



Kentucky Law Journal

Volume 73 | Issue 2

Article 9

1984

Kentucky Law Survey: Property

Carolyn S. Bratt
University of Kentucky

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Recommended Citation

Bratt, Carolyn S. (1984) "Kentucky Law Survey: Property," *Kentucky Law Journal*: Vol. 73 : Iss. 2 , Article 9.
Available at: <https://uknowledge.uky.edu/klj/vol73/iss2/9>

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Property

BY CAROLYN S. BRATT*

Law students, and probably practitioners, are often perplexed by the multitude of topics covered under the rubric of property law. Unfortunately, this Survey article does nothing to dispel the impression of property law as a hodgepodge of unrelated topics. This Survey of recent decisions discusses topics ranging literally from "a" to "z"—adverse possession to zoning.

I. ADVERSE POSSESSION

In order to successfully assert a claim of title to land based on adverse possession, one's possession of the land must have been open and notorious, actual, exclusive, continuous, and under a claim of right for the statutory period.¹ Because these elements of adverse possession have been subjected to years of judicial interpretation, it would seem unlikely that surprises in their application could arise. Nevertheless, the Kentucky Supreme Court reached an unorthodox result in a recently decided adverse possession case. In *Humphrey v. Harrison*² the Court sustained a son's claim of ownership of an undivided one-half interest in the family farm on the basis of adverse possession. The son predicated his claim on two factors: his father's invalid parol gift to him of half of the farm and more than fifteen years of joint occupation of the farm with his father after the attempted gift.³

* Professor of Law, University of Kentucky. J.D. 1974, Syracuse University. The author gives special recognition to Karen Greenwell, J.D. 1985, University of Kentucky.

¹ 7 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 1013[1] (1984). "Actual" possession means that the claimant has used the property in keeping with its geophysical nature. *Id.* at ¶ 1013[2][a]. The "open, notorious and visible" requirement means that the possessor must do such acts to the land as would put a duly alert landowner on notice of the possessor's presence. *Id.* at ¶ 1013[2][b]. The requirement of "hostility" is imposed so as to require possession "which conveys the clear message that the possessor intends to possess the land as [her or his] own." *Id.* at ¶ 1013[2][c]. Traditionally, "exclusive" possession must exclude the true owner from possession. *Id.* at ¶ 1013[2][d]. "Continuous" may mean uninterrupted possession although it does not mean constant. *Id.* at ¶ 1013[2][e]. "Claim of right" means that the possessor must make entry to claim the property as her or his own. *Id.* at ¶ 1013[2][f].

² 646 S.W.2d 340 (Ky. 1982).

³ *Id.* at 341.

Prior to *Humphrey*, Kentucky case law had already recognized an exception to the exclusivity requirement in cases of adverse possession following an invalid oral gift. These decisions recognized the legitimacy of such a claim even though the would-be donor of the land continued to occupy the land jointly with the donee after the attempted parol gift.⁴ However, the cases prior to *Humphrey* clearly required that, after the attempted gift, the would-be donor must disclaim all continued ownership of the land, admit that ownership was in the donee, and refrain from any acts of ownership.⁵ With such a showing, the donor's continued presence on the land would not negate the donee's claim of title by adverse possession.

In *Humphrey*, however, there was no such showing. In fact, the father kept one-half of the farm profits and paid one-half of the farm expenses (splitting both with the son) during the entire twenty-year period at issue. The father also paid the annual insurance premiums on the farm and claimed ownership of the whole both on his federal income tax return as well as on loan applications. This behavior hardly constitutes a disclaimer of all ownership. Indeed, it is not even consistent with a disclaimer of an undivided one-half interest in the farm.

Perhaps the recipient of an invalid gift of an undivided fractional interest in land who subsequently jointly occupies the land with the donor should have some method to perfect title. In some cases title might properly be established by a claim of adverse possession of the fractional interest. If the Kentucky Supreme Court's purpose was to introduce such a novel idea, *Humphrey* was a poor case with which to do it. Not only is the decision at odds with prior case law, but it is unclear whether the land was ever actually possessed jointly by father and son.

⁴ See, e.g., *Owsley v. Owsley*, 77 S.W. 397, 402 (Ky. 1903); *Ward v. Edge*, 39 S.W. 440 (Ky. 1897).

The *Humphrey* dissent cites *Moore v. Terry*, 170 S.W.2d 29, 31 (Ky. 1943) for the proposition that "[w]here property is jointly occupied, the possession of neither occupant can be deemed adverse to the rights of the other." 646 S.W.2d at 343 (Palmore, J., dissenting). However, that case is distinguishable from *Owsley* and *Ward*. *Moore* involved joint occupancy by a man and his children all of whom claimed under their spouse-mother, whereas *Owsley* and *Ward* involved joint occupancy by the purported donor and donee.

⁵ 646 S.W.2d at 341 (citing *Owsley v. Owsley*, 77 S.W. at 401-02 and *Layne v. Norman*, 221 S.W. 869, 870 (Ky. 1920)).

Their acts are as indicative of "a profit-sharing tenant farmer arrangement as [of] a joint tenancy."⁶

II. WILLS AND TRUSTS

In *Conley v. Brewer*,⁷ the Kentucky Court of Appeals addressed the permissibility of a partial revocation of a will by physical act when the act is accompanied by an expressed intention to increase the shares of the other residuary takers. The testator in *Conley* validly executed a will containing two separate gifts for her stepgrandchild.⁸ The grandchild was given \$5000 in one provision and one-third of the residuary in another provision. Subsequently, the testator inked out both the general bequest of \$5000 and the grandchild's name in the residuary clause. The testator also substituted the phrase "one-half (1/2)" for the phrase "one-third (1/3)" in the residuary gifts originally made to the two remaining residuary takers.⁹

The grandchild argued that any increase in the shares of the remaining residuary takers would constitute a new testamentary disposition. To be valid, such an increase would have to be made in compliance with the statutory requisites for executing a valid will or codicil.¹⁰ This increase was not so executed. The court, however, held that if a devise or bequest is revoked in accordance

⁶ *Id.* at 342. The Court recognized the ambiguous nature of the father and son's financial arrangements but concluded that the son's "actions coupled with the uncontradicted evidence of an unconditional parole gift proven in a clear and convincing manner makes the quantum leap from tenant farmer to joint tenant." *Id.*

⁷ 666 S.W.2d 751 (Ky. Ct. App. 1983).

⁸ *Id.* at 751. To digress somewhat, it is not easy to articulate a definition of "stepgrandchild" in particular or "step" relationships in general. For instance, must a stepchild be a minor when the natural parent marries in order to create a legal "step" relationship or is the stepchild's age immaterial? Does the "step" relationship terminate if the "step" and natural parent divorce? Must one of the child's natural parents be dead in order for a "step" relationship to exist between the child and the new spouse of the other natural parent? See Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209 (1970).

⁹ 666 S.W.2d at 751.

¹⁰ *Id.* at 753. In Kentucky, no will or codicil is valid unless it is in writing and subscribed either by the testator or by some person who subscribed the testator's name in the presence and at the direction of the testator. Moreover, if the will or codicil is not wholly written by the testator, the testator's subscription must be made or acknowledged by the testator in the presence of at least two credible witnesses. The witnesses must subscribe their names in the presence of the testator and in each other's presence. See KY. REV. STAT. ANN. § 394.040 (Baldwin 1978) [hereinafter cited as KRS].

with the statutory provisions controlling partial revocation,¹¹ the revoked gifts, including revoked residuary gifts, pass to the remaining residuary takers.¹² The resulting increase in the residuary takers' shares has no effect on the validity or permissibility of the revocation.¹³

The court reached this result by applying Kentucky Revised Statutes (KRS) section 394.500 which provides: "Unless a contrary intention appears from the will, real or personal estate, comprised in a devise or bequest incapable of taking effect, shall be included in the residuary devise contained in the will." Since the testator's act of inking out the gifts to the grandchild was a sufficient physical act to revoke¹⁴ the gifts, they were "incapable of taking effect." The court of appeals held that, under the statute, the gifts were then included in the residuary devise to the two remaining residuary takers.¹⁵ Kentucky has now totally abandoned the rule requiring all failed gifts, wherever they appear in the will, to pass in intestacy.¹⁶

Although the actual legal issues raised in the other will cases discussed in this section differ, each case involves a homedrawn will. Whether the will was a nonholographic, attested instrument or a holographic, unattested instrument, the drafter's lack of legal expertise created the opportunity for postmortem litigation.¹⁷

Before an instrument can be found to be a valid will, it must not only meet the formal requirements for proper execution, but

¹¹ In Kentucky, a will or codicil may be revoked in whole or in part by a subsequent will or codicil; by a writing executed in the manner of a will declaring an intention to revoke; or, by the testator, or some person at the direction and in the presence of the testator, by cutting, tearing, burning, obliterating, cancelling or destroying the will with the intent to revoke. KRS § 394.080 (Cum. Supp. 1984).

¹² See 666 S.W.2d at 754.

¹³ *Id.*

¹⁴ See KRS § 394.080(4). See also note 11 *supra*.

¹⁵ 666 S.W.2d at 754.

¹⁶ Prior to 1974, KRS § 394.500 provided: "Unless a contrary intention appears from the will, real or personal estate, comprised in a devise incapable of taking effect, shall not be included in the residuary devise contained in the will, but shall pass as in the case of intestacy." See KRS § 394.500 (1942) (amended 1974).

¹⁷ Although the drafter's lack of legal expertise created the opportunity for litigation, a contest only occurs when the contestant is disappointed by the will provisions. In fact, if a successful will contest would not leave the contestant better off pecuniarily, the contestant has no standing to contest in the first place. 2 J. MERRITT, KENTUCKY PRACTICE § 1253 (1984).

it must be written with the requisite testamentary intent.¹⁸ If the instrument offered to probate is in traditional will form, the court will presume that testamentary intent existed at the time of execution.¹⁹ However, if the instrument is not in will form, but rather is in the form of a letter or deed or some other nontestamentary document, the propounders of the will must establish that it was written with the requisite testamentary intent.²⁰

In *Holtzclaw v. Arneau*,²¹ a handwritten document addressed "To whom it may concern" and signed by the decedent was offered for probate. Since the parties agreed that the instrument was wholly written and signed by the testator, the only question was whether the document was written with the requisite testamentary intent.

The Kentucky Supreme Court held that the presence or absence of testamentary intent should be determined by first considering the plain meaning of the language used in the instrument.²² If the language is ambiguous, all the surrounding circumstances are admissible in discerning the purpose of the writing.²³ In *Holtzclaw* the first paragraph of the disputed document provided: "In case something should happen to me everything I own or have goes to my wife—Bea—without reservation."²⁴ The Court found this language "simply and plainly expresses the intention that Beatrice inherit all."²⁵ Although the remaining paragraphs in the document were not dispositive, the Court found they "[did] not detract from the testamentary character of the instrument" offered for probate.²⁶ As the testator's intention was unambiguously expressed within the four corners of the instrument, extrinsic evidence was neither needed nor admissible for the purpose of ascertaining the testator's intention.²⁷

¹⁸ 1 *Id.* at § 642.

¹⁹ E. SCOLES & E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENT'S ESTATES AND TRUSTS 123 (3d ed. 1981).

²⁰ *See id.*

²¹ 638 S.W.2d 704 (Ky. 1982).

²² *See id.* at 705.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 706.

²⁷ *Id.* at 705-06.

In addition to complying with the statutory requirements of formal execution and testamentary intent, a will must also be dispositive in order to be valid.²⁸ In *Atherton v. Byerley*,²⁹ the testator properly executed a codicil to an earlier will. The codicil directed that all the testator's property was to go to his aunt. It specifically provided that his two half-siblings were "exclude[d] from any share in my estate . . . for the reason that they were unkind to my mother."³⁰ No other provisions were made for the disposition of the testator's property.

The testator's aunt predeceased the testator and had no issue who survived the testator. Thus, the gift to the aunt lapsed.³¹ Because there was no residuary clause to dispose of the lapsed gift,³² the estate of the testator passed into intestacy. The testator's half-siblings were his intestate takers under the Kentucky statutory provisions on descent and distribution.³³ They therefore, to the exclusion of more remote relatives, inherited all of the testator's property despite the contrary intention expressed in the testator's will. The only way an intestate taker can be disinherited is for the testator to direct the disposition of the property to someone else in a validly executed will.³⁴

Gilbert v. Gilbert,³⁵ decided by the Kentucky Court of Appeals, is more interesting for the lesson it teaches than for any point of law it elucidates: Lack of training in the law of wills can create ambiguities and problems which require expensive and

²⁸ *Panke v. Panke*, 260 S.W.2d 397, 397 (Ky. 1953).

²⁹ 31 Ky. L. SUMM. 1, at 5 (Ky. Ct. App. Jan. 20, 1984) [hereinafter cited as KLS], *discretionary rev. denied and Court of Appeals opinion ordered not to be published*, 31 KLS 9, at 33 (Ky. June 27, 1984). Since this is an unpublished opinion, it has no precedential value. The case is discussed solely as a reminder of already well established rules.

³⁰ *Id.*

³¹ *Id.* A lapsed gift to an individual is a testamentary gift to a person who was alive at the execution of the will but who predeceased the testator. In Kentucky, such a gift can be saved by operation of the anti-lapse statute, but only if the beneficiary is survived by issue who survive the testator. See KRS § 394.400 (1984).

³² KRS § 394.500 (1978) provides that a lapsed gift shall be included in the residuary if there is one. See text accompanying notes 7-16 *supra* for a discussion of how a revoked will gift passes with the residuary.

³³ Under KRS § 391.010(3) (1978), where the decedent has no living issue or parents, the next class of intestate takers is comprised of decedent's brothers and sisters or their descendants.

³⁴ See KRS § 391.010-.360 (Descent and Distribution).

³⁵ 652 S.W.2d 663 (Ky. Ct. App. 1983).

lengthy litigation to resolve. The testator in *Gilbert* had an eight page typewritten will prepared by an attorney. Two and a half years after that will was properly executed, the testator wrote on the back of a business card, "Jim and Margaret I have appro [sic] \$50,000 in Safe. See Buzz if anything happens." On the back of a pay stub, the testator wrote, "Jim and Margaret \$20,000 the Rest divided Equally the other Living Survivors Bro. & Sisters." Both holographic writings were dated and subscribed by the testator. The business card and pay stub were found folded together in a sealed envelope.³⁶

The court was asked to determine whether these holographic instruments constituted a second and superseding will, or whether they merely served as a codicil to the earlier typewritten will.³⁷ The court found that the holographic documents comprised a will which merely modified and did not revoke the earlier will.³⁸

The Court based its conclusion in part on the lack of an express revocation clause in the card and pay stub will. Thinking it very unlikely that a testator would supplant the elaborate distribution scheme in his typewritten will with directions written on a pay stub and business card, the court declined to imply a revocation.³⁹ Finally, the court noted that the money in the safe referred to by the holographic will was not specifically disposed of in the typewritten will and would, otherwise, have passed through the residuary clause.⁴⁰ The court applied the rule of construction requiring that a will be construed, if possible, so as to harmonize seemingly conflicting provisions and so as to give effect to all provisions.⁴¹ Applying this rule, the court held that the two holographic writings constituted a second will that distributed only the money kept in the safe. The rest of the

³⁶ *Id.* at 664.

³⁷ *See id.* at 665.

³⁸ *Id.* The court of appeals chose to characterize the holographic instruments as a second will rather than a codicil because the holographic instruments did not refer to the typewritten will. *See id.* The choice of labels has no relevance to the resolution of the problem presented. KRS § 394.010 defines "will" to mean a last will, testament, or codicil. Also, a testator may have more than one will at a time distributing different assets of the estate. *Id.* (citing *Muller v. Muller*, 56 S.W. 802, 803 (Ky. 1900)).

³⁹ *See id.* at 665.

⁴⁰ *Id.*

⁴¹ *See id.* *Cf.* *Stivers v. Mitchell*, 314 S.W.2d 569, 571 (Ky. 1958).

testator's property passed under the terms of the earlier type-written will.⁴²

*Phillips v. Lowe*⁴³ is the only case involving trust law decided during this Survey period. The Kentucky Supreme Court addressed, for the first time, whether a person who is both the settlor and the sole beneficiary of an inter vivos trust may revoke the trust even though the trust instrument expressly provides that it is irrevocable.⁴⁴ The Court decided in favor of permitting the revocation. In doing so, the Court adopted⁴⁵ the position advocated both by the leading commentators on trusts—Scott⁴⁶ and Bogert⁴⁷—and by the Restatement (Second) of Trusts.⁴⁸ This position is based on the fact that the change only affects the settlor/sole beneficiary. As no purpose is served in refusing the change in such a case, it should be permitted.⁴⁹

III. CONCURRENT OWNERSHIP⁵⁰

At common law a unique form of concurrent ownership evolved for wives and husbands—tenancy by the entirety.⁵¹ When a wife and husband held title to land as tenants by the entirety with right of survivorship, the husband, during their joint lives, had the sole right of control, management and enjoyment of the land. This included a right, subject only to his wife's contingent right of survivorship, to sell and deliver immediate possession of the land to another.⁵² The effect of that contingent right of survivorship was that if the wife survived, the transfer was defeated and the wife had full title. Similarly, only the husband's

⁴² See 652 S.W.2d at 665.

⁴³ 639 S.W.2d 782 (Ky. 1982).

⁴⁴ See *id.* at 783.

⁴⁵ See *id.* at 783-84.

⁴⁶ See 4 SCOTT, THE LAW OF TRUSTS § 339 (3d ed. 1967).

⁴⁷ See G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1004, at 523 (rev. 2d ed. 1983).

⁴⁸ RESTATEMENT (SECOND) OF TRUSTS § 339 (1959).

⁴⁹ See 639 S.W.2d at 784.

⁵⁰ Concurrent ownership is ownership of a present estate or future interest in property by more than one person. See R. CUNNINGHAM & W. STOEBUCK, THE LAW OF PROPERTY 195-96 (1984).

⁵¹ A tenancy by the entirety is a type of joint tenancy based on the common law idea of the unity of the wife and husband. It can only exist between wife and husband. R. BOYER, SURVEY OF THE LAW OF PROPERTY 88 (1981).

⁵² R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 623 (abr. ed. 1968).

interest in the property could be subjected by his creditors to satisfaction of his debts. The survival of the wife, however, would defeat the creditors' claim even in the husband's interest.⁵³

With the adoption of Married Women's Property Acts,⁵⁴ the growth of women's independence, and creditors' demands for freer access to their debtor's assets, all but twenty-two states have eliminated tenancies by the entirety as a form of concurrent ownership.⁵⁵ The states which have retained this form of concurrent ownership have significantly modified its attributes from those it possessed at the common law. In Kentucky, which still recognizes this form of concurrent ownership, each spouse has a contingent right of survivorship during the joint married lives of the spouses. Each spouse can convey his or her own contingent right of survivorship, and the interest can be reached by that spouse's individual creditors.⁵⁶ However, the transferee of the spouse's contingent right of survivorship does not get an immediate right of possession. The transferee receives the right to possession of the property only if the transferor is the survivor of the two spouses.⁵⁷

In *Peyton v. Young*,⁵⁸ the Kentucky Supreme Court was asked to further define the characteristics of Kentucky's tenancy by the entirety. The husband and wife in *Peyton* had purchased their home as tenants by the entirety. The husband thereafter encumbered his interest by a mortgage in which the wife did not join. The husband and wife divorced, and the husband conveyed his interest in the house to his former spouse. Shortly after the conveyance, the husband killed his former wife and himself. The Court held that one-half of the property was encumbered by the mortgage given solely by the husband. The Court reasoned that the conveyance to his former spouse was a conveyance of his interest subject to the mortgage.⁵⁹

⁵³ *Id.*

⁵⁴ The Married Women's Property Acts were a series of legislative attempts to mitigate the married woman's legal subjugation to her husband. The first such act was adopted by Mississippi in 1839. L. KANOWITZ, *WOMEN AND THE LAW* 40 (1969).

⁵⁵ See R. POWELL & P. ROHAN, *supra* note 52, at ¶ 621.

⁵⁶ *Id.* at ¶ 623.

⁵⁷ *Id.* See *Hoffmann v. Newell*, 60 S.W.2d 607, 612 (Ky. 1932).

⁵⁸ 659 S.W.2d 205 (Ky. 1983).

⁵⁹ See *id.*

The result in this case is correct despite the Court's misplaced discussion of statutory and case law concerning murdering joint tenants.⁶⁰ The result in *Peyton* follows the rule articulated in the seminal case concerning tenancies by the entirety, *Hoffmann v. Newell*.⁶¹ In *Hoffmann* the Court held that a creditor of one of the tenants by the entirety could force the sale, in satisfaction of the debt, of the debtor spouse's contingent right of survivorship.⁶² If a spouse's contingent right of survivorship can be reached involuntarily by a creditor, certainly the spouse should be permitted to voluntarily encumber that contingent right of survivorship by giving a mortgage. When tenants by the entirety divorce, one of the essential elements of the tenancy—spousal unity—is destroyed.⁶³ On divorce the parties become tenants in common,⁶⁴ each having an individual undivided one-half interest which she or he can sell or encumber. In *Peyton* the husband's interest in the tenancy in common was already encumbered by his prior mortgage. Thus, when he transferred his interest to his former spouse, he transferred an encumbered interest. That he later killed himself and his former spouse is irrelevant to the property question. Neither the statutory provision on the rights of a murdering joint tenant⁶⁵ nor the case law interpreting that statute⁶⁶ is applicable because the parties were not joint tenants at the time of the murder-suicide. Indeed, the parties were not concurrent owners of any sort. By virtue of the divorce and

⁶⁰ The Court states that *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1953) is dispositive of the issue in this case. See 659 S.W.2d at 207. However, that case dealt with whether the heirs of a husband who owned property with his wife as tenants by the entirety were deprived of the husband's interest when the husband killed his wife and then himself. See 263 S.W.2d at 496.

⁶¹ 60 S.W.2d 607 (Ky. 1932).

⁶² See *id.* at 613.

⁶³ The five unities essential for a tenancy by the entirety are time, title, interest, possession and person. R. BOYER, *supra* note 51, at 88.

⁶⁴ R. POWELL & P. ROHAN, *supra* note 52, at ¶ 624.

⁶⁵ KRS § 381.280 (1981) provides:

If the husband, wife, heir-at-law, beneficiary under a will, joint tenant with right of survivorship or the beneficiary under any insurance policy takes the life of the decedent and is convicted therefor of a felony, the person so convicted forfeits all interest in and to the property of the decedent, including any interest he would receive as surviving joint tenant, and the property interest so forfeited descends to the decedent's other heirs-at-law, unless otherwise disposed of by the decedent.

⁶⁶ See note 60 *supra*.

property transfer, the former wife was the sole owner of the property, one-half of which was encumbered by the husband's prior mortgage.

IV. MORTGAGES

The United States Supreme Court's decision in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*⁶⁷ permits a federal savings and loan association to include "due-on-sale" clauses in its mortgages.⁶⁸ Such a clause provides that if the property securing the loan, or any interest in that property, is sold or transferred without the lender's prior written consent, the lender may accelerate the loan and declare the entire balance immediately due and payable.⁶⁹ Prior to the *Fidelity Federal* decision, some states had attempted to limit the lender's right to exercise a due-on-sale clause to those instances where the lender demonstrated that enforcement was "reasonably necessary to protect against impairment to its security or the risk of default."⁷⁰ After *Fidelity Federal*, any federal savings and loan association can exercise a due-on-sale clause in a mortgage whenever the mortgagor sells or transfers the land or any interest in the land regardless of whether the transfer affects the lender's security or risk of default.⁷¹

Typically, the lender will only permit the sale or transfer for a price—for example, where the transferee assumes the loan at a higher interest rate.⁷² This has sparked attempts to structure transactions in such a way that they are not characterized as a sale or transfer. *Greater Louisville First Federal Savings & Loan*

⁶⁷ 458 U.S. 141 (1982).

⁶⁸ See *id.* at 170.

⁶⁹ Often the due-on-sale clause contains exceptions. For instance, the due-on-sale clause at issue in *Greater Louisville First Fed. Sav. & Loan Ass'n v. Etzler*, 659 S.W.2d 209 (Ky. Ct. App. 1983), excluded:

- (a) the creation of a lien or encumbrance subordinate to this Mortgage,
- (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase.

Id. at 210.

⁷⁰ *Wellenkamp v. Bank of America*, 582 P.2d 970, 977 (Cal. 1978).

⁷¹ See *Fidelity Fed. v. de la Cuesta*, 458 U.S. at 167.

⁷² See, e.g., 659 S.W.2d at 210 (one way lenders exercise their rights under a due-on-sale clause is by requiring new purchasers to buy at a higher interest rate).

*Ass'n v. Etzler*⁷³ involved such an attempt. The arrangement between the mortgagor/owner and the new purchaser was characterized as an option to purchase rather than as a sale.⁷⁴

The "Metro Option Loan Plan" ("Metro Option") at issue in *Greater Louisville* was devised in 1980 by a group of Louisville real estate lawyers⁷⁵ to "convince the lender that the buyer is not entering into a sale in which the title of the property is transferred or the title is conveyed, while at the same time . . . protect[ing] the buyer's interest in the property."⁷⁶ The Etzlers, who had given Great Western a \$44,500 purchase money mortgage containing a due-on-sale clause, later contracted with Coleman under the "Metro Option." Pursuant to the contract, Coleman paid the Etzlers approximately \$18,000 in cash, and the parties executed a "Metro Real Estate Option" as well as an "Agreement for Delivery of Deed." The latter was an escrow agreement providing that the escrowee would hold the deed to the property until Coleman had paid the entire amount stipulated in the "Metro Option." The "Metro Option" was properly recorded and was automatically renewable each year for twenty-eight years (the term of the Etzlers' mortgage loan). Upon learning of the Etzler-Coleman transaction, Greater Louisville exercised the due-on-sale clause and declared the full amount of the Etzler mortgage loan, plus interest, immediately due. When this amount was not paid, Greater Louisville filed a foreclosure action.⁷⁷

A true option transfers neither the ownership of the property nor any other interest in it.⁷⁸ Thus, a true option would not trigger a due-on-sale clause until the option was exercised. The Kentucky Court of Appeals, however, recognized that the "Metro Option" was not a true option.⁷⁹ The Etzlers received a cash payment from Coleman equal to their equity in the property. Coleman took possession, paid the taxes, maintained the property, and made monthly payments to the Etzlers in an amount

⁷³ 659 S.W.2d 209.

⁷⁴ *Id.* at 210.

⁷⁵ *Id.*

⁷⁶ *Id.* at 212.

⁷⁷ *Id.* at 210-11.

⁷⁸ *Id.* at 211.

⁷⁹ *See id.* at 212.

exactly equal to their monthly mortgage payments to Greater Louisville. Although this arrangement was called an option, the parties acted like sellers and buyers of an interest in the property, not like sellers and buyers of a mere right to acquire an interest in the property in the future.⁸⁰ As the court of appeals correctly noted, "if something walks like a duck, acts like a duck and quacks like a duck, it's a duck."⁸¹ The parties intended to have a transaction with all the attributes of a "sale" while calling it an "option." According to the court, however, the purpose, not the name, controls. Thus, the "due-on-sale" clause was triggered by the arrangement,⁸² and Greater Louisville was within its contractual rights in accelerating the mortgage.⁸³

V. INCORPOREAL HEREDITAMENTS

Nonpossessory land interests, such as easements and covenants running with the land, continued to generate controversies during the Survey period. In *Farmer v. Kentucky Utilities Co.*,⁸⁴ the Kentucky Supreme Court considered the permissible scope of the use of a prescriptive easement.⁸⁵ *Elliott v. Jefferson County Fiscal Court*⁸⁶ concerned the applicable criteria for determining when one may obtain modification or cancellation of a restrictive deed covenant designed to maintain the residential character of a subdivision.⁸⁷

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 213.

⁸³ One of the exceptions to the "due-on-sale" clause was for "the creation of a lien or encumbrance subordinate to this mortgage." *Id.* at 210. The Etzlers argued that the transaction created an equitable mortgage with the Etzlers as mortgagee and the Colemans as mortgagor. They relied on the decision in *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979) which held that a buyer under an installment land sale contract had an equitable mortgage in the property which was the subject matter of the contract. *See id.* at 382. Even if the Etzlers were correct in claiming that their interest in the land was that of an equitable mortgagee after the "Metro Option" was entered into, the encumbrance is not the type contemplated by the exception. The "due-on-sale" clause exception for subordinate liens or encumbrances contemplates junior mortgages in which the Etzlers are the mortgagors not the mortgagees.

⁸⁴ 642 S.W.2d 579 (Ky. 1982).

⁸⁵ A prescriptive easement is "[a]n easement . . . created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is (a) adverse, and (b) for the period of prescription, continuous and uninterrupted." RESTATEMENT OF PROPERTY § 457 (1944).

⁸⁶ 657 S.W.2d 237 (Ky. 1983).

⁸⁷ *Id.* All the lots covered by the restrictive covenant were restricted to use as single-family residences. *See id.* at 238.

The utility company in *Farmer* had an easement by prescription to run its wires over the plaintiff's property. The plaintiff did not dispute the existence of the easement, but rather claimed that the utility company did not have the right to enter the land to clear out the vegetation beneath the wires.⁸⁸

Although the easement was created by prescription rather than by express grant or reservation, the Court found that the resolution of the question was the same regardless of the mode of creation.⁸⁹ The easement for the overhanging wires included such use of the servient estate as was reasonably necessary for the enjoyment of the easement.⁹⁰ This included the right to enter the part of the servient estate over which the wires ran to remove vegetation or other growth which would interfere with the wires.⁹¹

Elliott involved another private land use device—a restrictive covenant. The property in question was a vacant corner lot on the peripheral boundary of a subdivision. All forty-one lots in the subdivision had been restricted since 1937 by the recorded plat and deed of restriction filed of record.⁹² The lots were restricted to residential use only. The area outside the restricted subdivision had become nonresidential with a concomitant increase in traffic on the surrounding streets. The owner of the restricted corner lot wanted the property released from the residential restrictions because of these changes.

The Kentucky Supreme Court correctly refused to permit relief from the restriction because of a change which occurred outside the restricted area.⁹³ Articulating its rationale, the Court stated: "If border lots are released from residential restrictions, the ultimate result could be the destruction of whole subdivisions . . . a domino effect."⁹⁴ The argument for the corner lot owner was cast in terms of an appeal to equity; however, equitable principles appear to support the Court's decision. The purchaser of a border lot in a subdivision which is restricted to residential

⁸⁸ *Farmer v. Kentucky Utilities*, 642 S.W.2d at 580.

⁸⁹ *See id.* at 581.

⁹⁰ *Id.*

⁹¹ The case was remanded for a new trial on the issue of whether the cutting of shrubs, trees and undergrowth by the utility company had been reasonably necessary. If the company exceeded this limit, it would be liable for damages. *See id.*

⁹² *Elliot v. Jefferson County Fiscal Court*, 657 S.W.2d at 238.

⁹³ *See id.* at 239.

⁹⁴ *Id.* at 238.

use knows or should know of the restrictions. Because the border lots act as a buffer zone for the interior lots in the subdivision, the purchaser pays a lower price for the lot. If the restrictions are removed, the purchaser would be unjustly enriched at the expense of the owners of the interior lots.⁹⁵

VI. LEASES

Although decisions involving mineral leases more properly belong in a discussion of recent decisions on surface mining or environmental law, there are no such articles in this Survey Issue. Consequently, since mineral leases are conveyances of an interest in real property, the Kentucky Court of Appeals' decision in *Kruger v. Holloway*⁹⁶ is discussed here. It is a case of major importance which will probably wind up before the Kentucky Supreme Court.

Previous Kentucky case law indicated that coal lessors were liable for all of the results of a trespass by their lessee's mining operations.⁹⁷ Such liability seemed to be the preferred rule of law. Otherwise, the imposition of joint liability on the lessor and lessee sometimes had to be predicated on the flimsy fiction of an implied agency relationship.⁹⁸ In *Kruger*, however, the court enunciated a rule of liability for coal lessors of far less sweeping proportions than that contained in the older cases.

The lessor in *Kruger* leased the minerals on eighty acres of land. Unbeknownst to both lessor and lessee, the lessor did not actually own those minerals. The lease was without a warranty of title or quiet enjoyment.⁹⁹ In the suit brought by the true owners of the mineral estate against both the lessee and the

⁹⁵ R. POWELL & P. ROHAN, *supra* note 52, at ¶ 684.

⁹⁶ No. 83-CA-1509-MR (Ky. Ct. App. Jan. 13, 1984). As this Survey was going to press the Kentucky Supreme Court reversed the court of appeals decision. *Holloway v. Kruger*, 682 S.W.2d 787 (Ky. 1984). The Supreme Court held that the measure of damages for innocent trespass was "reasonable royalties" if actual royalties did not meet the standard of reasonableness and that a mineral lease was not the equivalent of a quitclaim deed so that the lessor could not be held to be a willful trespasser. *Id.* at 788.

⁹⁷ See *Ritchie v. Paine*, 431 S.W.2d 498, 501 (Ky. 1968).

⁹⁸ See *Kentucky Harlan Coal Co. v. Harlan Gas Coal Co.*, 53 S.W.2d 538, 543 (Ky. 1932).

⁹⁹ The court said that a lease without warranty is no more than a quitclaim. See *Kruger v. Holloway*, No. 83-CA-1509-MR, slip op. at 5.

lessor, the trial court imposed liability jointly on both for the total damage suffered by the true owner because of the lessee's trespass.¹⁰⁰ The court of appeals held that a lessor who leases minerals without warranty is liable to the true owner of the mineral estate for the trespass only to the extent of the royalties received by the lessor and then only for that amount of damages which have not been compensated for by the actual trespasser (the lessee).¹⁰¹ Under some circumstances the lessor, under a lease without a warranty, may still be held to the same liability for its lessee's trespass as if the lease had contained a warranty. This additional liability would be imposed only if the lessor without warranty was acting in bad faith or had participated with the trespasser in the trespass, or if there were some other circumstances which would warrant a finding of liability upon equitable principles.¹⁰²

VII. EMINENT DOMAIN/CONDEMNATION

In 1972 the Kentucky General Assembly enacted the Kentucky Wild Rivers Act.¹⁰³ The purpose of the Act was to preserve certain streams in "their free-flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their [present and future] value for water development."¹⁰⁴ The Act sought to maintain the primitive character of those streams designated "wild rivers"¹⁰⁵ by imposing significant regulations on the use of surrounding public and private property.¹⁰⁶

¹⁰⁰ See *id.* slip op. at 4-5.

¹⁰¹ *Id.* slip op. at 9.

¹⁰² *Id.*

¹⁰³ Kentucky Wild Rivers Act, ch. 117, §§ 1-17, 1972 Ky. Acts 525 (codified as amended at KRS §§ 146.200-.360 (1980 & Cum. Supp. 1982)). The following discussion of the history of the Wild Rivers Act and earlier litigation concerning the Act is taken from Bratt & Brown, *Environmental Law*, 70 Ky. L.J. 455, 464-68 (1981-82).

¹⁰⁴ KRS § 146.220 (1980).

¹⁰⁵ See *id.* KRS § 146.241 (1980) designates eight rivers, or parts thereof, as wild rivers. KRS § 146.260(1) (1980) directs the Secretary of the Department of Natural Resources and Environmental Protection to propose other rivers for future addition to the wild rivers system, subject to approval by the General Assembly.

¹⁰⁶ The land use restrictions in designated stream areas originally imposed by the Act were contained in the Kentucky Wild Rivers Act, ch. 117, § 10, 1972 Ky. Acts 525, 530-31.

In 1976 the General Assembly amended the Wild Rivers Act¹⁰⁷ in response to the litigation in *Commonwealth v. Stephens*.¹⁰⁸ The amendments purported to authorize compensation to owners of regulated property only when the state acquired "easements or lesser interests in or fee title to lands within the authorized boundaries" of the Wild River system.¹⁰⁹ The amendments did not make compensation available when the Act merely restricted a landowner's use of the property.¹¹⁰ However, the amendments did ease some land use restrictions contained in the original Act.¹¹¹

Prior to the effective date of the amendments, Stearns Coal & Lumber Company notified the Department for Natural Resources and Environmental Protection (the Department) that it was about to use its land for every activity that was then prohibited in the Wild Rivers area.¹¹² This obvious challenge to the validity of the Act was met by a Department administrative order directing Stearns to discontinue any threatened action until a hearing was held by the Department.¹¹³ Stearns obtained a restraining order enjoining the Department from holding any hearing on its abatement order and filed an inverse condemnation suit—*Commonwealth v. Stearns Coal & Lumber*.¹¹⁴ Subsequent to this, the new amendments to the Wild Rivers Act became effective. Shortly thereafter the Court held, in *Commonwealth v. Stephens*, that no violation of the Wild Rivers Act could occur until after the stream area was designated.¹¹⁵ Approximately three weeks after the *Stephens* decision, maps designating the boundaries of the Wild River system were formally published by the Commonwealth.¹¹⁶

The Kentucky Supreme Court's decision in *Stearns* was eagerly awaited. It seemed that the Court would have to address

¹⁰⁷ See Act of Mar. 29, 1976, ch. 197, §§ 1-11, 1976 Ky. Acts 442 (codified at KRS § 146.200-.360 (1980 & Cum. Supp. 1982)).

¹⁰⁸ 539 S.W.2d 303 (Ky. 1976).

¹⁰⁹ See KRS § 146.220 (1980 & Cum. Supp. 1982).

¹¹⁰ See KRS § 146.220 (1980).

¹¹¹ See KRS § 146.290 (1980 & Cum. Supp. 1982).

¹¹² See *Commonwealth v. Stearns Coal & Lumber Co.*, 678 S.W.2d 378, 380 (Ky. 1984).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *Commonwealth v. Stephens*, 539 S.W.2d at 308.

¹¹⁶ *Commonwealth v. Stearns Coal & Lumber Co.*, 678 S.W.2d at 380.

the question it had avoided in *Stephens*—whether the Act's prohibitions on land use within the Wild River system constituted a legal "taking" within the meaning of the fifth amendment to the United States Constitution and section 13 of the Kentucky Constitution.¹¹⁷ Although the Court in dicta superficially discussed the current state of "taking" jurisprudence,¹¹⁸ it avoided a substantive decision on the "taking" issue raised by the Act. Instead, the Court held, as it had in *Stephens*,¹¹⁹ that there was no taking because the Department could not enforce the prohibitions of the unamended Act until the stream areas were designated.¹²⁰ That designation occurred only after the lawsuit was filed.¹²¹ The 1976 amendments to the Act were not subject to review because, like the designation of the Wild Rivers areas, they too did not become effective until after the filing of the lawsuit.¹²² Although the decision in *Stearns* may have saved the Court from having to unravel the knotty issue of when a "taking" has occurred, the question was merely postponed. Moreover, by failing to address the issue within the context of the Wild Rivers Act, the Court again left the statute—now more than twelve years old—still in constitutional limbo.¹²³

¹¹⁷ KY. CONST. § 13 provides: "[N]or shall any man's [sic] property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

¹¹⁸ See 678 S.W.2d at 381-82.

¹¹⁹ See 539 S.W.2d at 308.

¹²⁰ See 678 S.W.2d at 382.

¹²¹ *Id.*

¹²² See *id.* at 383.

¹²³ For in-depth discussions of the "taking" issue see: B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1966-67); Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1002-08 (1982); Rodgers, *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, S. CAL. L. REV. 561 (1984); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964-65); Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970-71).

In *Fearin v. Fox Creek Valley Watershed Conservancy District*,¹²⁴ a landowner sought to enjoin an attempt by the Watershed District to condemn her land for construction of a dam and watershed. The landowner alleged that the Watershed District was without power to condemn her land for a dam, which was partially funded by money from the federal government, until it complied with the requirements of the National Environmental Policy Act by preparing an environmental impact statement and a cost-benefit analysis.¹²⁵

The Kentucky Court of Appeals decided that the Watershed District could proceed with its condemnation action regardless of any alleged violations of federal law.¹²⁶ The question raised by the landowner might prevent the Watershed District from qualifying for federal funds for the project, but the project's financing is irrelevant in a condemnation action. The question, according to the court, is whether there is a "public necessity" for the dam.¹²⁷ Once public necessity is established and condemnation is accomplished, the Watershed District has eight years from the taking of possession to commence construction of the project.¹²⁸ If the Watershed District does not qualify for federal funding because of its failure to complete an environmental impact statement and a cost-benefit analysis, it may not be able to build the dam. However, the failure of the condemner to begin development within the prescribed time period merely entitles the landowner to repurchase the property at the price the condemner paid to the landowner.¹²⁹ There is no prospective relief for a landowner who alleges that the condemner will fail to qualify for the federal funding needed for the project.¹³⁰

VIII. ZONING

In *Hall v. Housing Authority of Louisville*,¹³¹ property owners in Jefferson County sought to block the Housing Authority's

¹²⁴ 667 S.W.2d 389 (Ky. Ct. App. 1983).

¹²⁵ *Id.* at 390.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See* KRS § 416.670 (Cum. Supp. 1982).

¹²⁹ *See id.*

¹³⁰ *See* 667 S.W.2d at 391.

¹³¹ 660 S.W.2d 674 (Ky. Ct. App. 1983).

plan to build low-income, scattered-site housing in their neighborhood. The plan called for individual apartment buildings with four to ten single-family residential units. The apartment buildings would not contain public offices or meeting rooms and access would be limited to the families living in the buildings. The sites selected for each apartment project were properly zoned for the contemplated multifamily building. However, the property owners alleged that the Housing Authority was required to submit its plans to the Planning Commission for approval because the apartment structures were public structures within the meaning of KRS section 80.110.¹³² That statutory section provides:

All low-cost housing projects are subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the project is situated. In a city of the first class, the housing authority shall submit to the city planning and zoning commission the location, character and extent of any new street, square, park or other public way, ground or open space, or any *public structure* or public utility, for approval in the manner provided in KRS 100.197.¹³³

The court of appeals determined that scattered-site, publicly owned, four-to-ten unit apartment complexes are not public structures within the meaning of the statute.¹³⁴

According to the court, the mere fact of public ownership is not determinative of whether the building is within the ambit of the statute.¹³⁵ The use of the building is the relevant factor for determining whether Planning Commission approval must be obtained. The court stated:

There is a need for information, planning, and approval for large public uses of public or private property, and the location, character, and extent of such facilities are relevant considerations. Such considerations do not have the same relevance and need in relation to facilities used by families and relatively small numbers of individuals, however.¹³⁶

¹³² *Id.* at 675.

¹³³ KRS § 80.110 (1980) (emphasis added by the court).

¹³⁴ *Hall v. Housing Authority*, 660 S.W.2d at 677.

¹³⁵ *See id.* at 676.

¹³⁶ *Id.*

Consequently, prior approval by the planning commission was not required for the proposed low density, scattered-site apartment complexes.¹³⁷

In *Stratford v. Crossman*,¹³⁸ the Kentucky Court of Appeals held that a writ of mandamus is the appropriate mechanism for requiring a building inspector and city zoning enforcement officer to fulfill the duties of their offices.¹³⁹ Prior litigation had established that a tavern located in a shopping center across the street from the plaintiff's townhouse complex violated the local zoning ordinance.¹⁴⁰ The tavern, however, was still operating in spite of lower and appellate court decisions against it. The plaintiff sought to compel the appropriate public officials to abate this zoning ordinance violation.¹⁴¹

The court of appeals strongly reaffirmed that mandamus is an appropriate remedy to bring about the resolution of a zoning issue, stating: "Indeed, without mandamus, a private citizen would be helpless at the hands of public officials who for one reason or another chose not to enforce the zoning ordinances."¹⁴² The court held that, upon application for the writ, the applicant is not required to show either irreparable injury or pecuniary damage.¹⁴³ The writ, if granted, may not direct how the public official should act or what result must be obtained.¹⁴⁴ The plaintiff is only entitled to an order requiring the officials to fulfill the duties of their offices by acting on the matter presented.¹⁴⁵ The court, however, reminded the officials that they must act in accordance with the law, and that failure to so act after the writ is issued would subject them to the power of the court.¹⁴⁶

¹³⁷ *Id.* at 677.

¹³⁸ 655 S.W.2d 500 (Ky. Ct. App. 1983).

¹³⁹ *See id.* at 502.

¹⁴⁰ *Id.* at 501.

¹⁴¹ *Id.*

¹⁴² *Id.* at 502.

¹⁴³ *See id.*

¹⁴⁴ *Id.* at 503.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

