky. 1941).

³⁶ KRS § 391.140(1).

³⁷ 87 S.W.2d at 383.

³⁸ *Id.* at 384.

³⁹ 250 S.W. at 94.

will interpretation, however, is the intention of the testator, and any such provision must be interpreted in light of such intention. If the testator provided that certain will beneficiaries are to be charged with advancements against their will shares, the testator's intention controls even if the particular transaction would not have been an advancement in intestacy under the advancement statute.

The testator in *Duff v. Duff's Ex'r*⁴⁰ devised land to his son's children. Under the advancement statute the transfer would not have been an advancement to the son in intestacy unless the son had consented to be charged.⁴¹ The will's provisions, however, demonstrated to the court's satisfaction that the testator intended to treat the conveyance as an advancement to the son, and the son was so charged.⁴² Unlike a person who dies intestate, a testator, with the intention to do so, can make an advancement of a gift that would not be one under the advancement statute.

Other seemingly conflicting cases discuss the donor's intention in relation to the issue of what was given to the donee. They do not, however, consider the donor's intention in determining whether the thing given is characterized properly as an advancement. In *Isgrigg v. Isgrigg*⁴³ evidence of the donor's intention was admitted to determine whether the donor intended to give the donee ownership or merely the use and occupation of disputed land.⁴⁴ In another case, *Combs' Adm'r v. Morgan*,⁴⁵ the decedent's intention was relevant in determining whether the decedent's son had taken title to certain land as a \$2000 advancement or subject to a \$2000 lien in favor of the decedent's estate.⁴⁶

Some Kentucky cases refer to the majority, non-Kentucky rule that the donor's intention is relevant to resolve the question of whether there has been an advancement.⁴⁷ A close reading of

⁴⁰ 142 S.W. 242 (Ky. 1912).

⁴¹ See note 38 *supra* and accompanying text.

⁴² 142 S.W. at 243.

⁴³ 200 S.W. 478 (Ky. 1918).

⁴⁴ *Id.* at 479-80.

⁴⁵ 281 S.W. 466 (Ky. 1926).

⁴⁶ *Id.* at 466.

⁴⁷ See, e.g., *Chism v. Chism*, 176 S.W.2d 101, 103 (Ky. 1943); *Thompson v. Latimer*, 273 S.W. 65, 66-67 (Ky. 1925).

these cases reveals, however, that the language is unnecessary to the holdings, and the actual results are consistent with Kentucky's advancement rules. For example, in *Thompson v. Latimer*,⁴⁸ the court held for the first time that the value of an insurance policy originally payable to the donor's estate but later assigned to the donee was an advancement.⁴⁹ Initially, the court made no reference to the donor's intention. The court pointed out that using the donor's funds to pay premiums on a life insurance policy payable to the donee is no different in substance than using the donor's money to buy stock for the donee.⁵⁰ Both transactions involve setting aside some of the donor's property for the benefit of the donee — property which could have accumulated in other forms and passed to all of the donor's intestate takers upon death. The court pointed out that its treatment of the insurance policy proceeds was in harmony with the advancement statute's purpose of effecting equality of distribution.⁵¹ Only as an afterthought, no doubt to buttress its opinion, the court stated that the donor clearly assigned the policy with the intent that it be part of the donee's share of the estate.⁵²

When a donor dies partially or totally intestate, an advancement given by the donor to a descendant affects the donee only to the extent that the donee may not share further in the donor's intestate estate until all other takers are made financially equal.⁵³ The donee, however, cannot be forced to give up any advancements which exceed the value of the donee's intestate share.⁵⁴

II. HOTCHPOT — THE METHOD OF COMPUTING AN ADVANCEMENT

The hotchpot method is used to account for advancements when a decedent dies totally or partially intestate.⁵⁵ The easiest way to explain this method is with an example.

⁴⁸ 273 S.W. 65 (Ky. 1925).

⁴⁹ *Id.* at 67.

⁵⁰ *Id.* at 66.

⁵¹ *Id.* at 67.

⁵² *Id.*

⁵³ KRS § 391.140(1).

⁵⁴ *Edwards v. Livesay*, 261 S.W. 839, 840 (Ky. 1924); *Farley v. Stacey*, 197 S.W. 636, 640 (Ky. 1917); *Cornette v. McCoy*, 140 S.W. 683, 684 (Ky. 1911).

⁵⁵ *Bowman's Adm'rs v. Bowman's Ex'r and Adm'r*, 192 S.W.2d 955, 957 (Ky.

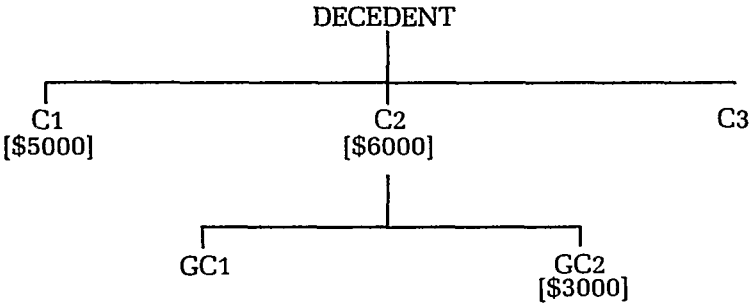


FIGURE 1

Assume that the decedent *D* died intestate survived by two children, *C1* and *C3*, and two grandchildren, *GC1* and *GC2*, the children of child *C2* who predeceased *D*. Prior to death and while *C2* was still alive, *D* gave \$5000 to *C1* and \$6000 to *C2*. After *C2* died, *D* gave \$3000 to *GC2*. The decedent's net intestate estate was \$16,000 after exemptions, debts, costs of administration and funeral expenses were deducted from *D*'s gross estate.

The first step of the hotchpot method requires that all advancements made to intestate takers be brought into hotchpot. Any donee who refuses to participate is not entitled to any other share of the donor's estate.⁵⁶ The intestate takers who received or are charged with advancements do not actually have to turn the advancement over to the decedent's estate *in specie*.⁵⁷ The hotchpot is just a paper computation aimed at achieving equality among the intestate takers. The decedent's net estate is theoretically increased by the value of all advancements. This calculation produces a figure that represents the value of the decedent's estate as if the decedent died owning the property given as advancements.

If a spouse survived *D*, the spouse's share in *D*'s intestate estate is deducted from the estate before any advancements are

1946); *Traugher v. King*, 32 S.W.2d 8, 11 (Ky. 1930); *Montgomery's Trustee v. Brown*, 121 S.W. 472, 474 (Ky. 1909) (hotchpot computation in a wills context).

⁵⁶ 192 S.W.2d at 957; *Collins v. Collins' Adm'r*, 45 S.W.2d 811, 815 (Ky. 1931); *Erdman's Adm'r v. Erdman's Ex'r and Trustee*, 16 S.W.2d 756, 757 (Ky. 1929).

⁵⁷ *Damron v. Bartley*, 194 S.W.2d 73, 75 (Ky. 1946).

added.⁵⁸ The advancements are added to the net estate because by statute and caselaw, exemptions, costs of administration, funeral expenses, and debts must be paid before there is any distribution of the intestate estate.⁵⁹ After adding the value of the various advancements to the net estate, each intestate taker's share in the theoretical estate is determined. All advancements made or chargeable to each intestate taker are then subtracted from each share.

In the example, the \$5000 given to child *C1*, the \$6000 given to the predeceased child *C2*, and the \$3000 given to the grandchild *GCI* are added to the net estate. The amount given to the grandchild is includable because the advancement statute expressly treats gifts by a grandparent (*D*) to descendants (*GCI* and *GC2*) as advancements if the descendants are also intestate takers of the donor.⁶⁰ Because their parent, *C2*, predeceased *D*, the grandchildren are intestate takers in place of their parent.⁶¹ The amount given to *C2* is included in the hotchpot because the statute provides that any gift from a parent (*D*) to a descendant (*C2*) is charged to those claiming through the descendant in the division and distribution of the decedent's estate.⁶² Both grandchildren are claiming an intestate share in *D*'s estate through their parent *C2*.

After adding all of the advancements to *D*'s net estate (\$16,000 + \$5,000 + \$6,000 + \$3,000), the sum obtained (\$30,000) is divided among the intestate takers according to their statutorily determined intestate shares. In this example, the estate is divided into three shares representing the two children who

⁵⁸ KRS § 391.140(2) (Baldwin 1984) (advancements shall not be taken as part of the decedent's personal estate in estimating the distributable share of a surviving spouse).

⁵⁹ *International Harvester Co. v. Dyer's Adm'r*, 178 S.W.2d 966 (Ky. 1944) (costs of administration); KRS ch. 396 (Baldwin 1984) (claims against decedents' estates); KRS § 391.030(1) (Baldwin 1984) (personal exemption); KRS § 396.090 (Baldwin 1984) (funeral expenses); KRS § 427.060 (Baldwin 1984) (homestead exemption).

⁶⁰ KRS § 391.140(1) (Baldwin 1984). *Cf. Owsley v Owsley*, 77 S.W. 394 (Ky. 1903) (property given to a donee is not technically an advancement as long as the donor is alive). *Contra Stevenson v. Martin*, 74 Ky. (11 Bush) 485, 493 (1875) (gift to grandchild during life of parent was not converted into an advancement to the grandchild by subsequent death of the parent during the lifetime of the grandparent).

⁶¹ KRS §§ 391.010(1), 391.040 (Baldwin 1984).

⁶² *Frye v. Avritt*, 68 S.W. 420, 421 (Ky. 1902) (advancements to daughter chargeable to her children); KRS § 391.140(1).

survived *D* and the one child who left issue surviving *D*.⁶³ *C1* and *C3* are each entitled to one-third of the estate, or \$10,000, while *GCI* and *GC2* share equally the one-third *C2* would have taken (\$5000 each).

Any advancement received by, or chargeable to, an intestate taker is then subtracted from that taker's share in hotchpot. *C1* is entitled to receive only \$5000, not \$10,000, from the estate because *C1* received a \$5000 advancement on that share ($\$10,000 - \$5000 = \$5000$). Because *C3* did not receive any advancements, *C3* is entitled to the full one-third share or \$10,000 ($\$10,000 - \$0 = \$10,000$). The grandchildren are each charged with half of all advancements received by their parent and for any advancement they received individually. *GCI* is entitled to \$2000 from the estate because *GCI* did not receive any individual advancements and is charged with half of *C2*'s advancement ($\$5000 - [\$6000 \div 2] = \$2000$). *GC2* is not entitled to receive anything because *GC2* had advancements in excess of the intestate share allotted to each grandchild. *GC2* is charged with half of *C2*'s advancement and all of *GC2*'s own advancement ($\$5000 - [\$6000 \div 2] - \$3000 = -\1000). Grandchild *GC2* drops out of hotchpot but retains the property received as advancements.⁶⁴

GC2 cannot be compelled to refund any part of the advancements to the decedent's estate because an advancement does not constitute a debt owing from the donee to the donor's estate.⁶⁵ Even when a donee participates in a hotchpot in which the donee received more as advancements than her or his rightful intestate share, the donee need not forfeit any advancement.⁶⁶ If litigation arises concerning whether advancements were made, the alleged donee may refuse to come into the hotchpot until the litigation is resolved without forfeiting the right to thereafter participate.⁶⁷

In the above example, because *GC2* does not refund any advancements, the computation is done again, adding only the

⁶³ KRS § 391.040.

⁶⁴ *Pendley v. Lee*, 25 S.W.2d 1030, 1032 (Ky. 1930).

⁶⁵ *Farmers' Exch. Bank of Millersburg v. Moffett*, 75 S.W.2d 1063, 1065 (Ky. 1934); *Gibbs v. Gibbs*, 72 S.W.2d 473, 474 (Ky. 1934); *McPherson v. Black*, 284 S.W. 413, 414-15 (Ky. 1926); *Edwards v. Livesay*, 261 S.W. 839, 840 (Ky. 1924).

⁶⁶ *Damron v. Bartley*, 194 S.W.2d 73, 75 (Ky. 1946).

⁶⁷ *Cf.* 261 S.W. at 840.

advancements made to *C1* and *C2* to the decedent's net estate (\$16,000 + \$5,000 + \$6,000 = \$27,000). Grandchild *GCI* is now the only taker of the share *C2* would have taken and is charged with all of *C2*'s advancement instead of only one-half. The estate is still divided into three shares because two children and issue of the predeceased child survived the decedent. Each intestate taker should receive \$9000 in value from the estate. *C1* is entitled to only \$4000 because *C1* has already been given a \$5000 advancement ($\$9000 - \$5000 = \4000). *C3* did not receive any advancements and is entitled to the full \$9000. *GCI* is entitled to only \$3000 because all of *C2*'s \$6000 advancement is charged against *GCI*'s one-third of the intestate estate ($\$9000 - \$6000 = \$3000$).

One should note that if *C2* survived the decedent, *C2* would not be charged with the gift to *GC2*. Only gifts actually received by the intestate taker or received by a donee through whom the intestate taker claims a share in the donor's estate are charged as advancements.⁶⁸ If *C2* survived *D*, *C2* did not actually receive the gift given to *GC2* and *C2* is not claiming a share in *D*'s estate through *GC2*.

When an intestate taker is required to account for an advancement, the advancement is deducted from the taker's interest in both personalty and realty inherited from the estate.⁶⁹ There are no reported cases challenging the hotchpot method for achieving equality among intestate takers.

III. OTHER TRANSACTIONS DISTINGUISHED FROM ADVANCEMENTS

Not all *intervivos* transfers of real or personal property by a grandparent or parent to a descendant are advancements. The transfer may create a debt or may be made pursuant to a bona fide contract of sale. Neither creation of a debt nor sale of property qualifies as an advancement. By definition an advancement is a gratuitous transfer⁷⁰ with no obligation in the donee

⁶⁸ KRS § 391.140(1). See notes 36-38 *supra* and accompanying text.

⁶⁹ *Harlow v. Brand*, 148 S.W.2d 690, 691 (Ky. 1941); *Loverett v. Veatch*, 105 S.W.2d 1052, 1057 (Ky. 1937).

⁷⁰ KRS § 391.140(1) (Baldwin 1984).

to repay the donor.⁷¹ Because different legal consequences flow from characterizing a transfer as an advancement, a sale, or a debt, it is important to distinguish among them.

A. Sale

A parent and child may legally contract with each other for the sale of property.⁷² The character of the consideration received determines whether a transfer of property is a sale or an advancement.⁷³ If the decedent received valuable consideration for the property, the transfer is a sale with no obligation on the transferee to account for the property in the distribution of the decedent's estate.

Valuable consideration can be in money or money's worth.⁷⁴ Because the transfer is in an intrafamily context, allowance for the natural affection between parent and child is made in judging the adequacy of the consideration. To support a finding that there has been a sale, and not an advancement, the consideration does not have to be the equivalent of the price a stranger would be charged.⁷⁵ If the consideration is alleged to be past or future services by the child for the benefit of the parent, the child must show that at the time of the conveyance the parties intended that the transfer was to be payment for those services. Showing merely that the transferee rendered services that might have been of sufficient value to serve as consideration for the transfer is not sufficient.⁷⁶

*Thomas v. Thomas*⁷⁷ illustrates this rule. The court in *Thomas* expressly found that two of three daughters rendered extraordinary services to their mother for many years.⁷⁸ Nonetheless, the

⁷¹ *Farmers' Exch. Bank of Millersburg v. Moffett*, 75 S.W.2d 1063, 1065 (Ky. 1934); *Gibbs v. Gibbs*, 72 S.W.2d 473, 474 (Ky. 1934); *McPherson v. Black*, 284 S.W. 413, 414 (Ky. 1926).

⁷² *Day v. Grubbs*, 32 S.W.2d 327, 329-30 (Ky. 1930).

⁷³ *Gossage v. Gossage's Adm'r*, 136 S.W.2d 775, 777 (Ky. 1940).

⁷⁴ 17 AM. JUR. 2D *Contracts* § 95, at 438 (1964).

⁷⁵ 136 S.W.2d at 777. *Cf.* 32 S.W.2d at 330 (if consideration is grossly disproportionate, excess is an advancement).

⁷⁶ *Thomas v. Thomas*, 398 S.W.2d 231, 232 (Ky. 1965); 32 S.W.2d at 330; *Ecton v. Flynn*, 17 S.W.2d 407, 411 (Ky. 1929).

⁷⁷ 398 S.W.2d 231 (Ky 1965).

⁷⁸ *Id.* at 232.

appellate court determined that the conveyance of land to these two daughters was an advancement because the conveyance was made "in appreciation" for, rather than "in consideration" of, the services.⁷⁹ The court found there was no meeting of the minds between the mother and daughters of any price to be paid for the services. Neither was there any indication whether the transfer included an obligation to furnish continuing support to the mother. The daughters never presented any claim for services and did not execute any release to the mother against their unrepresented claims.⁸⁰

Other cases⁸¹ have reached the same result when the child provided services out of filial devotion without an expectation of compensation, and because of those services the parent made a gift to the child. The child failed to demonstrate that the transfer was intended as payment for the services rendered.

This rule penalizes children who gratuitously fulfill their filial duties because they are charged with an advancement. Only a child who expressly conditions providing services to a parent upon receipt of compensation can be assured that the services will be treated as valuable consideration sufficient to support a finding that the transfer was a sale. Only one Kentucky case sustains a property transfer from a parent to a child as a sale in exchange for services rendered.⁸² That case involved an express recital in the deed that the transfer was in consideration of the care that the transferee gave and would give to the transferor during the transferor's natural lifetime.⁸³

In *Ecton v. Flynn*,⁸⁴ the deed of land from a father to his sons recited the consideration as the "love and affection" the father had for his sons.⁸⁵ Such consideration, if true, mandates a finding that the transfer was an advancement. In *Crafton v. Inge*,⁸⁶ the deed from a father to his daughter and her husband

⁷⁹ *Id.* at 233.

⁸⁰ *Id.*

⁸¹ *Remmele v. Kinstler*, 298 S.W.2d 680, 682 (Ky. 1957); 17 S.W.2d at 411-12.

⁸² 32 S.W.2d at 330.

⁸³ *Id.* at 329.

⁸⁴ 17 S.W.2d 407.

⁸⁵ *Id.* at 409.

⁸⁶ 98 S.W. 325 (Ky. 1906).

recited consideration of a sum of money.⁸⁷ The payment of money in exchange for a conveyance of land, if actually paid, requires a finding of a sale. In *Ecton*, the deed recital was found to be true and the transfer was treated as an advancement.⁸⁸ In *Crafton*, the challengers successfully proved that despite the recitation of monetary consideration in the deed, the conveyance was not a sale, but an advancement.⁸⁹ Challenges to the correctness of a deed recitation of consideration are permitted because a grandparent or parent cannot, by a mere declaration, exempt a descendant from being charged with an advancement if the transfer is actually gratuitous and thus an advancement.⁹⁰ Nor can a parent or grandparent unilaterally change a non-advancement transfer into an advancement.⁹¹

The burden of proof in a challenge to the accuracy of a deed recital of consideration rests on the party attacking the recital's validity.⁹² The challenger may meet that burden without pleading that the recital was fraudulent or inserted by mistake,⁹³ but must prove by clear and convincing evidence that the consideration was not as recited in the deed.⁹⁴ A recital of consideration may be impeached by declarations, including oral statements, of the parent or grandparent made before or contemporaneously with the deed stating whether the conveyance was in response to the consideration recited.⁹⁵ Evidence of the circumstances surrounding the conveyance is also competent for impeaching the recital.⁹⁶ Declarations by the decedent subsequent to the conveyance, however, are only competent if part of *res gestae* or against the interest of the donor.⁹⁷

Although testimony concerning what the parent or grandparent said about the actual consideration for the transfer is

⁸⁷ *Id.*

⁸⁸ 17 S.W.2d at 412.

⁸⁹ 98 S.W.2d at 326.

⁹⁰ See note 27 *supra* and accompanying text.

⁹¹ See note 35 *supra* and accompanying text.

⁹² 32 S.W.2d at 329.

⁹³ *Id.*

⁹⁴ 17 S.W.2d at 411.

⁹⁵ *Id.* at 412; *McCray v. Corn*, 182 S.W. 640, 643 (Ky. 1918); *Bailey's Adm'rs v. Barclay*, 60 S.W. 377, 378 (Ky. 1901).

⁹⁶ 32 S.W.2d at 329-30; 17 S.W.2d at 411; 182 S.W. at 643.

⁹⁷ 32 S.W.2d at 329; 60 S.W. at 378.

competent for impeaching the deed recital, it may be inadmissible under Kentucky's Dead Man's statute.⁹⁸ The Dead Man's statute prohibits people from testifying for themselves concerning any verbal statement by, any transaction with, or any act done or not done by a person who is dead.⁹⁹ Thus, parties seeking to impeach the recital of consideration in a deed cannot testify about conversations they had with the decedent in which the decedent contradicted the consideration recited in the deed.

Exceptions do exist to the Dead Man's statute prohibitions. For example, if the testimony is offered against a party who also heard the decedent's statement or was present when the transaction took place, it is admissible.¹⁰⁰ Another exception arises when testimony concerning statements by or transactions with the decedent is given by an interested witness without objection.¹⁰¹ The other party may then refute this testimony by testifying about other statements by or transactions with the decedent.¹⁰²

In *Crafton*,¹⁰³ the deed recited that money had been paid for the conveyance. All of the parties agreed that the stated consideration was never actually paid to the decedent. The grantee son-in-law contended that he and the decedent agreed that the land was to be transferred in consideration of the services the son-in-law provided and the proceeds the decedent received from the land the son-in-law worked for the two years immediately prior to the conveyance. The opposing parties contended that the transfer was an advancement. They introduced the decedent's widow's testimony that the decedent told her the transfer was an advancement.¹⁰⁴

The opposing parties also established circumstances indicative of an advancement rather than a sale. For instance, the

⁹⁸ KRS § 421.210(2) (Baldwin 1984).

⁹⁹ *Id.* Cf. *Edwards v. Livesay*, 261 S.W. 839, 841 (Ky. 1924) (parties cannot testify for themselves about any act or declaration of the decedent, but a party is competent to testify about any act or declaration of the decedent for any other party); *Nichols v. King*, 68 S.W. 133, 133 (Ky. 1902) (father executed separate deeds to his wife and several sons—each grantee was competent to testify about delivery of deeds to other grantees).

¹⁰⁰ *National Life Co. v. Rigney*, 180 S.W.2d 847, 849 (Ky. 1944).

¹⁰¹ *Combs v. Roark*, 267 S.W. 210, 213 (Ky. 1924).

¹⁰² *Id.*

¹⁰³ 98 S.W. 325.

¹⁰⁴ *Id.* at 325-26.

value of the services supposedly rendered and the proceeds from the land for the two-year period were no more than what the father would have received if he had worked the land himself. The transferor was able-bodied and capable of caring for himself and the land. The deed was not recorded until after the father's death. The son-in-law was impecunious when he married the daughter, and the father was very concerned about the marriage. The land transfer followed closely after the marriage. The son-in-law's own testimony was the only evidence that supported his contention.¹⁰⁵

The court held the evidence offered by the son-in-law inadmissible because it was testimony by an interested party about a statement of the decedent and did not fit within any of the exceptions to the Dead Man's statute. Because no one else was present when the conversation between the decedent and his son-in-law allegedly took place, the son-in-law's testimony was not offered against a party who had heard the statement, too. The son-in-law's testimony was inadmissible even to rebut the widow's testimony that the decedent told her the conveyance was an advancement because the widow was not an interested party in the controversy.¹⁰⁶ Her property rights in the estate were the same whether the decedent sold the land or gave it as an advancement. The express terms of the advancement statute provided that advancements made to distributees are not taken in account in determining the distributable share of the surviving spouse.¹⁰⁷ Because no competent evidence of a bona fide sale existed, the *Crafton* court held that the transfer was an advancement. The daughter had to account for its value before she could share any further in the decedent's estate.¹⁰⁸

Finally, there are cases that do not involve an alleged sale of land by a parent or grandparent to a descendant, but instead involve the purported release, or sale, of an intestate taker's expectant share of the ancestor's estate in exchange for consid-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 326.

¹⁰⁷ KRS § 391.140(2).

¹⁰⁸ 98 S.W. at 326.

eration from the ancestor.¹⁰⁹ For example, in *Pendley v. Lee*,¹¹⁰ a daughter expressly accepted a conveyance of land from her father and mother as her full share in their estate.¹¹¹ This purported release of her expectancy was ineffectual¹¹² because Kentucky, unlike the majority of states, does not permit a contract of release to be valid even if the intestate taker receives fair consideration.¹¹³ Although the contract of release is invalid, the intestate taker is not forced to return the consideration to the decedent's estate. The consideration is treated as an advancement to the intestate taker,¹¹⁴ and is chargeable against any intestate share in the ancestor's estate to which the taker may be entitled.

B. Debt

Many Kentucky cases involve the question of whether the transfer of property by a parent or grandparent to a descendant constituted an advancement or created a debt owed by the descendant to the estate of the ancestor. In a few cases the property transfer was the ancestor's payment of a debt owed to the descendant.¹¹⁵ Because the transactions are not gratuitous, the satisfaction or creation of binding legal obligations are not advancements.

In *Corbin's Ex'rs v. Corbin*,¹¹⁶ the executors of the deceased mother's estate claimed that money the mother paid to her daughter was an advancement. For ten years during the daughter's minority, the mother used land inherited by the daughter to pasture animals and grow crops without the daughter receiving

¹⁰⁹ *Weddington v. Adkins*, 54 S.W.2d 331 (Ky. 1932); *Pendley v. Lee*, 25 S.W.2d 1030 (Ky. 1930); *Elliot v. Leslie*, 99 S.W. 619 (Ky. 1907).

¹¹⁰ 25 S.W.2d 1030 (Ky. 1930).

¹¹¹ *Id.*

¹¹² *Id.* at 1032.

¹¹³ *Prater v. Hicks*, 220 S.W.2d 1011, 1012 (Ky. 1949); *Snyder v. Snyder*, 235 S.W. 743, 744 (Ky. 1921); *Hunt v. Smith*, 230 S.W. 936, 938 (Ky. 1921); *Burton v. Campbell*, 195 S.W. 1091, 1092 (Ky. 1917); *McCall's Adm'r v. Hampton*, 32 S.W. 406, 407 (Ky. 1895); *Wheeler's Ex'rs v. Wheeler*, 59 Ky. (2 Met.) 474, 477 (1859); *Beard v. Griggs*, 24 Ky. (1 J.J. Marsh.) 22, 26 (1829).

¹¹⁴ 54 S.W.2d at 332; 25 S.W.2d at 1032; 99 S.W. at 622.

¹¹⁵ *Corbin's Ex'rs v. Corbin*, 194 S.W.2d 65 (Ky. 1946); *Schweitzer v. Schweitzer*, 82 S.W. 625 (Ky. 1904).

¹¹⁶ 194 S.W.2d 65 (Ky. 1946).

any income. The money the mother paid the daughter was found to be compensation for this use of the land. The case is instructive because the court treated the money transfer as satisfaction of a legal obligation the mother owed the daughter even though there was no formal or informal agreement between the mother and daughter requiring the mother to compensate her daughter for the use of the land.¹¹⁷ Because the court characterized the transaction as the payment of a debt, and not as an advancement, the daughter was not accountable for the money when the mother's intestate estate was distributed.

The burden of proving that a grandparent or parent actually transferred property to a descendant is on the party claiming that a transfer occurred.¹¹⁸ Once the transfer is established or admitted, certain presumptions assist in determining the transfer's character. For example, an unexplained transfer of property by a grandparent or parent to a descendant is presumed to be a gift chargeable as an advancement and not a loan.¹¹⁹ A transfer accompanied by the normal incidents of a loan, such as a note and payment of interest, however, is presumed to be a debt and not an advancement.¹²⁰ In the latter situation, the burden is on the party claiming the transaction was an advancement.¹²¹

In *Gibbs v. Gibbs*,¹²² the presumption arose that the transfers of money from the father to his son created a debt because the transfers were accompanied by interest bearing notes. The only evidence that the transactions were actually advancements was that the son was not a good financial risk and the father never attempted to collect the notes. The court held that the transfer was a valid debt, because it believed that the father's behavior was explainable as parental concern for the child's financial condition, a concern not inconsistent with making a loan.¹²³

¹¹⁷ *Id.* at 66.

¹¹⁸ *Chism v. Chism*, 176 S.W.2d 101, 103 (Ky. 1943). *See also*, *Bailey's Adm'rs v. Barclay*, 60 S.W. 377 (Ky. 1901) (declarations made by parent or grandparent subsequent to alleged transaction fail to meet burden).

¹¹⁹ *Stiff's Ex'r v. Stiff*, 290 S.W. 718, 719 (Ky. 1927).

¹²⁰ 75 S.W.2d at 1065; 72 S.W.2d at 474.

¹²¹ 75 S.W.2d at 1065; 72 S.W.2d at 474. *Cf.* 32 S.W.2d at 329 (burden of proof on party seeking to impeach the deed recitation of consideration); 182 S.W. at 643.

¹²² 72 S.W.2d 473 (Ky. 1934).

¹²³ *Id.* at 473-74.

The father conveyed real property to one of his sons in *Proctor v. Proctor*.¹²⁴ The son claimed the transaction was a genuine, completed sale and introduced the note for the purchase price. Ordinarily, a strong presumption of payment arises when the alleged debtor possesses a note evidencing the indebtedness. The presumption was very weak in this case, however, because the son lived in his father's home at the time of the father's death and had access to everything in the house. The court characterized other evidence of payment as too vague and unsatisfactory to warrant reversal of the determination that the conveyance was an advancement and not a bona fide installment sale.¹²⁵

Another case in which a transaction was characterized as an advancement and not a debt despite the presence of a note was *Boblett v. Barlow*.¹²⁶ The transfer of money by a father to his son was evidenced by the son's note, but the court concluded that the note was without consideration because evidence clearly demonstrated that the father intended from the outset to give the money to his son. The father declared to a disinterested witness that he was giving the money to keep the son equal with a daughter who had the use of the father's land without charge for more than twenty years. A deposition the father gave in a lawsuit by the son's creditors also established that the money was really an advancement and the note was only an afterthought with no legal significance.¹²⁷

A descendant has no liability to repay the ancestor's estate for advancement which exceeds the descendant's rightful share of the decedent's intestate estate. An intestate taker only must account for an advancement when the advancement is less than the intestate taker's share and the intestate taker wants to share further in the distribution of the decedent's estate.¹²⁸

The consequences of a debt, however, are very different. A right of retainer exists when any intestate taker owes a debt to

¹²⁴ 137 S.W.2d 354 (Ky. 1940).

¹²⁵ *Id.* at 356-57.

¹²⁶ 83 S.W. 145 (Ky. 1904).

¹²⁷ *Id.* at 145-46.

¹²⁸ See notes 65-67 *supra* and accompanying text.

the decedent. The estate is permitted to set off any debt legally owing to the decedent against the share of any intestate taker so indebted.¹²⁹ Unlike an advancement, if the debt exceeds the intestate taker's share of the estate, the intestate taker is liable to the estate for the difference.¹³⁰

Because of this liability, it is usually better for the intestate taker if the transaction with the decedent is characterized as an advancement and not as a debt. This is not always true, however. If collection of the debt owed by the intestate taker is barred by a statute of limitations, the intestate taker is better off if the transaction is treated as a debt. In Kentucky, contrary to the majority rule,¹³¹ the personal representative may not set off a debt time-barred by the relevant statute of limitations.¹³² If the property transferred was an advancement, the transferee would be charged in the estate's distribution regardless of when the transfer occurred.¹³³

A child of the decedent in *Oliver v. Crewdson's Adm'r*¹³⁴ pleaded a sister state's statute of limitation barring collection of the debt as a defense to the set-off of the owed money. The debt was evidenced by a note bearing interest. The note was executed by the child in the sister state, delivered to a bank in the sister state and was payable in that state. The decedent's husband was the surety on the child's note and after his death, the decedent paid the child's debt and acquired the note. The court characterized the transaction as a debt the daughter owed to her mother, the decedent. Although the debt was time-barred in the sister state, the court applied Kentucky's longer statute of limitation because it viewed statutes of limitations as affecting the remedy only and not the right to recover. Because the note's enforcement was not time-barred in Kentucky, the amount of the note plus interest was set off against the daughter's intestate share.¹³⁵

¹²⁹ Cf. *Veatch's Adm'r v. Loverett*, 97 S.W.2d 47, 48-49 (Ky. 1936).

¹³⁰ 75 S.W.2d at 1066.

¹³¹ T. ATKINSON, *supra* note 11, at 789-90.

¹³² *Luscher v. Security Trust Co.*, 199 S.W. 613, 615 (Ky. 1918).

¹³³ *Id.* at 613.

¹³⁴ 77 S.W.2d 20 (Ky. 1934). *But see* *Payne v. Auxier*, 277 S.W. 298 (Ky. 1925) (payment of child's note by father who was the surety was an advancement, not a debt subject to a statute of limitations).

¹³⁵ 77 S.W.2d at 21-22.

Even though the initial transaction between a parent or grandparent and a descendant may properly be characterized as the creation of a debt, the debt may be changed into an advancement by mutual agreement.¹³⁶ For example, a parent who is owed debts by a child can forgive those debts and release the child from an obligation to re-pay any part of the debt.¹³⁷ Because the release is a gratuitous transfer, however, the value of the debt forgiven must be accounted for as an advancement if the child wishes to share in the intestate distribution of the parent's estate.¹³⁸ On the other hand, even with the descendant's agreement, a parent or grandparent cannot change a legal advancement into a debt. Because the statute defines an advancement, any agreement purporting to change an advancement into a debt is contrary to the terms of the statute and therefore void.¹³⁹

IV. PROPERTY INTERESTS SUBJECT TO THE ADVANCEMENT DOCTRINE

Any property interest may be the subject of an advancement. It does not matter whether the property interest is real or personal, tangible or intangible, or whether it is a present or future legal interest or an equitable one.¹⁴⁰ The most commonly litigated advancements are gifts of land¹⁴¹ followed closely by gifts of

¹³⁶ 75 S.W.2d at 1065.

¹³⁷ *Gray v. Gray*, 248 S.W. 172, 174 (Ky. 1923).

¹³⁸ See note 27 *supra* and accompanying text.

¹³⁹ 75 S.W.2d at 1065.

¹⁴⁰ KRS § 391.140(1) (Baldwin 1984).

¹⁴¹ *E.g.*, *Thomas v. Thomas*, 398 S.W.2d 231, 232 (Ky. 1965) (land given by mother to two daughters); *Remmele v. Kinstler*, 298 S.W.2d 680, 681 (Ky. 1957) (land given by father to four of his six children); *Popplewell v. Flanagan*, 244 S.W.2d 445, 447 (Ky. 1951) (land given by father to a son and a daughter); *Damron v. Bartley*, 194 S.W.2d 73, 74 (Ky. 1946) (land given by parent to child); *Williamson v. Phillips*, 179 S.W.2d 603, 603 (Ky. 1944) (land given by father to son); *Traughber v. King*, 32 S.W.2d 8, 10 (Ky. 1930) (land of unequal value given by father to his five children); *Pendley v. Lee*, 25 S.W.2d 1030, 1030 (Ky. 1930) (land given by father to one of his two daughters); *Ecton v. Flynn*, 17 S.W.2d 407, 409 (Ky. 1929) (land given by father to three of his five children); *Cochran v. Simmons*, 276 S.W. 989, 990 (Ky. 1925) (land given by father to one of his three children); *Edwards v. Livesay*, 261 S.W. 839, 840 (Ky. 1924) (land of unequal value given by father to his seven children); *McCray v. Corn*, 182 S.W. 640, 641 (Ky. 1916) (land given by mother to two of her three children); *Crafton v. Inge*, 98

money.¹⁴²

When an advancement of land is made, the parent or grandparent usually has transferred a present possessory fee simple interest to a descendant. A descendant is still chargeable with an advancement, however, when the interest given in the land is merely a present possessory life estate¹⁴³ or a remainder interest following a life estate.¹⁴⁴ On at least one occasion, the descendant was charged with an advancement when the ancestor gave the descendant a present, but undivided, fractional interest as a tenant in common in land.¹⁴⁵ Occasionally, the ancestor transfers to the descendant not the ownership but the present right to the rents or use and occupation of the land.¹⁴⁶ The value of the rent or use and occupation of land is also an advancement.¹⁴⁷

If the parent or grandparent attempted but failed to transfer ownership of the land, the descendant is not charged with any advancement. Even if the descendant enjoyed possession of the land under the invalid conveyance, there has been no advancement equal to the value of that possession.¹⁴⁸ According to the Kentucky courts, in an advancement the donor and the donee intended respectively to give and to accept *ownership* of the land, not merely the use and occupation of the land. Accordingly, to require the donee to account for the value of the use

S.W. 325, 325 (Ky. 1906) (land given by father to only one of his children); *Ward v. Johnson*, 97 S.W. 1110, 1110 (Ky. 1906) (land of unequal value given by father to his ten children); *Boblett v. Barlow*, 83 S.W. 145, 145 (Ky. 1904) (land given by father to one of his two children); *Nichols v. King*, 68 S.W. 133, 133 (Ky. 1902) (land given by father to three of his nine children); *Bowles v. Winchester*, 76 Ky. (13 Bush) 1, 7 (1877) (land of unequal value given by will by father to all of his surviving children and grandchildren).

¹⁴² *E.g.*, *Harlow v. Brand*, 148 S.W.2d 690, 690 (Ky. 1941) (mother gave over \$5000 to one of her two sons); *Payne v. Auxier*, 277 S.W. 298, 298 (Ky. 1925) (father gave \$5000 each to two of his three children); *Boblett v. Barlow*, 83 S.W. 145, 145 (Ky. 1904) (father gave \$2116 to one of his two children).

¹⁴³ 76 Ky. (13 Bush) at 8.

¹⁴⁴ *Gossage v. Gossage's Adm'r*, 136 S.W.2d 775, 776 (Ky. 1940) (life estate reserved to the donor and the donor's spouse).

¹⁴⁵ 97 S.W. at 1110 (father had a one-third interest in fee and a life estate in the other two-thirds of the land he gave to his daughter).

¹⁴⁶ 276 S.W. at 992; *Garrott v. Rives*, 80 S.W. 519, 520 (Ky. 1904).

¹⁴⁷ *Isgrigg v. Isgrigg*, 200 S.W. 478, 479 (Ky. 1918) (father attempted to orally give land to his daughter who then occupied it).

¹⁴⁸ *Id.* at 480.

and occupation of land under an invalid conveyance would be unjust. Neither party intended the donee to be obligated to pay rent for the land. If a long period of time elapsed from the commencement of occupation by the intended donee and the death of the donor, the value of the use and occupation could exceed the value of the land itself.¹⁴⁹

If the descendant takes possession of the land under an invalid conveyance which is later perfected by conveyances from the other intestate takers, the descendant is charged with an advancement equal to the value of the land.¹⁵⁰ If the descendant receives land for less than full value, the excess may be an advancement.¹⁵¹

Money is the most common subject matter of personal property advancements. Because the advancement statute does not exempt even trivial sums from its definition of advancements,¹⁵² theoretically, the gift of any sum of money is an advancement.

The court in *Chism v. Chism*,¹⁵³ however, opined that a parent should be able to voluntarily assist a child by paying the child's attorney's fees in a criminal proceeding or by giving the child a small sum of money without creating either a debt or an advancement.¹⁵⁴ Six-hundred dollars was in issue in *Chism*.¹⁵⁵ Other cases, dealing with allegations of financial advancements even smaller than in *Chism*, make no mention of any exception

¹⁴⁹ *Id.* at 481.

¹⁵⁰ *Farley v. Stacey*, 197 S.W. 636, 641 (Ky. 1917) (mother's void conveyance to son was later perfected by his siblings' quitclaim deeds to him).

¹⁵¹ 179 S.W.2d at 604 (ancestor's conveyance of land to descendant on which ancestor had paid part of purchase price was an advancement to that extent); *Sevier v. Bonta*, 290 S.W. 683, 684 (Ky. 1927) (ancestor conveyed land worth \$6000 to son in exchange for forgiveness of \$3000 debt if father's excess was an advancement); *Beatty v. Beatty's Adm'r*, 5 S.W. 771, 772 (Ky. 1887) (ancestor conveyed land to descendant, retaining a mortgage for less than the value of land); *Renaker v. Lafferty's Adm'r*, 68 Ky. (5 Bush) 88, 88-89 (1868) (ancestor devised land to descendant subject to charge less than value of land); *Clarke v. Clarke*, 56 Ky. (17 B. Mon.) 698, 699 (1856) (ancestor conveyed land to descendant and remitted purchase price).

¹⁵² KRS § 391.140(1) ("[a]ny . . . money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant. . .").

¹⁵³ 176 S.W.2d 101 (Ky. 1943).

¹⁵⁴ *Id.* at 103.

¹⁵⁵ *Id.* at 102.

for small sums of money.¹⁵⁶ In reality, however, small amounts of money frequently escape treatment as advancements either because there is no evidence to establish the transfer or because the cost of proving the transfer is greater than any increase the advancement would cause in the shares of the other intestate takers.

The court in *Popplewell v. Flanagan*¹⁵⁷ stated that wedding gifts of money and personal property to children were not chargeable as advancements against the children's intestate shares. This case does not, however, carve out an exception from the advancement statute for wedding gifts of money. In *Popplewell*, each of the children received approximately the same amount in wedding gifts from the parent. Including the gifts' values in the hodgepot computation would not have affected the amount each child was entitled to receive from the parent's intestate estate.¹⁵⁸

The form of a money advancement is not always a direct payment of money to the intestate taker. In two cases, the parent's or grandparent's money was used to pay a descendant's college or professional education costs and the amounts paid were treated as advancements.¹⁵⁹ In other instances, the decedent's money was used to pay an intestate taker's debt for which the decedent was the surety¹⁶⁰ or for which the decedent was not legally obligated to pay.¹⁶¹ In the former case, the debt payment was an advancement.¹⁶² In the latter instance, it was not found to be an advancement because the decedent acquired the intestate taker's note. The court characterized the relationship between

¹⁵⁶ E.g., *Bailey's Adm'r v. Barclay*, 60 S.W. 377, 377 (Ky. 1901) (\$300 in controversy); 56 Ky. (17 B. Mon.) at 699 (\$500 in controversy). *But cf.* *Griggs v. Love*, 13 Ky. L. Rptr. 175, 175 (1891) (gift of small diamond ring not an advancement); *Ross v. Dimmit*, 3 Ky. L. Rptr. 685, 685 (1882) (gift of bedding as wedding present not an advancement).

¹⁵⁷ 244 S.W.2d 445 (Ky. 1951).

¹⁵⁸ *Id.* at 450.

¹⁵⁹ *Weddle v. Waddle's Adm'r*, 87 S.W.2d 383, 385 (Ky. 1935) (grandmother's payment for granddaughter's college expenses held advancement); *Hill's Guardian v. Hill*, 92 S.W. 924, 925 (Ky. 1906) (father's payment for son's medical education held advancement).

¹⁶⁰ 277 S.W. at 299 (father was surety on daughter's note).

¹⁶¹ *Oliver v. Crewdson's Adm'r*, 77 S.W.2d 20, 21 (Ky. 1934) (mother paid daughter's note on which the mother's husband was the surety).

¹⁶² 277 S.W. at 299.

the parties after payment of the debt as that of debtor-creditor.¹⁶³ The decedent's forgiveness of a debt owed by an intestate taker would also qualify as an advancement.¹⁶⁴

The money expended by a parent or grandparent for the support and maintenance of a disabled adult child is not considered an advancement.¹⁶⁵ Similarly, the payment of an adult child's hospital bill is not an advancement.¹⁶⁶ On the other hand, the decedent's deposit of money in the intestate taker's bank account is treated as an advancement.¹⁶⁷ Also, the proceeds of an insurance policy on the parent's life purchased by the parent and paid to a descendant are an advancement.¹⁶⁸

The cases uniformly demonstrate that the type of property given by parents or grandparents to descendants is irrelevant in determining whether an advancement has been made. Tangible personal property given by a decedent to an intestate taker in the form of lumber,¹⁶⁹ stock¹⁷⁰ or a piano¹⁷¹ are advancements if accepted by the intestate taker.¹⁷² A mortgage assigned by a parent to a child after the parent obtained a judgment on the mortgage would become an advancement when the child actually received the money from the judgment debtor.¹⁷³ Whether the gift was made *intervivos* or by will is also irrelevant.¹⁷⁴ As long as the decedent died totally or partially intestate, a gift of

¹⁶³ 77 S.W.2d at 22.

¹⁶⁴ *Gray v. Gray*, 248 S.W. 172 (Ky. 1923) (father forgave debts owed to him by two sons).

¹⁶⁵ *Crain v. Mallone*, 113 S.W. 67, 68 (Ky. 1908) (mother cared for disabled adult son for twenty-four years).

¹⁶⁶ 244 S.W.2d at 450 (father paid an adult daughter's \$210 hospital bill).

¹⁶⁷ *Collins v. Collins' Adm'r*, 45 S.W.2d 811, 815 (Ky. 1931) (father deposited money in a bank account in the name of an infant child).

¹⁶⁸ *Justice v. Mead*, 295 S.W. 976, 976 (Ky. 1927) (insurance proceeds treated as a satisfaction of a will gift); *Thompson v. Latimer*, 273 S.W. 65, 67 (Ky. 1925) (proceeds of insurance policy originally payable to insured's estate were assigned to insured's children).

¹⁶⁹ 276 S.W. at 991.

¹⁷⁰ 194 S.W.2d at 74 (stock held advancement even though valueless on date of transfer).

¹⁷¹ 77 S.W.2d at 22 (daughter never accepted mother's piano).

¹⁷² *Id.*

¹⁷³ 276 S.W. at 991.

¹⁷⁴ *Walters v. Neafus*, 125 S.W. 167, 169 (Ky. 1910) (testator's daughter who received a remainder interest in one-half of testator's land charged with its value in the distribution of property not disposed of in will).

property by a parent or grandparent to a descendant, whenever made, is an advancement.¹⁷⁵

V. PERSONS CHARGEABLE WITH ADVANCEMENTS

Kentucky's advancement statute expressly defines advancements as gratuitous transfers of property from a parent or grandparent to a descendant.¹⁷⁶ Because advancements cannot be made to the decedent's ascending or collateral relatives, a decedent's gift to a sibling or parent is never a statutory advancement.¹⁷⁷ Similarly, any gift between spouses is not an advancement.¹⁷⁸ Therefore, if the decedent's spouse, sibling or parent receives a gift from the decedent and then shares in the decedent's intestate estate, the donee need not account for the gift.

Any gratuitous transfers made to a child by a parent who died either totally or partially intestate are advancements chargeable to the child or to those claiming through the child in the distribution of the parent's intestate property.¹⁷⁹ However, not all gifts by a grandparent to grandchild are advancements. If the grandchild's parent survives the grandparent, the grandchild is not charged with an advancement for a gift received from the grandparent because the grandchild does not share in the grandparent's intestate estate.¹⁸⁰

Even if the grandchild's parent predeceases the grandparent, the grandchild is only charged with an advancement for gifts made by the grandparent after the parent's death. In *Stevenson v. Martin*,¹⁸¹ the grandchild's parent was alive when the grandparent made the gift to the grandchild.¹⁸² Therefore, the gift was characterized as a mere gratuity, not an advancement. The court

¹⁷⁵ *Stiff's Ex'r v. Stiff*, 290 S.W. 718, 718 (Ky. 1927); *Jones v. Jones' Ex'r*, 250 S.W. 92, 94 (Ky. 1923); *Owsley v. Owsley*, 77 S.W. 394, 397 (Ky. 1903).

¹⁷⁶ KRS § 391.140(1).

¹⁷⁷ *Id.*; *Contra* UNIF. PROBATE CODE § 2-110 (1982) (property given to any heir treated as advancement if other prerequisites satisfied).

¹⁷⁸ *Talbott's Ex'r v. Goetz*, 151 S.W.2d 369, 371 (Ky. 1941) (husband gave wife \$5,000 shortly before his death).

¹⁷⁹ KRS § 391.140(1).

¹⁸⁰ KRS § 391.010(1) (Baldwin 1984).

¹⁸¹ 74 Ky. (11 Bush) 485 (1875).

¹⁸² *Id.* at 491.

theorized that the gift, when received, was not chargeable to the grandchild as an advancement because the parent was alive. The grandchild, therefore, was not then an intestate taker. According to the court, the subsequent parent's death before the grandparent did not and could not change the legal consequences of the transfer to the grandchild.¹⁸³

The *Stevenson* decision is at odds with the statute's policy of strict financial equality among the decedent's intestate takers in distribution of the decedents undeviseed property.¹⁸⁴ If an ultimate intestate taker received a gift from the decedent, it should not matter whether the gift was received before or after the death of someone who would have taken in intestacy if she or he survived the decedent. Regardless of the timing of the gift, the grandchild in *Stevenson* received a larger portion of the decedent's estate than a similarly situated grandchild who never received an intervivos gift from the decedent. This decision also ignores the fact that technically there can be no advancement to anyone until the donor dies intestate. Until that moment, the donor has the power to prevent application of the advancement statute to any intervivos gifts by dying totally testate.¹⁸⁵

A descendant who received a gift from a parent or grandparent cannot be charged with an advancement unless the intestate estate being distributed is the donor's estate. For example, in one case a daughter who received a gift from her father did not have to account for it because the estate being settled was her mother's.¹⁸⁶ In another case, the court reached a seemingly opposite result. There, even though the mother's estate was being settled, the child was not charged with a personalty gift received from the mother because the child's stepfather had consented to the transfer.¹⁸⁷ By virtue of the common law doctrine of curtesy

¹⁸³ *Id.* at 493.

¹⁸⁴ *E.g.*, *Popplewell v. Flanagan*, 244 S.W.2d 445, 450 (Ky. 1951); *Gossage v. Gossage's Adm'r*, 136 S.W.2d 775, 777 (Ky. 1940); *Weddle v. Waddle's Adm'r*, 87 S.W.2d 383, 384 (Ky. 1935); *Erdman's Adm'r v. Erdman's Ex'r and Trustee*, 16 S.W.2d 756, 757 (Ky. 1929).

¹⁸⁵ *Owsley v. Owsley*, 77 S.W. 394, 396-97 (Ky. 1903).

¹⁸⁶ *Oliver v. Crewdson's Adm'r*, 77 S.W.2d 20, 21 (Ky. 1934). *See also* *Woodward v. Little*, 4 Ky. L. Rptr. 990, 990 (1883) (children could not be charged in settlement of their mother's estate with proceeds of land given them by their father).

¹⁸⁷ *Gavin v. Gaines*, 5 Ky. L. Rptr. 247 (1883).

in effect at the time, the mother's personalty belonged to her husband and the transfer was really a gift by the stepfather.¹⁸⁸ The adoption of the Weissinger Act in 1894¹⁸⁹ terminated a husband's right to acquire title to his wife's personalty upon marriage. Today, such a transfer by the wife of her personal property would be treated as an advancement to the daughter in the settlement of the mother's estate.

In *Garrott v. Rives*,¹⁹⁰ the decedent's grandchildren, who were children of a predeceased daughter, were charged with an advancement because of a conveyance of land to them by their father.¹⁹¹ After the death of the decedent's daughter, the grandfather loaned money to his son-in-law to purchase the land but later the son-in-law could not repay the loan. To settle the debt, the grandfather directed the son-in-law to transfer the land to the children.¹⁹² The land was properly characterized as an advancement in the settlement of the grandfather's estate because the land was really a gift from him to the grandchildren.¹⁹³

The statute charges those claiming a share in the decedent's estate through a descendant who received a gift from the decedent with the value of that gift.¹⁹⁴ The obvious application of this principle is in the settlement of a grandparent's estate. If the grandchild's parent, a child of the decedent, dies before the decedent, the grandchild shares in the grandparent's intestate estate in the place of the predeceased parent. Because the child is claiming through the parent,¹⁹⁵ the child is charged with any advancements made by the grandparent to the parent.¹⁹⁶

A less obvious application of this principle occurred in *Veatch's Adm'r v. Loverett*¹⁹⁷ in which an intestate taker's cred-

¹⁸⁸ *Id.* at 247.

¹⁸⁹ 1894 Ky. Acts ch. 76, § 37 (current version at KRS § 404.010 (Baldwin 1984)).

¹⁸⁹ 80 S.W. 519 (Ky. 1904).

¹⁹¹ *Id.* at 520.

¹⁹² *Id.* at 519.

¹⁹³ *Cf. McGarr v. Taylor's Adm'r*, 98 S.W. 1030 (Ky. 1907) (wife given money by her husband to buy a lot and hold its title in trust for their son did not incur any obligation to husband's estate to repay the money because money was intended as gift to son).

¹⁹⁴ KRS § 391.140(1).

¹⁹⁵ KRS §§ 391.010, 391.040.

¹⁹⁶ *Sevier v. Bonta*, 290 S.W. 683, 684 (Ky. 1927) (advancement of land to a son by his father was chargeable to son's children in the settlement of the father's estate).

¹⁹⁷ 97 S.W.2d 47 (Ky. 1936).

itor was charged with the advancement made to that heir.¹⁹⁸ A son received an advancement from his father in the form of a loan he was never required to repay. The father died owning title to land which vested immediately upon his death in the son and the other intestate takers, subject to the son's obligation to account for the advancement he received. Prior to the settlement of the decedent's estate, a creditor of the son obtained an attachment and levied upon the son's undivided interest in the land.¹⁹⁹ The court concluded that because a creditor acquires no better rights in a debtor's property by attachment than the debtor has, the land attached by this creditor was subject to the son's advancement obligation. If the son's advancement exceeded the value of his intestate share of the decedent's estate, the creditor would have no interest in the land.²⁰⁰ In effect, the son's creditor was charged with the advancement made to the son.

A person generally is not charged with an advancement for gifts made by the decedent to the person's own child.²⁰¹ The express language of the advancement statute seems to preclude any other result because it provides that only gifts actually received by an intestate taker or a descendant through whom the intestate taker claims are chargeable as advancements to the intestate taker.²⁰² A child of the decedent would neither receive gifts given to his or her child by the decedent nor claim an intestate share through the grandchild.

The courts are alert for situations in which parental advancements to a child are disguised as gifts to a grandchild. For example, in one case²⁰³ a son asked his father to make an advancement to him by conveying certain land to his infant child. The reason for the form of the transaction was to prevent the son's creditors from reaching the land. The deed was not to be recorded so that when the land was sold, the father could convey the land with a new deed to the purchaser and the son could obtain the proceeds of the sale without his creditors'

¹⁹⁸ *Id.* at 50-51.

¹⁹⁹ *Id.* at 47-48.

²⁰⁰ *Id.* at 50.

²⁰¹ 87 S.W.2d at 383; *Stevenson v. Martin*, 74 Ky. (11 Bush) 485, 493 (1875).

²⁰² KRS § 391.140(1).

²⁰³ *Hamilton v. Moore* 70 S.W. 402 (Ky. 1902).

knowledge. The father, however, died before the land was sold. The court concluded that the son had to account to his father's estate for an advancement equal to the value of the land conveyed to his infant son.²⁰⁴

A child may be charged with an advancement for gifts made to the child's own child in situations other than attempts by the donor to disguise the true identity of the recipient of the gift. In *Weddle v. Waddle's Adm'r*,²⁰⁵ the grandmother had paid for her granddaughter's attendance at a music conservatory while the mother was alive. The court stated a broad rule that if, in making a gift to a grandchild, the grandparent's intention is to enable an intestate taker to enjoy presently a part of the estate the taker was destined to take eventually, the fact that the taker's child is the immediate beneficiary is irrelevant and the taker is charged with an advancement.²⁰⁶ On closer reading, the holding is much narrower. The mother had *agreed* that the grandmother should pay the cost of the granddaughter's schooling as an advancement against the mother's share of the grandmother's estate.²⁰⁷ Correctly stated, the holding is that a gift by a grandparent to a grandchild is chargeable to the parent as an advancement when the parent *consents* that the gift is to be paid to the grandchild on the parent's account.

Although the advancement statute only requires that gifts to descendants be treated as advancements, in some cases intestate takers have been required to account for gifts made to their spouses. If a gift is made by a parent to the child's spouse solely because the transferee is the spouse of that child, the gift is treated as an advancement to the child.²⁰⁸ If the gift is made to

²⁰⁴ *Id.* at 402-03. See also *Mills' Adm'x v. Mills*, 265 S.W.2d 458, 461 (Ky. 1954) (court indicated in dicta that a conveyance to his infant grandson ought to be treated as an advancement to the father's son).

²⁰⁵ 87 S.W.2d 383, 384 (Ky. 1935).

²⁰⁶ *Id.* at 383-384.

²⁰⁷ *Id.* at 384.

²⁰⁸ *Austin v. Sellars' Adm'r*, 261 S.W. 248, 248 (Ky. 1924) (Decedent built and occupied a house on land owned by her son-in-law to be near daughter. At decedent's death, son-in-law owned the house.); *Barber v. Taylor's Heir*, 39 Ky. (9 Dana) 84, 84 (1839) (Father settled daughter and her husband on his land. After daughter died, father transferred title to son-in-law.). Cf. *Duff v. Duff's Ex'r*, 142 S.W. 242, 243 (Ky. 1912) (will provisions established that testator intended a devise of land to a son's children as

both the child and spouse, the child is charged with an advancement for the whole amount.²⁰⁹ If, however, the transaction between the parent and the child's spouse is either a bona fide sale or creates a bona fide debt, no advancement is charged.

*Meysers v. Brown*²¹⁰ illustrates this distinction. In that case, the father conveyed land to his daughter's husband who executed notes for the purchase price. When the husband failed to pay the notes, the father took a reconveyance of the property in settlement of the debt and cancelled the notes. Although the daughter had derived some economic benefit from occupying the land with her husband while the land was in his possession, she was not charged with the use value of the land as an advancement. The court viewed the original transaction between the father and son-in-law as the creation, both in form and in fact, of a debtor-creditor relationship.²¹¹

In another similar case, a transaction between a mother and her son-in-law was characterized as a bona fide sale, and not a gift chargeable to the daughter as an advancement.²¹² A number of years before the mother's death, she and her son-in-law entered into an agreement wherein she agreed to build a house on his land, and he agreed that she could occupy the house for the rest of her life. There was a distinct agreement between the mother and her son-in-law supported by adequate consideration. The mother had the use of the son-in-law's land for her life, and he received an improvement to his property. Because there was no gift to the son-in-law, there was nothing to charge to the daughter as an advancement.²¹³

From the recipient's perspective, an advancement is a liability that will be charged to the recipient or those claiming through the recipient in the settlement of the donor's intestate estate.

advancement to the son); *Frye v. Avritt*, 68 S.W. 420, 421 (Ky. 1902) (in a will situation testator intended to charge his daughter an advancement for money he had given her husband).

²⁰⁹ *Pendley v. Lee*, 25 S.W.2d 1030, 1032 (Ky. 1930) (husband and wife received gratuitous land transfer from wife's parents); *Crafton v. Inge*, 98 S.W. 325, 325 (Ky. 1906) (father conveyed land to daughter and her husband).

²¹⁰ 110 S.W. 402 (Ky. 1908).

²¹¹ *Id.* at 404.

²¹² 261 S.W. at 248-49.

²¹³ *Id.*

From the perspective of an intestate taker who did not share in the decedent's *intervivos* largesse, however, the advancements doctrine guarantees a modicum of fairness in the distribution of the decedent's intestate estate by equalizing the financial treatment of all intestate takers.

An intestate taker not favored with gifts during the decedent's lifetime is not the only one who benefits from the advancement statute. A grantee of an intestate taker may set up advancements received by the other intestate takers as a defense in a lawsuit by the favored intestate taker.

*Heath v. Heath*²¹⁴ illustrates this point. The father in *Heath* gave two large tracts of land to his son and then died owning only a small tract of land. His heirs were three daughters who had not received any advancements and the son who had. Without securing the agreement of their brother, the daughters purported to convey the small tract to a third party for valuable consideration. Eventually, the son's children claimed their father's interest in that tract. They sought to have the land partitioned and to require an accounting for the rents.²¹⁵

The court permitted the purchaser to raise a defense that the son's children had no interest in the land because the son had received advancements in excess of his intestate share of his father's estate. The court noted that intestate takers who have received more than their share through advancements are not entitled to any more of the estate as against other intestate takers who have not been made the donee's financial equal. The same principle, the court concluded, should apply to a purchaser for valuable consideration from the unfavored intestate takers.²¹⁶ Application of the advancement statute determines the extent of the interest the purchaser bought from the unfavored intestate takers.

Under certain circumstances, the advancement doctrine may be raised as a defense by a grantee of the decedent. If a descendant who has received an advancement later asserts a claim to land conveyed by the decedent to a third party, the third party,

²¹⁴ 300 S.W. 343 (Ky. 1927).

²¹⁵ *Id.* at 343-44.

²¹⁶ *Id.* at 344.

under certain circumstances, may raise the advancement as a defense to the descendant's claim. Kentucky Revised Statute (hereinafter KRS) section 381.160 provides that if a grantor, by a deed containing a general warranty of title, purports to convey a greater interest in the land than the grantor actually owns and there is a claimant who has received an advancement from the grantor, the claimant is barred from recovering to the extent of the value of the advancement.

A father gave land to all of his children in *Blankenship v. Haldeman*.²¹⁷ As a gratuitous transfer, it qualified as an advancement. Thereafter, the father purported to convey the mineral rights to a portion of the land to a third party by a deed which contained a covenant of general warranty.²¹⁸ The children attacked that transfer, but the court determined that KRS section 381.160 barred their right to assert any claim to the mineral rights against the purchaser because the value of the land, received as an advancement, exceeded the value of the mineral rights transferred by the deed.²¹⁹

*Justice v. Mead*²²⁰ involved another application of KRS section 381.160. In that case the husband and wife each owned an undivided one-half interest in certain land prior to the wife's death. The wife died, and her one-half interest was inherited by their only child, subject to the father's rights as the surviving spouse. Purporting to be the sole owner, the husband conveyed the land to a third party by a deed containing a covenant of general warranty. After his father's death, the child received the proceeds of a life insurance policy which the father had purchased. The court characterized the insurance proceeds as an advancement within the meaning of KRS section 381.160. Because the proceeds of the policy exceeded the value of the undivided one-half interest in the property, the son was estopped by the statute from asserting a claim to the property.²²¹

VI. VALUATION OF ADVANCEMENTS

²¹⁷ 10 S.W.2d 469, 469 (Ky. 1928).

²¹⁸ *Id.* at 469.

²¹⁹ *Id.* at 470-71.

²²⁰ 295 S.W. 976 (Ky. 1927).

²²¹ *Id.* at 976.

A. *Present Undivided Interests*

An advancement of a *present, undivided* interest in either realty or personalty is valued at the time the gift is irrevocably made.²²² For example, stock is valued for advancement purposes when it is transferred to the donee. Any increase in value between the date of the delivery of the stock and the date of the donor's death is not part of the value of the advancement.²²³ When the descendant is the beneficiary of an insurance policy on the ancestor's life, the proceeds of the policy received by the descendant are charged as an advancement, not the premiums paid by the ancestor. This is because the gift is completed only by the death of the insured.²²⁴

Generally, if an advancement is in the form of debt forgiveness, the amount of the debt forgiven is the proper measure of the advancement.²²⁵ This was not, however, the measure of value used in *Garrot v. Rives*.²²⁶ In that case, the decedent's son-in-law was indebted to the decedent for money borrowed to purchase land. Later, in settlement of this debt, the decedent directed his son-in-law to convey the land to the decedent's grandchildren.²²⁷ The value of the land transferred to the grandchildren, not the amount of the forgiven debt, was the proper measure of the value of the advancement to grandchildren.²²⁸ Similarly, if a parent or grandparent is indebted to a descendant and conveys land to the descendant to settle the debt, any excess value in the land above the amount of the indebtedness is chargeable to the descendant as an advancement.²²⁹

Because real property is valued when the land is irrevocably given to the donee, the valuation time is usually when the deed

²²² E.g., *Damron v. Bartley*, 194 S.W.2d 73, 74 (Ky. 1946) (stock); *Edwards v. Livesay*, 261 S.W. 839, 841 (Ky. 1924) (land); *Isgrigg v. Isgrigg*, 200 S.W. 478, 479 (Ky. 1918) (land); *Farley v. Stacey*, 197 S.W. 636, 640 (Ky. 1917) (land); *Stevenson v. Martin*, 74 Ky. (11 Bush) 485, 488 (1875) (land).

²²³ 194 S.W.2d at 74 (although stock later rose substantially in value, advancement held valueless because stock had no value when given to donee).

²²⁴ *Thompson v. Latimer*, 273 S.W. 65, 67 (Ky. 1925).

²²⁵ *Garrot v. Rives*, 80 S.W. 519, 520 (Ky. 1904).

²²⁶ *Id.*

²²⁷ *Id.* at 519.

²²⁸ *Id.* at 520.

²²⁹ *Sevier v. Bonta*, 290 S.W. 683, 684 (Ky. 1927) (father conveyed farm valued at \$6000 to a son to whom he only owed \$3000).

is delivered.²³⁰ In one case,²³¹ however, the value of a real property advancement was determined as of the date the parent and child entered into a written contract for the transfer, not later when the deed was delivered. The court reasoned that the date of the signing of the binding contract was the appropriate time for fixing the value of the advancement because the donee took possession of the land on that date.²³²

If, at the time of transfer, the land is encumbered by a lien, the value of the advancement is the value of the property when conveyed minus the amount of the lien.²³³ Similarly, if the donor only paid part of the purchase price for the land and the donee pays the rest, the value of the advancement is equal to only the consideration paid by the donor.²³⁴

Occasionally, an attempted advancement of land is ineffective because the donor fails to comply with required formalities for land conveyances. Frequently the donee has taken possession before the invalidity of the transfer is realized. In such instances, the donee is not charged with the value of the use of the land under the void conveyance.²³⁵ The rationale offered for this result is that the donor and donee intended transfer of title to the land and not merely the use and occupation of it.²³⁶ Charging a donee with the value of the use and occupation under these circumstances is thought to impermissibly create a new object of the advancement.²³⁷ Because it defies economic reality, this rationale is not persuasive. The use of land is something of value. If such use is unaccounted for in the final settlement of the decedent's estate, financial equality among the intestate takers, the guiding principle of Kentucky's advancement statute, can never be achieved.

²³⁰ 261 S.W. at 840-41; *Ward v. Johnson*, 97 S.W. 1110, 1110 (Ky. 1906); *Bowles v. Winchester*, 76 Ky. (13 Bush) 1, 8 (1877).

²³¹ 74 Ky. (11 Bush) 485.

²³² *Id.* at 489.

²³³ *Weddington v. Adkins*, 54 S.W.2d 331, 332 (Ky. 1932) (land worth \$450 when conveyed encumbered by lien. Court held hand was worth at least \$200 more than the lien).

²³⁴ *Williamson v. Phillips*, 179 S.W.2d 603, 604 (Ky. 1944) (father paid \$1,000 of \$1,700 purchase price of land for child).

²³⁵ 200 S.W. at 479; 97 S.W. at 1111; 76 Ky. (13 Bush) at 13.

²³⁶ 200 S.W. at 479.

²³⁷ *Id.* at 480-81.

As the courts have interpreted the advancement statute, the donee must account for the value of the use of land only when the donor intended to give just the use and occupation of the land.²³⁸ If a descendant and spouse occupy land pursuant to a bona fide sale to the spouse by the descendant's parent or grandparent, the descendant is not charged with the economic benefit of the occupancy as an advancement.²³⁹ This is the rule even if the spouse does not fulfill the obligation to pay for the land, and the decedent takes a reconveyance of the property in settlement of the debt.²⁴⁰ The indirect economic benefit derived by the decedent's child through occupancy of the land with the spouse, while the land was in the spouse's rightful possession, is not chargeable to the descendant as an advancement.²⁴¹

If a defective gift of land is later perfected by a proper conveyance, the donee's advancement is valued at the time title is perfected in the donee, not when the donee earlier commenced occupancy under the invalid conveyance.²⁴² When a descendant occupies land under an invalid, but later perfected, gift of title, or occupies the land under a valid gift of mere use rights, questions may arise about the proper valuation of the advancement when they make improvements to the land.²⁴³ Permanent improvements of land by donees are excluded from the value of the land or the value of the use and occupancy of the land chargeable as an advancement.²⁴⁴ However, it is the enhancement in vendible value of the land caused by the improvements, and not the actual cost of the improvement, which is excluded.²⁴⁵ The cost of ordinary repairs to keep the land in the same

²³⁸ *Cochran v. Simmons*, 276 S.W. 989, 992 (Ky. 1925) (child received only a right to use land); *McCray v. Corn*, 182 S.W. 640, 644 (Ky. 1916) (children conveyed like estate); 80 S.W. at 520 (child occupied land during decedent's life); 76 Ky. (13 Bush) at 7 (father devised life estate to daughter and allowed her to take possession before his death).

²³⁹ *Myers v. Brown*, 110 S.W. 402, 404 (Ky. 1908).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² 261 S.W. at 840; 200 S.W. at 480; 76 Ky. (13 Bush) at 7.

²⁴³ See 276 S.W. at 992; 182 S.W. at 644; 97 S.W. at 1111.

²⁴⁴ See 276 S.W. 92; 182 S.W. 644; 97 S.W. 1111; *Clarke v. Clarke*, 56 Ky. (17 B. Mon.) 698 (1856) (donee not charged with any advancement for use of father's land because donee's improvements were equal to land's rental value).

²⁴⁵ 97 S.W. at 1111. *Contra* 276 S.W. at 992.

condition as when occupancy was commenced is not excluded from the value of the property or of the use and occupancy of the property,²⁴⁶ but the payment of the taxes due by the descendant in possession has been deducted from the value of the advancement chargeable to the descendant.²⁴⁷

B. Future and Other Divided Interests

When a gift of property is less than a fee simple title, valuation of an advancement is more difficult. When parents or grandparents give a descendant a life estate or remainder in property, the value of the descendant's advancement is only the present value of the descendant's estate in the property.²⁴⁸ The Kentucky court has authorized the use of the Life Expectancy and Annuity Table²⁴⁹ to compute the present value of a life estate or a remainder.²⁵⁰

For example, if a 30 year old descendent was given a life estate in \$100,000 worth of property with the remainder in a third person, the present value of the property is multiplied by 4% ($\$100,000 \times .04 = \4000) to obtain the annual income earned by \$100,000 invested at 4% interest. The annual income figure is multiplied by a factor of 19.4028, obtained from the Life Expectancy and Annuity Table for a 30 year old person. One is subtracted from the factor to account for the immediate payment of annual income. The resulting figure ($\$4000 \times 19.4028 = \$77,611.20$) is the value of the life estate of the 30 year old descendant in \$100,000 worth of property at 4% interest rate.

²⁴⁶ 97 S.W. at 1111.

²⁴⁷ 290 S.W. at 684.

²⁴⁸ 76 Ky. (13 Bush) at 15-17.

²⁴⁹ KRS Tables (Baldwin 1984).

Age	Immediate Annuity Certain for Total Expectancy of Life at 4%	Complete Expectation of Life
30	20.4028	43.18

²⁵⁰ *Morris v. Morris*, 293 S.W.2d 243, 245 (Ky. 1956) (used to compute the present cash value of a surviving spouse's dower right).

If the value of the life estate is subtracted from the total value of the property, the difference is the present value of the remainder interest in the property (\$100,000 - 77,611.20 = \$22,388.80).

There are problems in using the Life Expectancy and Annuity Table for computing the present value of life estates or remainders. First, the 4% interest rate fails to accurately reflect today's market conditions. Second, because the life expectancy figures are derived from the 1959-61 census, they do not reflect changes in life expectancy rates during the last twenty-five years. At least one case intimates that the court will look at factors other than the theoretical life expectancy of the life tenant and interest rates when valuing an interest which is less than a present fee simple. In *Ward v. Johnson*,²⁵¹ the court considered the *actual* life expectancy of the life tenant. There a father gave his daughter his own life estate in real property. The daughter, however, was not charged with an advancement for the value of the life estate because, in the opinion of the court, her father's ill health made the gift valueless.²⁵²

The valuation rules are different when the advancement is a life estate gift to a descendant with the remainder given to the child or children of the life tenant (*D* conveys property to *C* for life, remainder to *C*'s children). The value of the life estate is not calculated because the life tenant is charged with the full present value of the property in fee.²⁵³ The only justification offered is that this result supposedly fosters the equitable distribution policy of the advancement statute.²⁵⁴ It is difficult, however, to see equity in charging a life tenant with the full value of the fee merely because the remainder is given the life tenant's children. Certainly the life tenant in such circumstances has no greater rights and privileges of ownership than a life tenant whose estate is followed by the remainder given to a non-descendent. In either case, the life tenant lacks the fee owner's power to direct the devolution of the property at death. Never-

²⁵¹ 97 S.W. 1110 (Ky. 1906).

²⁵² *Id.* at 1110-11.

²⁵³ *Gossage v. Gossage's Adm'r*, 136 S.W.2d 775, 778 (Ky. 1940); 76 Ky. (13 Bush) at 15.

²⁵⁴ 76 Ky. (13 Bush) at 19.

theless, when the remainder is given to the life tenant's issue, the life tenant must account for the whole value of the fee,²⁵⁵ but when the remainder is owned by non-issue, the life tenant's advancement is the value of just the life estate.²⁵⁶

When a descendant is given a concurrent ownership interest in the advancement's subject matter, the descendant is usually charged with only the value of the fractional interest acquired. For example, in one case, a parent's gratuitous conveyance to a child of an undivided one-third fee interest as a tenant in common was valued at one-third of the value of the fee at the time of the conveyance.²⁵⁷ In the advancement cases involving gratuitous conveyances of the fee interest in land to a child and the child's spouse as concurrent owners, however, the child received an undivided one-half interest in the land, but was charged with the full value of the land as an advancement.²⁵⁸

Kentucky's advancement statute specifically provides that an advancement is "estimated according to the value of the property when given."²⁵⁹ The statute has been consistently interpreted to mean that the value of a present interest is determined when the property is irrevocably given to the donee.²⁶⁰ If the statute requires the same valuation time when the gift is a future interest, a remainder is valued when created, not when the donee finally comes into possession of the property. This is the result when the donor gives a life estate to a third party and the remainder to a descendant (*D* conveys property to *X* for life, remainder to *D*'s child). The child's advancement is the total value of the property on the date of transfer minus the value of *X*'s life estate as computed by the mortality tables.²⁶¹

The case law ignores the statutory language when the future interest to be valued is a remainder given to a descendant following a life estate reserved by the donor (*D* conveys property

²⁵⁵ 136 S.W.2d at 778; 76 Ky. (13 Bush) at 12-13.

²⁵⁶ 136 S.W.2d at 778.

²⁵⁷ 97 S.W. at 1111.

²⁵⁸ See *Pendley v. Lee*, 25 S.W.2d 1030, 1032 (1930); *Crafton v. Inge*, 93 S.W. 325, 326 (1906).

²⁵⁹ KRS § 391.140(1) (Baldwin 1984).

²⁶⁰ See, e.g., 194 S.W.2d at 74 (personalty); 261 S.W. at 841 (realty).

²⁶¹ See *Popplewell v. Flanagan*, 244 S.W.2d 445, 448 (Ky. 1951); 136 S.W.2d at 778.

to *D* for life, remainder to *D*'s child).²⁶² In such instances, the full value of the property at the death of the donor, *D*, is charged to the descendant, *D*'s child.²⁶³ A similar result occurs when a donor reserves a life estate both for her or himself and a third person with a remainder to a descendant (*D* conveys property to *D* and *D*'s spouse for life, remainder to *D*'s child). The descendant, *D*'s child, is charged with an advancement equal to the value of the property at the time of the donor *D*'s death minus the value of the third person's life estate at the donor's death.²⁶⁴ These timing differences in valuing the descendant's future interest when the donor is the sole or co-life tenant are inexplicable. Not only does this contradict the express language of the statute, but two indistinguishable interests are treated differently. The donee's interest is no different when the life tenant is the donor or a third party. In either case, the donee has a remainder which cannot be enjoyed in possession until the death of the life tenant.

In one case the father conveyed title to land to his child reserving for himself and his spouse a right to receive a fixed percentage of the property income for their lives. The value charged to the child as an advancement was computed by valuing the father and mother's interest as of the date of the conveyance, not the date of the father's death, and subtracting their interest from the value of the land on the date of the conveyance.²⁶⁵ Even though this early valuation time appears to contradict the rule for valuation of a future interest following a donor's life estate, a real difference exists between the nature of this child's gift and a gift in remainder. The child was given complete title to the property, including the right to present possession and enjoyment, subject only to something like an equitable charge on the land²⁶⁶ payable to the donor and his spouse. When a child is given a remainder interest following a life estate in the

²⁶² See 136 S.W.2d at 778.

²⁶³ See *id.*; *Hook v. Hook*, 52 Ky. (13 B. Mon.) 526, 529-30 (1853).

²⁶⁴ 244 S.W.2d at 449.

²⁶⁵ *Id.* at 448-49.

²⁶⁶ Property conveyed by an owner who states an intention that the transferee holds it "subject to a charge" to confer part or all of the capital or income of the property on another has been held to be subject to an equitable charge. G.G. & G.T. BOGERT, *LAW OF TRUSTS* 28-30 (5th ed. 1973).

donor or the donor and another, the child has no present interest in the land and no present right to possess and enjoy it.

C. Evidence of Value

The actual value of advancement property may be established in a variety of ways. Traditionally, expert testimony from an appraiser is competent. Other evidence, however, is also admissible. Lay witnesses who live near the land advanced and who are familiar with the value of real estate in the community are competent to testify to establish the value of the land.²⁶⁷

Invalid deeds established the value of land in *Cornette v. McCoy*,²⁶⁸ where prior to her death, the decedent's children attempted an invalid oral partition of the decedent's land. Pursuant to this invalid agreement, the children executed deeds to the decedent's land. The deeds were not valid because they were executed while the decedent was still alive and the children did not own any interest in the land. When the land later became the subject matter of an advancement, the values recited in the invalid deeds were accepted as a basis for determining the value of the land.²⁶⁹

In another case, entries in an account book kept by the donor were found to be competent evidence to establish the amount of money given to the donee.²⁷⁰ Generally, however, the donor's ability to fix the value of an advancement is limited.²⁷¹ This is consistent with the rule that the advancement statute, not the intention of the donor, controls the question of an advancement.²⁷² If a donor's valuation was dispositive, the donor could easily circumvent the statute's policy of achieving financial equality among the decedent's intestate takers. By undervaluing or overvaluing a conveyance, the donor could favor one intestate taker over another. Consequently, no valuation made by the donor is conclusive.²⁷³ Because the value of property is within

²⁶⁷ 194 S.W.2d at 74.

²⁶⁸ 140 S.W. 683, 683-84 (Ky. 1911).

²⁶⁹ *Id.*

²⁷⁰ *Hill's Guardian v. Hill*, 92 S.W. 924, 925 (Ky. 1906).

²⁷¹ *See id.*; 76 Ky. (13 Bush) at 18.

²⁷² 76 Ky. (13 Bush) at 19.

²⁷³ 97 S.W. at 1111.

the personal knowledge of the donor, however, the donor's valuation can be considered along with other evidence to determine the actual value of the property.²⁷⁴ The value of an advancement is a question for the trier of fact and the trier's finding will not be disturbed on appeal unless clearly contrary to the weight of the evidence.²⁷⁵

The only method by which a donor can control whether an advancement has or has not been made and the value of given advancements is for the donor to die testate. In total testacy the will provisions regulate whether an advancement has been made²⁷⁶ and the value of any advancement.²⁷⁷

D. Interest

Because only gifts qualify as advancements under Kentucky's advancement statute, an advancement does not create any obligation to repay the donor's estate.²⁷⁸ Charging a donee with interest on an advancement is inconsistent with this gift theory. With only a few exceptions, the case law reflects that an advancement is a gift, not a loan with interest chargeable to the donee.²⁷⁹

The few cases that do permit interest to be assessed against recipients of advancements rest on the ground that interest promotes greater equality among intestate takers.²⁸⁰ In one case, the

²⁷⁴ See *Boblett v. Barlow*, 83 S.W. 145, 146 (Ky. 1904); 76 Ky. (13 Bush) at 16-17.

²⁷⁵ 194 S.W.2d at 74.

²⁷⁶ See *Sullivan v. Sullivan*, 92 S.W. 966, 967 (Ky. 1906).

²⁷⁷ *Montgomery's Trustee v. Brown*, 121 S.W. 472, 475 (Ky. 1909); 97 S.W. at 1111.

²⁷⁸ See *Farmers' Exch. Bank of Millersburg v. Moffett*, 75 S.W.2d 1063, 1065 (Ky. 1934); *Gibbs v. Gibbs*, 72 S.W.2d 473, 474 (Ky. 1934); *McPherson v. Black*, 284 S.W. 413, 414-15 (Ky. 1926); 261 S.W. at 840.

²⁷⁹ See, e.g., *Royse v. Royse*, 34 S.W. 1068, 1069 (Ky. 1896) (issue of interest on an advancement raised but not decided); *Metcalf v. Stubbs*, 3 Ky. Op. 338, 340 (1869) (expressly refused to permit the charging of interest on an advancement).

²⁸⁰ *Cline v. Cline*, 284 S.W. 1110, 1111 (Ky. 1926) (court charged descendants interest on transfers fraudulently obtained from decedent from date of conveyances to date conveyances were set aside and charged interest on nonfraudulently obtained transfers from date of donor's death until time estate distributed); *Payne v. Auxier*, 277 S.W. 298, 299 (Ky. 1925) (interest charged on excess of advancement over descendant's intestate share from date of incomplete original distribution of decedent's estate until final distribution of estate).

intestate takers who were not given advancements were awarded money from the decedent's intestate property equal to interest charged on the excess of an advancement over the intestate shares.²⁸¹ The interest was computed from the date of the original, but incomplete, distribution of the decedent's intestate estate to the final distribution some twenty-five years later. In the original distribution there was not enough property to equalize the shares of those intestate takers who received advancements with those who did not. In the original distribution, the donee's advancement exceeded the individual shares of the other intestate takers by approximately \$1500. Because the donee enjoyed a full share of the decedent's estate for almost twenty-five years prior to the final settlement while the other intestate takers did not, the court determined that it was equitable and just to award an amount of money to the other intestate takers equivalent to interest on \$1500 for the time period the final distribution was postponed.²⁸² Although the result seems equitable, it is inconsistent with the overwhelming number of advancement decisions that do not hold donees of advancements accountable for interest on the advancement.²⁸³

With a will, the testator's intention is controlling.²⁸⁴ The testator can affirmatively make a will beneficiary accountable for *intervivos* gifts as advancements and instruct the executor to charge interest on such gratuitous transfers.²⁸⁵ Testamentary directions to charge a donee with interest on an advancement are given effect by computing interest from the date of the *intervivos* advancement and subtracting that amount from any amount payable to the donee under the terms of the will.²⁸⁶

VII. AN EXCEPTION: MAINTAINING, EDUCATING OR GIVING MONEY WITHOUT A VIEW TO A PORTION IN LIFE

Only one exception exists to Kentucky's statutory mandate that property given or devised by a parent or a grandparent to

²⁸¹ 277 S.W. at 299.

²⁸² *Id.*

²⁸³ See note 279 *supra*.

²⁸⁴ See notes 276-77 *supra*.

²⁸⁵ *Fisk v. Carpenter*, 242 S.W. 30, 31 (Ky. 1922).

²⁸⁶ *Id.*

a descendant must be charged to the descendant in the division and distribution of the donor's undevise estate. The exception embodied in the statute provides that "[t]he maintaining or educating or the giving of money, to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement."²⁸⁷ Case law examples of transactions within the exception are not numerous, but they are diverse. For example, a parent's payment of attorney's fees incurred by an adult child in a criminal proceeding was found to fall within the exception²⁸⁸ as was the payment of the cost of a trip to Europe for two children of another parent.²⁸⁹

The statutory language "without any view to a portion or a settlement in life"²⁹⁰ seems to require consideration of the donor's intention. The case law, however, emphatically rejects the idea that the donor's intention controls the determination of whether an expenditure to a child was made with a "view to a portion".²⁹¹ Instead, the case law articulates an objective test holding that if the parental expenditure is for the health, education, maintenance, amusement or other temporary pleasure of the child, it is not made with a "view to a portion" in life.²⁹² If the gift is made for investment in property or for other permanently enjoyable uses, it is an advancement.²⁹³ The type and size of the donor's estate and the gift's amount are relevant to determine whether expenditures are temporary or permanent.²⁹⁴

Maintenance of a child usually falls within the statutory exception because the support of an infant child is a parental obligation running to all of the parent's children. Thus, the equality in distribution policy of the advancement statute is not jeopardized by recognizing the fulfillment of this obligation as

²⁸⁷ KRS § 394.140(1) (Baldwin 1984).

²⁸⁸ *Chism v. Chism*, 176 S.W.2d 101, 103 (Ky. 1943).

²⁸⁹ *Bowles v. Winchester*, 76 Ky. (13 Bush) 1, 17-18 (1877).

²⁹⁰ KRS § 394.140(1).

²⁹¹ See note 270 *supra*.

²⁹² *Hill's Guardian v. Hill*, 92 S.W. 924, 925 (Ky. 1906); 76 Ky. (13 Bush) at 19; *Clarke v. Clarke*, 56 Ky. (17 B. Mon.) 698, 706-07 (1856).

²⁹³ See note 292 *supra*.

²⁹⁴ See 92 S.W. at 925-26; 76 Ky. (13 Bush) at 15.

an exception.²⁹⁵ No legal duty is imposed on a parent to support an adult child, but the discharge of a parent's moral obligation to support a disabled adult child should also be within the statutory exception.²⁹⁶ However, if an adult child suffers no mental or physical impediments to self sufficiency but is gratuitously supported and maintained by a parent, the value of that support ought to be treated as an advancement. It is analogous to holding a child accountable for the value of the use of land when a parent permits a child to occupy the land gratuitously.²⁹⁷

Similarly, while parental expenditures for a child's professional school training are treated as advancements, providing an ordinary education to a child is not.²⁹⁸ The court reasoned in *Hill's Guardian v. Hill*²⁹⁹ that the father's payment of his son's medical school education was an advancement because the father entered each expenditure into an account book. According to the court, the periodic entries evidenced the father's intention that the money was provided with a view to a portion or settlement in life.³⁰⁰ The result is correct, but the reliance on the account book to establish whether the transaction was within or without the exception to the advancement statute was wrong. The intention of the donor is irrelevant in determining whether the expenditure is or is not an advancement. When a parent provides a child with a typical or ordinary amount of education, the parent is merely fulfilling a parental obligation owing to all of the children. That is not true when the parent provides an adult child with a professional school education. The child has been given something just as permanent and lasting in value as a child who is given a piece of land by a parent and should be likewise held accountable for its value.

²⁹⁵ See 92 S.W. at 925-26.

²⁹⁶ Cf. *Crain v. Mallone*, 113 S.W. 67, 68-69 (Ky. 1908) (Without specifically referring to the exception to the advancement statute, the cost of maintaining a disabled adult child was not treated as an advancement.).

²⁹⁷ See, e.g., *Cochran v. Simmons*, 276 S.W. 989, 992 (Ky. 1925); *McCray v. Corn*, 182 S.W. 640, 643-44 (Ky. 1916).

²⁹⁸ See 92 S.W. at 925-26. Cf. *Brannock v. Hamilton*, 72 Ky. (9 Bush) 446, 448-49 (1872) (money paid by grandfather for granddaughter's ordinary education not an advancement, but court's rationale was incorrect because the child's mother was the one against whom the money was sought to be charged).

²⁹⁹ 92 S.W. 924 (Ky. 1906).

³⁰⁰ *Id.* at 925-26.

Without the statutory exception, the advancement statute would deprive parents of the ability to give a child even a small gift of money for amusement or pleasure without the child being accountable for the money as an advancement. The exception, however, is not intended to be a means by which parents can excuse children from having to account for gifts of significant and permanent value. This temporary/permanent enjoyment dichotomy, as applied in *Clarke v. Clarke*³⁰¹ convinced the court that the father's \$500 gift to his son was not within the exception.³⁰² When applied in *Bowles v. Winchester*,³⁰³ however, the court concluded that \$15,000 expended by the parent on two children was not an advancement.³⁰⁴ In *Clarke*, the father had conveyed land to his son for consideration of \$2100.³⁰⁵ After the sale, the father returned \$500 of the purchase price to his son. Although the amount of money was not large, the transaction was treated as the equivalent of giving the son \$500 worth of real property. Therefore, because the money was for permanent, not temporary, pleasure it was treated as an advancement. In *Bowles*, the money was expended to pay for a one-year tour of Europe.³⁰⁶ Although the amount of money was sizable for the time period, it was small in relationship to the substantial wealth of the parent. Consequently, the court treated the gift as one for the temporary, not permanent, amusement and pleasure of the two children and they did not have to account for the money in the final settlement of their parent's estate.³⁰⁷

VIII. A PROPOSAL FOR STATUTORY REFORM

The foregoing discussion of Kentucky's case law on advancements demonstrates a number of serious problems with Kentucky's current advancement statute. The following statute is proposed as a solution to the problems currently associated with the advancement doctrine in Kentucky. It is modeled on the

³⁰¹ 56 Ky. (17 B. Mon.) 698 (1856).

³⁰² *Id.* at 709.

³⁰³ 76 Ky. (13 Bush) 1 (1877).

³⁰⁴ *Id.* at 17-20.

³⁰⁵ 56 Ky. (17 B. Mon.) at 704.

³⁰⁶ 76 Ky. (13 Bush) at 17.

³⁰⁷ *Id.* at 19-20.

advancement statute contained in the Uniform Probate Code³⁰⁸ but modified because a surviving spouse in Kentucky receives a dower share rather than an intestate share as provided under the Uniform Probate Code.³⁰⁹

(1) Any inter vivos gift of real or personal property made to an intestate taker by a decedent who dies totally intestate shall be charged to the intestate taker as an advancement against the recipient's share of the estate only if declared to be an advancement in a contemporaneous writing signed by the decedent or acknowledged to be an advancement in writing by the recipient. If the recipient does not survive the decedent, the property given is not charged as an advancement against the intestate share of the decedent's estate taken by the recipient's issue unless the declaration or acknowledgment provides otherwise.

One critical problem with Kentucky's advancement statute is its application to the estates of decedents who never intended the doctrine to apply to a recipient of their inter vivos or testamentary largesse. Currently, the only way such donors can prevent application of the advancement doctrine is to die totally testate.³¹⁰ The application of the doctrine to the estate of any decedent who has not expressly manifested an intention that the doctrine ought to apply is based on an erroneous assumption that decedents want equality among their intestate takers. Donors rarely intend to make recipients accountable for the value of small gifts. Larger and more valuable inter vivos gifts favoring some intestate takers over others more likely result from a donor's knowing decision to favor the recipient at the expense of other intestate takers than from a decision to make a gift which is later charged to the recipient to equalize the shares of all intestate takers.

The proposed statute is based on the opposite presumption that most donors do not intend inter vivos gifts to be advancements against the donee's intestate share of the donor's estate.

³⁰⁸ UNIF. PROBATE CODE § 2-110 (1982).

³⁰⁹ *Id.* at § 2-102; KRS § 392.020 (Baldwin 1984).

³¹⁰ See *Remmele v. Kinstler*, 298 S.W.2d 680, 681-82 (Ky. 1957) (conveyance treated as advancement contrary to grantor's intent because grantor died intestate).

Decedents may still make advancements under this proposed statute, but a donor's intention that the *intervivos* gift be held an advancement must be demonstrated by written evidence before a donee can be charged with the value of the gift. In addition to this statutorily prescribed method, donors would continue to have the power to charge donees with the value of advancements by appropriate provisions in their wills.³¹¹

Just as it is wrong to presume that donors intend *intervivos* gifts to potential intestate takers to be advancements, it is erroneous to presume that decedents want *intervivos* gifts charged to children of donees if the donees do not survive the decedents. Therefore, the proposed statute requires written evidence of the donor's intention to charge the child of a donee with the donee's advancement. Without written evidence of such donor intention, a gift which would be chargeable against the recipient as an advancement if the recipient survived the donor is not charged against the recipient's child even if the recipient does not survive the donor and the donee's child shares in the donor's intestate estate.

The unexpected consequences caused by application of Kentucky's current advancement statute are only worsened by the statute's application to cases of partial as well as total intestacy. Not only are *intervivos* gifts that were never intended to be taken into account in the final settlement of the decedent's estate charged against the donee,³¹² but will gifts are deducted from the beneficiary's share of the testator's undisposed of intestate property.³¹³

The proposed statute restricts the advancement concept to situations of total intestacy. When decedents die partially testate, they must expressly provide in their wills that a will beneficiary is to account for any will gifts in the distribution of the decedent's intestate property. This is in keeping with the entire thrust of the proposed statutory changes that no one should be charged with an advancement unless there is an unambiguous, written manifestation of the donor's intention to so charge the donee.

³¹¹ See *Jones v. Jones' Ex'rs*, 250 S.W. 92, 94-95 (Ky. 1923); *Gulley v. Lillard's Ex'r*, 141 S.W. 58, 59 (Ky. 1911).

³¹² See, e.g., *Ecton v. Flynn*, 17 S.W.2d 407, 410 (Ky. 1929).

³¹³ See, e.g., *Walters v. Neafus*, 125 S.W. 167, 169-70 (Ky. 1910).

This portion of the proposed statutory revision of Kentucky's advancement statute also eliminates a basic inconsistency embodied in Kentucky's present advancement statute. Currently, the advancement statute treats only *intervivos* gifts from parents and grandparents to a descendant as advancements when those descendants are intestate takers of the donor.³¹⁴ If the class of intestate takers includes only ancestors or collateral relatives of the decedent, the advancement concept is inapplicable even if some members of the class have received *intervivos* gifts from the decedent and others have not. If the pursuit of equality among intestate takers is a legitimate and important concern when the intestate takers are descendants of the decedent, it is an equally legitimate and important concern when the intestate takers are collateral relatives or ancestors. Under the proposed statute, the decedent is given the power to hold any intestate taker accountable for the value of an *intervivos* gift if that intention is expressed in an appropriate writing.

The requirement of written evidence of the donor's intention to charge the donee of an *intervivos* gift with an advancement will help to decrease the amount of advancement litigation. The current statute stimulates litigation over the nature of various parent-child and grandparent-grandchild transfers,³¹⁵ the adequacy of the consideration for such transfers,³¹⁶ and the truthfulness of documents such as deeds or notes evidencing the transfers.³¹⁷ The present statutory exception which permits a parent or grandparent to maintain, educate, or give money to a descendant without a view to a portion or settlement³¹⁸ also creates opportunities for litigation. Whether a particular expenditure falls within the statutory exception is a question of fact which must be determined on a case-by-case basis. Similarly, the temporary/permanent pleasure test for determining whether a gift of money was made with or without a view to a portion or settlement in life must be addressed in the same case-by-case manner.³¹⁹ The proposed statute eliminates the potential for this

³¹⁴ KRS § 391.140(1) (Baldwin 1984).

³¹⁵ See text accompanying notes 70-139 *supra*.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ KRS § 391.140(1).

³¹⁹ See notes 291-307 *supra* and accompanying text.

type of litigation by requiring written evidence of the donor's intention to create an advancement with the intervivos gift she or he made to the donee. Only challenges to the validity of the writing based on allegations of forgery, fraud, undue influence or mistake would be brought to the courts.

(2) An advancement is valued at the earlier of the time the intestate taker came into possession or enjoyment of the property or the decedent's death. Only the value of the donee's actual interest or estate in the property at the time set for valuation is charged to the donee as an advancement.

Kentucky's case law has developed a number of unfair distinctions in the timing and method of valuing certain kinds of advancements. For example, a child who is given a life estate with a remainder in a third person is charged with only the value of the life estate.³²⁰ The same child is charged with the whole value of the property given if the remainder is given to that child's children.³²¹ A similar anomaly arises when the child is given a remainder following a life estate in certain property. If the remainder follows a life estate in a third person, the value of the child's remainder interest is determined at the creation of the interests by subtracting the value of the stranger's life estate from the fair market value of the property.³²² If the child's remainder interest follows a life estate created in favor of the donor, the child is charged with the full value of the property at the death of the donor when she or he finally has the present right to possess the property.³²³

Under the proposed valuation rule, any present possessory estate or interest given is valued as of the time the estate or interest was created. Any future interest given is valued when the donee first has the right to possess or enjoy the property or at the time of the donor's death, whichever occurs first. Valuation of a future interest can not be postponed beyond the donor's death because of the need to complete administration of the donor's estate. Until the value of an advancement is

³²⁰ *Gossage v. Gossage Adm'r*, 136 S.W.2d 775, 778 (Ky. 1940).

³²¹ *Id.*; *Bowles v. Winchester*, 76 Ky. (13 Bush) 1, 12-13 (1877).

³²² See note 261 *supra*.

³²³ See note 263 *supra*.

determined, the intestate share of the donee and the other intestate takers cannot be ascertained. When the time for valuation occurs, the donee cannot be charged with more than the value of the actual interest or estate the donee then owns. If, at the time for valuation, the donee owns only a present possessory life estate, the donee is charged with only the value of the life estate regardless of the identity of the future interest holders. Similarly, if, at the donor's death, the donee owns a remainder interest which is not made possessory by the donor's death, the donee is only charged with the value of that future interest and not with the whole value of the fee simple.

(3) Advancements shall not be considered part of the decedent's personal estate in estimating the distributable share of the surviving spouse.

This last section is necessary because in Kentucky the surviving spouse is not an intestate taker of the decedent unless the decedent dies without any issue, parents, siblings or the issue of siblings surviving.³²⁴ Instead, the surviving spouse is entitled to one half of the surplus personalty the decedent died owning, one-half of the surplus realty the decedent died owning and a life estate in one-third of any real property the decedent conveyed away during marriage without the release of the dower.³²⁵ If advancements are taken into account in determining the surviving spouse's distributable share, the spouse would be entitled to a proportionately larger share of the intestate property. Because the donee of an advancement is not required to actually surrender to the donor's estate any excess advancement over the donee's intestate share, the spouse would be entitled to this larger share at the expense of any intestate taker who did not receive advancements.

For example, assume the decedent, owning \$40,000 in surplus personalty, died survived by a spouse and two children. Also, assume that one of the children received an advancement of \$20,000 from the decedent. If the advancement is added into the

³²⁴ KRS § 391.010(4) (Baldwin 1984).

³²⁵ KRS § 392.020.

decedent's estate for the purpose of calculating the spouse's share, the surviving spouse is entitled to \$30,000 in personalty (1/2 of \$60,000). With the advancement included, the children are entitled to share equally in the remaining \$30,000 receiving \$15,000 a piece. Although the donee of the \$20,000 advancement would not be entitled to receive anything more from the estate, that child would not have to contribute the \$5,000 excess over her or his intestate share to the decedent's estate. Thus, there would only be \$40,000 in personalty to distribute. The surviving spouse would be entitled to \$30,000 and the child who did not receive an advancement would only receive \$10,000 from the decedent's intestate personalty.

If, however, the \$20,000 advancement is excluded from the calculation of the surviving spouse's distributable share as directed by the proposed statute, the spouse would be entitled to only \$20,000 from the decedent's personalty (1/2 of \$40,000). The remaining \$20,000 of surplus personalty will be distributed solely to the child who did not receive an advancement because the child who received the advancement received more than her or his intestate share of \$10,000 (1/2 of \$20,000). This result is fairer because the child who did not receive the advancement is not penalized by receiving the smaller intestate share which results from including the advancement.

The surviving spouse continues to be protected against fraudulent transfers made by the decedent spouse. Any transaction which is a fraud on the surviving spouse's marital share may be set aside to the extent necessary to protect the surviving spouse's rights. A transfer is a fraud on the marital share if it is not made in good faith or if it is unreasonable in amount.³²⁶ Thus, even a transfer to an intestate taker in the form of an advancement is attackable as a fraud on the marital share of the surviving spouse. The proposed advancement statute would not eliminate this protection for the surviving spouse.

The proposed changes in Kentucky's advancement statute would result in a statute that is fairer in result than the present

³²⁶ See *Rudd v. Rudd*, 214 S.W. 791, 793-94 (Ky. 1919). See also *Murray v. Murray*, 13 S.W. 244, 245-46 (Ky. 1890).

statute and more likely to effectuate the average donor's intent. No longer would there be a danger that a birthday, graduation or other present will be used later to decrease the intestate share of a child of the donor. Children who are rewarded by a parent for fulfilling their filial duties would no longer see that reward set off against their shares of the parent's intestate estate. Yet, donors who truly intend to advance a child part of their inheritance can accomplish that result by simply evidencing that intention in writing.

CONCLUSION

Kentucky's advancement statute works injustices in a number of ways. Gifts never intended as advancements are charged against the recipient's intestate share. Descendants are charged with advancements but collateral heirs receiving the same gifts are not charged. The courts characterize transactions between the decedent and descendants of the decedent as sales, debts or advancements without reference to the decedent's intention. The valuations rules are based on distinctions which are based on differences in form, but not differences in fact. Kentucky's highest court has recognized that Kentucky's advancement doctrine works injustices, but the court believes that the fault lies in the statutory language, not in its interpretation of the advancement statute.

This article proposes changing Kentucky's advancement statute to end its unfairness and arbitrariness. The decedent's intention is dispositive of whether an advancement has been made. However, the intention to make an advancement must be expressed in writing. A consistent rule for valuing advancements is proposed. Only the actual interest of the donee is valued and it is valued only at a clearly specified time. Finally, the proposed statute calculates the surviving spouse's share of the decedent's estate without reference to any advancements made by the decedent. This precludes unfairness to those intestate takers who did not receive an advancement. Passage of this proposed statute will result in an advancement statute which is clearer, fairer and easier to apply.