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Kentucky Law Survey: Domestic Relations

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Domestic Relations

BY LOUISE GRAHAM* AND JANET JAKUBOWICZ**

In the decade since Kentucky's adoption of the Uniform Marriage and Divorce Act (UMDA),¹ appellate domestic relations opinions have focused primarily upon property division and child custody.² Recent decisions continue this emphasis but also address problems regarding the marital relationship, spousal maintenance, and child support.

I. DIVORCE VENUE

Kentucky's divorce venue statute, enacted in 1852, places venue in the county of the wife's residence whether she is the plaintiff or defendant.³ Despite major reforms in Kentucky's divorce laws,⁴ the divorce venue provisions remain unchanged.

The constitutionality of the venue statute was challenged in 1981 in *Hummeldorf v. Hummeldorf*.⁵ In *Hummeldorf*, the hus-

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¹ Act of Mar. 25, 1972, 1972 Ky. Acts ch. 182, §§ 1-27 (codified at KY. REV. STAT. ANN. §§ 403.010, 403.110-.350 (Bobbs-Merrill Cum. Supp. 1980) [hereinafter cited as KRS]). See UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. 17 (Supp. 1982).

The Uniform Marriage and Divorce Act [hereinafter cited as UMDA] has also been adopted in the following jurisdictions: Arizona (ARIZ. REV. STAT. ANN. §§ 25-311 to -339 (1976)); Colorado (COLO. REV. STAT. §§ 14-2-101 to -113, 14-10-101 to -133 (1973)) (Colorado has not adopted the provisions of the Act dealing with Effective Date and Repealer); Illinois (ILL. ANN. STAT. ch. 40, §§ 101 to 707 (Smith-Hurd 1980)); Montana (MONT. CODE ANN. §§ 40-1-101 to -404, 40-4-101 to -221 (1981)).

² For previous domestic relations law surveys, see Crone, *Domestic Relations*, 69 KY. L.J. 581 (1980-81); Harris & Donoho, *Domestic Relations*, 68 KY. L.J. 753 (1979-80); Wilson, *Domestic Relations*, 65 KY. L.J. 383 (1976-77).

³ Revised Statutes of Kentucky, ch. 47, art. III, § 4 (1860) (codified at KRS § 452.470 (1975)). See note 7 *infra* for the text of this provision.

⁴ The Kentucky divorce act is modeled after the divorce, maintenance, and child custody provisions of the UMDA. See KRS §§ 403.010, 403.110-.350 (Cum. Supp. 1980). For an extensive discussion of the new divorce laws, see Note, *Kentucky's New Dissolution of Marriage Law*, 61 KY. L.J. 980 (1972-73); Comment, *Kentucky Divorce Reform*, 12 J. FAM. L. 109 (1972-73).

⁵ 616 S.W.2d 794 (Ky. Ct. App. 1981).

band filed for divorce in Boone County, although his wife and children resided in adjacent Kenton County.⁶ The Boone County Circuit Court, relying on Kentucky Revised Statutes (KRS) section 452.470,⁷ dismissed the divorce action for improper venue.⁸ The Kentucky Court of Appeals reversed, however, holding that the statute was so "patently unequal and . . . unjust" that it violated both the equal protection clause⁹ and the Kentucky Constitution.¹⁰ Noting that a statutory classification based on gender must serve legitimate state objectives and must be substantially related to the achievement of those legislative objectives,¹¹ the court found that there was no valid justification "for continuing to give a resident wife the home court advantage in divorce actions."¹² In dicta, the court asserted that a divorce venue statute allowing an action to be brought in the county where the parties last resided before separation would withstand an equal protection challenge.¹³

No justification exists for retaining a divorce venue statute produced by women's lack of social, economic, and political power in the mid-nineteenth century.¹⁴ Women's status has

⁶ *Id.* at 796.

⁷ KRS § 452.470 (1975) provides: "An action for alimony or divorce must be brought in the county where the wife usually resides, if she have [sic] an actual residence in this state; if not, in the county of the husband's residence."

⁸ 616 S.W.2d at 798.

⁹ *Id.* at 797. U.S. CONST. amend. XIV, § 1, para. 1 provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁰ 616 S.W.2d at 797. KY. CONST. § 2 states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

¹¹ See *Orr v. Orr*, 440 U.S. 268 (1979) (striking down laws imposing alimony obligations on husbands but not wives); *Craig v. Boren*, 429 U.S. 190 (1976) (striking down Oklahoma statute which prohibited the sale of nonintoxicating 3.2% beer to males under the age of 21 while allowing sale to females between the ages of 18 and 21).

¹² 616 S.W.2d at 797.

¹³ *Id.* Two states have adopted this type of venue statute. See MASS. ANN. LAWS ch. 208, § 6 (Michie/Law. Co-op. 1981); S.C. CODE ANN. § 20-3-60 (Law. Co-op. 1977).

¹⁴ The following excerpt illustrates the social and legal environment of women in the nineteenth century:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family or-

changed,¹⁵ and Kentucky's marriage and divorce laws generally reflect this change.¹⁶ The venue statute was an anomaly in light of the new laws.

While the appellee did not argue that women continue to need protection, she did assert that venue equalization could cause other problems. Judge McDonald, writing for a majority of the court in *Hummeldorf*, rejected the argument that equalizing the venue provision would result in a "race to the courthouse."¹⁷ Rather, "it would merely change the character of the existing race" since the statute, in the past, had fostered a wife's race to establish a residency.¹⁸

ganization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

. . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

For a comprehensive discussion of the rationale of the Kentucky divorce venue statute, see Comment, *The Kentucky Divorce Venue Statute: A Call for Reform*, 66 Ky. L.J. 724 (1977-78).

¹⁵ In 1979, 64% of all American women between the ages of 25 and 34 were in the work force. By 1980, over 40% of mothers with children under the age of three were either in the work force or seeking work. Sawyer, *Women Increase Share of Jobs in Just About Every Profession*, *The Louisville Courier-Journal*, Sept. 10, 1981, at C8, col. 1 (statewide ed.).

¹⁶ The UMDA has eroded the traditional grounds for divorce:

[T]he sole basis for dissolution under the new Act is irretrievable breakdown. [KRS § 403.170 (Cum. Supp. 1980).]

The new Act also provides that either spouse may receive maintenance support [KRS § 403.200 (Cum. Supp. 1980)], while under previous law only the wife had such a right. [KRS § 403.060 (1972) (repealed 1972).] This Act has also equalized the division of property provisions. Today, it is the party most deserving of financial support who will receive it [KRS § 403.190 (Cum. Supp. 1980)]; no longer is there the presumption that the wife alone is the party in need. [KRS § 403.060 (1970) (repealed 1972).]

Comment, *supra* note 14, at 728-29.

The purpose of the Kentucky divorce act is to make the divorce laws "effective for dealing with the realities of matrimonial experience." KRS § 403.110 (Cum. Supp. 1980).

¹⁷ 616 S.W.2d at 797.

¹⁸ *Id.* See *Gross v. Ward*, 386 S.W.2d 456 (Ky. 1965). In *Gross*, the term "residence" is defined as the wife's actual residence rather than her legal residence. *Id.* at 457. The *Gross* interpretation has engendered problems in ascertaining a wife's intent to establish

In the absence of a specific divorce venue statute, an action for dissolution may now be initiated in the county where *either* litigant resides.¹⁹ Until the legislature adopts a new statute,²⁰ the *Hummeldorf* decision provides the circuit courts with guidance in determining the proper forum. According to *Hummeldorf*, whether a court should assume jurisdiction of a divorce action depends upon: "(1) the county of the parties' marital residence prior to separation; (2) the usual residence of the children, if any; [and] (3) accessibility of witnesses and the economy of offering proof."²¹ If circuit courts adhere to these guidelines, it will be more difficult for either spouse to initiate a last minute change of residency immediately prior to filing for divorce in order to secure some perceived advantage.²²

II. MARITAL PROPERTY

Both statistical information and common sense indicate the

an "actual residence." See, e.g., *Martin v. Fuqua*, 439 S.W.2d 314 (Ky. 1976) (wife moved to new county only one day prior to filing divorce, but was considered a resident of that county); *Calhoun v. Peek*, 419 S.W.2d 152 (Ky. 1967) (seven days considered sufficient to demonstrate wife's intent to establish residence in Calloway County although wife was employed in Trigg County and children attended school there); *Whitaker v. Bradley*, 349 S.W.2d 831 (Ky. 1961) (four days sufficient to establish new residence); *Brumfield v. Baxter*, 210 S.W.2d 975 (Ky. 1948) (six days sufficient to establish residency). See also *Burke v. Tartar*, 350 S.W.2d 146 (Ky. 1961). In *Burke*, the husband won the race by filing his divorce action at 9:30 a.m. while his wife, then in transit to her new residence, filed later that same day.

¹⁹ *Hummeldorf v. Hummeldorf*, 616 S.W.2d at 797. For a discussion of proposals to change the divorce venue statute making suit proper in the county where *either* party resides, see Fortune, *Venue of Civil Action in Kentucky*, 60 Ky. L.J. 497, 500 (1971-72); Comment, *supra* note 14, at 470.

²⁰ Kentucky does not have a general civil venue statute. See KRS §§ 452.400-.505 (1975 & Cum. Supp. 1980).

²¹ 616 S.W.2d at 798. These factors were first enunciated in *Shumaker v. Paxton*, 613 S.W.2d 130, 132 (Ky. 1981). See notes 122-44 *infra* and the accompanying text for a discussion of jurisdiction in child custody disputes.

²² In determining venue in child custody cases, the UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979) [hereinafter cited as UCCJA], is often applied by analogy. See KRS §§ 403.400-.630 (Cum. Supp. 1980). On a jurisdictional level, a court assuming jurisdiction must either be in the home state of the child, or the child and at least one parent must have a significant connection with the state. KRS § 403.420(1)(a)-(b) (Cum. Supp. 1980). Logically it would seem that in choosing between counties within a state, that county in which most of the evidence regarding the child's interpersonal relationships is available should adjudicate child custody.

importance of the economic aspect of divorce.²³ Its importance is confirmed by widespread litigation concerning the status of assets as marital or separate property for purposes of division. Two frequent problems involve the property status of a professional license or degree and the property status of a government benefit. Additionally, state statutes that require consideration of such factors as a spouse's contribution as a homemaker²⁴ or that mandate apportionment of an asset's increased value between marital and separate property²⁵ have introduced new considerations into divorce litigation.

Under the Kentucky divorce statute, a trial court distributing property upon dissolution of a marriage must distinguish between separate property, which is assigned entirely to the owner spouse, and marital property, which is available for distribution between the spouses.²⁶ Recent cases decided under this statute cover four important topics: the extent to which one spouse who aids the other in acquiring a professional degree or license has a right to have that contribution considered upon divorce; the divisibility of federally-created benefits; proper characterization of income from separate property as marital or separate property; and correct division of property acquired prior to the marriage but subject to a mortgage that was reduced during the marriage.

A. *Educational Degrees and Professional Licenses*

One of the most conceptually difficult problems facing di-

²³ In 1975, there were over 1,026,000 divorces, thereby creating nearly a million new "economic units." Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 979 (1977).

²⁴ KRS § 403.190(1)(a) (Cum. Supp. 1980) provides that such contribution must be considered as part of the spouse's contribution to marital property. Over 27 other states recognize the contributions of a spouse as homemaker in determining maintenance and/or property distribution. Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 246 (1981).

²⁵ KRS § 403.190(2)(e) (Cum. Supp. 1980) provides that the increase in the value of property acquired before marriage is nonmarital property unless due to "efforts of the parties during marriage." For a discussion of this provision in relation to the *Sousley* case, see notes 73-86 *infra* and the accompanying text.

²⁶ KRS § 403.190 (Cum. Supp. 1980). See note 72 *infra* for a description of the section's requirements.

voiced courts today proceeds from the "educational partnership" marriage.²⁷ In such a marriage one spouse provides support for the other, enabling him or her to complete a graduate or professional education. The typical case involves parties who are divorced shortly after the graduate or professional spouse receives the degree. The provider spouses in these marriages cannot expect to receive maintenance since they are self-supporting.²⁸ Often the parties to such a marriage have accumulated little or no marital property. As a result, in increasing numbers, the provider spouses have argued that their contribution to their spouse's education should be recognized by a property award.²⁹

²⁷ See generally Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947; Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517 (1981); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979).

²⁸ Having supported the couple during the marriage, or at least during the educational period, the working spouse cannot now make a compelling case for maintenance support. Harris & Donoho, *supra* note 2, at 755 n.10. See KRS § 403.200 (Cum. Supp. 1980) (setting out requirements for maintenance awards). See note 40 *infra* for part of the text of KRS § 403.200.

For a pragmatic analysis of the makings of an "educational partnership" marriage, see Greer, *Dissolution of the "Educational Partnership" Marriage*, 4 FLA. B.J. 292 (1981).

A cursory examination of articles on this topic reveals no reported cases where the husband, after working to support the wife in her educational endeavors, sued for division of her degree as marital property.

²⁹ See, e.g., *Moss v. Moss*, 264 N.W.2d 97 (Mich. Ct. App. 1978) (alimony award of \$15,000 to compensate wife for contributions to husband's medical education); *Lynn v. Lynn*, [1980-81] 7 FAM. L. REP. (BNA) 3001 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980) (medical degree was a marital asset with a value of \$308,886); *Daniels v. Daniels*, 185 N.E.2d 773 (Ohio Ct. App. 1961) (court, in dictum, recognized medical license as marital property); *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974) (permanent alimony award for wife's contributions to husband's increased earning capacity). *Contra* *Mahoney v. Mahoney*, No. A-491-80-T2 (N.J. Super. Ct. App. Div. Feb. 9, 1982) (available June 7, 1982, on LEXIS, States library, N.J. file). See also *In re Marriage of Graham*, 574 P.2d 75, 78 (Colo. 1978) (Carrigan, J., dissenting); *Hubbard v. Hubbard*, 603 P.2d 747, 753 (Okla. 1979) (Lavender, J., dissenting).

A majority of courts addressing the issue have refused to treat an educational license or degree as part of the marital estate. See, e.g., *Todd v. Todd*, 78 Cal. Rptr. 131 (1969) (law degree is not community property); *In re Marriage of Graham*, 574 P.2d 75 (neither educational degree nor increased earning capacity derived therefrom is marital property); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (while law degree is not marital property, future earning capacity engendered by law degree is marital property); *Hubbard v. Hubbard*, 603 P.2d 747 (medical license is not marital property);

In 1979 the Kentucky Court of Appeals, in *Inman v. Inman*,³⁰ placed Kentucky among those states holding that a professional license or degree could be treated as marital property under limited circumstances.³¹ John and Sue Inman had been married for seventeen years. John was a dentist; Sue was a teacher. When their marriage was dissolved they were on the brink of bankruptcy.³² The *Inman* trial court initially awarded Sue Inman most of the couple's marital property and awarded John Inman the bulk of the indebtedness.³³ That distribution was based

Dewitt v. Dewitt, 296 N.W.2d 761 (Wis. Ct. App. 1980) (neither law degree nor license constitutes marital property).

One problem noted by the Colorado Supreme Court in *In re Marriage of Graham*, is the inapplicability of "pure" property concepts to educational degrees. The court stated: [The degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. . . . It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

574 P.2d at 77.

³⁰ 578 S.W.2d 266 (Ky. Ct. App. 1979). The court of appeals reversed and remanded this case to the trial court, from which it was again appealed to the court of appeals. *Inman v. Inman*, No. 81-CA-936-MR (Ky. Ct. App. Mar. 12, 1982). See note 36 *infra* for a discussion of this second *Inman* opinion by the court of appeals.

³¹ It should be noted that, prior to the *Inman* decision, no jurisdiction had held an educational degree and/or license to be marital property. Rather, the "courts [evaded] the issue semantically by incorporating an amount into alimony or maintenance that [purported] to reflect the wife's contributions to the husband's attainment of increased earning capacity." 1979 WASH. L.Q. 1175, 1178. See note 29 *supra* for a review of court decisions on this issue.

Kentucky's property distribution statute provides in part that the court "shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors." KRS § 403.190(1) (Cum. Supp. 1980). To date, a total of 40 states have similar equitable distribution statutes. See Freed & Foster, *supra* note 24, at 250-51.

In the five jurisdictions which follow the common law rule, the courts have no equitable powers to distribute the property of the parties since title alone controls. Thus, the issue of whether a professional license or degree is marital property is inapplicable in the following "title" states: Florida, Mississippi, South Carolina, Virginia, and West Virginia. *Id.* at 249. In light of recent decisions in both Florida and South Carolina, however, it is possible that these states will now be considered equitable distribution states. See *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *Blum v. Blum*, 382 So. 2d 52 (Fla. Dist. Ct. App. 1980); *Simmons v. Simmons*, 267 S.E.2d 427 (S.C. 1980).

The remaining nine states are community property states. Freed & Foster, *supra* note 24, at 249.

³² 578 S.W.2d at 267.

³³ *Id.* at 267, 271.

upon the trial court's assumption that John Inman's license to practice dentistry could be marital property.³⁴ The court of appeals upheld the classification, warning that it did so only under the narrow circumstances presented by *Inman*.³⁵ The court held that the provider spouse could recover the amount spent for direct support and school expenses during the period of education, plus reasonable adjustments for inflation, when three conditions were met: (1) one spouse had aided the other in the acquisition of a professional degree; (2) no significant marital property had been accumulated; and (3) the spouse not holding the degree was not entitled to maintenance.³⁶ Because these conditions were met in *Inman*, the court treated the professional degree as marital property.

More recently, in *Leveck v. Leveck*,³⁷ the court of appeals confirmed that the *Inman* holding is confined to the circumstances that produced that case. Terrence and Judith Leveck were married for eleven years. Judith worked as a nurse during the first three years of Terrence's medical education. The trial court found that Judith provided most of the funds to support the couple from the inception of their marriage until the end of Terrence's third year of medical school.³⁸ For the next seven and a half years, Terrence supported his family with his Army salary. The parties accumulated no substantial property other than Terrence's degree.³⁹ The trial court awarded Judith \$10,000 lump

³⁴ *Id.* at 267.

³⁵ *Id.* at 270. The court of appeals reasoned that the degreed spouse would receive "a windfall of contribution to his or her increased earning capacity" if the nondegree holding spouse was not compensated for the contribution. *Id.* at 268. However, the court expressed its concern that "placing a professional license in the category of marital property . . . can only create another field for battle in the already complex and delicate area of division of marital property." *Id.* at 268.

³⁶ *Id.* at 269. In *Inman v. Inman*, No. 81-CA-936-MR, slip op. at 3 (Ky. Ct. App. Mar. 12, 1982), the Kentucky Court of Appeals determined that the *increased earning capacity* derived from a license should *not* be considered when computing the supporting spouse's interest. "To award a contributing spouse a share of increased earning capacity would require the benefitted spouse to continue in that or a comparable wage earning position," factors which are much too subjective and speculative. *Id.* Cf. *Moss v. Moss*, No. 81-CA-571-MR (Ky. Ct. App. Mar. 12, 1982).

³⁷ 614 S.W.2d 710 (Ky. Ct. App. 1981).

³⁸ *Id.* at 711.

³⁹ *Id.*

sum maintenance⁴⁰ and periodic maintenance of \$400 per month based on the following findings: (1) that Judith was unable to support herself through appropriate employment because of a physical disability; (2) that she was required to stay at home with her children; and (3) that there was insufficient marital property to provide for her reasonable needs.⁴¹ Judith appealed, claiming that the trial court had erred in failing to find Terrence's medical license to be divisible marital property. The Kentucky Court of Appeals affirmed the trial court award, stating that it would not broaden the *Inman* holding.⁴²

Although the court of appeals pointedly refused to extend the *Inman* rule, it noted without criticism that the \$10,000 lump sum maintenance awarded to Judith Leveck by the trial court included compensation for her investment in Terrence Leveck's medical degree.⁴³ The appellate court's failure to criticize the trial court's maintenance award raises two questions. The first arises from the statutory standards for an award of maintenance. Those standards provide that a spouse must lack sufficient property to provide for his or her reasonable needs and be unable to support himself or herself through appropriate employment in order to receive maintenance.⁴⁴ A request for maintenance,

⁴⁰ *Id.* at 712. KRS § 403.200 (Cum. Supp. 1980) lists the requirements for maintenance support:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the house.

KRS § 403.200(1)(a)-(b) (Cum. Supp. 1980) (emphasis added).

The statute requires that both subsections, (a) and (b), be met before a trial court can award maintenance support.

⁴¹ 614 S.W.2d at 712-13. See *Diment v. Diment*, 531 P.2d 1071. For further discussion of maintenance support, see notes 43-51 *infra* and the accompanying text.

⁴² 614 S.W.2d at 712.

⁴³ *Id.*

⁴⁴ *Id.* Accord *Moss v. Moss*, 264 N.W.2d 97; *Diment v. Diment*, 531 P.2d 1071.

Judge Wilhoit, in his dissenting opinion from the first *Inman* decision, argued that

therefore, is grounded in the needs of a particular spouse. Yet, reimbursing a spouse for an investment in the other spouse's degree or license is not necessarily connected to the needs of the investing spouse. In fact, simultaneous reimbursement for an educational contribution and consideration of the statutory standards for maintenance could provide double compensation.

The Kentucky Supreme Court has confirmed that the maintenance standards⁴⁵ reflect a status principle. What is reasonable or appropriate maintenance depends upon the kind of lifestyle held by the spouses during the marriage.⁴⁶ Thus, in some cases, the spouse of an individual with an advanced education or a professional degree may receive a higher maintenance award because of the couple's more affluent lifestyle and the ability of the spouse holding the professional or graduate degree to pay.⁴⁷ A trial court which awards maintenance on that status basis and also orders reimbursement for a spousal contribution to a license or degree potentially compensates the non-degree holding spouse twice. Such a spouse receives the benefits of the degree through a higher maintenance award and is also reimbursed for helping to acquire the degree.

The second question arises from the court's characterization of Judith Leveck's maintenance award. If Judith recovered her investment in Terrence's education through the lump sum main-

a more equitable result would have been to award Mrs. Inman maintenance payments. He noted that the "'standard of living established during the marriage' provision of subsection (2)(c) [KRS § 403.200 (Cum. Supp. 1980)] is to be considered in determining whether a spouse is able to support himself." 578 S.W.2d at 271 (quoting *Casper v. Casper*, 510 S.W.2d 253 (Ky. 1974)). Although Mrs. Inman was capable of supporting herself, she could not support herself at the same level to which she was accustomed. 578 S.W.2d at 271.

As pointed out by one commentator, this standard is of little value when the couple's standard of living is low (which it generally is when a spouse is attending school), or the couple's standard of living is deceptive (as it was in *Inman*.) See DOMESTIC LAW—DIVORCE—KENTUCKY INCLUDES LICENSE TO PRACTICE DENTISTRY IN MARITAL PROPERTY, 1979 WASH. L.Q. 1175, 1181 n.32.

⁴⁵ See note 40 *supra* for a brief discussion of the applicable portions of KRS § 403.200 (Cum. Supp. 1980).

⁴⁶ KRS § 403.200 (Cum. Supp. 1980).

⁴⁷ *Accord* *Casper v. Casper*, 510 S.W.2d 253 (ex-wife, although employed, unable to maintain self to standard of living established during the marriage; award of maintenance to ex-wife upheld). See *Harris & Donoho, supra* note 2, at 755-56 for a discussion of the methods of valuing a professional degree.

tenance award, she actually received the same compensation as Sue Inman, whether or not the court labelled the degree "marital property." For that reason, it seems inappropriate for the court to distinguish between the two cases. The fact that Sue Inman recovered under the guise of a property award while Judith Leveck recovered through lump sum maintenance may have tax implications⁴⁸ or an effect upon the award's modifiability,⁴⁹ but it has little other significance. Both women were in fact compensated for their investments. Furthermore, compensation through maintenance violates an express limitation of *Inman* since Sue Inman's award was based, in part, upon the fact that she was ineligible for maintenance. If maintenance awards such as the one received by Judith Leveck become typical, the distinction between cases like *Leveck* and *Inman* may turn out to have no practical significance.

Although the *Leveck* decision raises problems with regard to maintenance, it does clarify the basis of the court's ruling in *Inman*. The *Inman* decision permitted John Inman's professional license to be treated as marital property. However, the decision was based on the flexible and equitable nature of divorce adjudication rather than on an expanded notion of property for divorce purposes. Thus, the major difference between Sue Inman and Judith Leveck is that Sue Inman was in danger of "walk[ing] away empty-handed from a marriage to which she had made substantial contributions"⁵⁰ and Judith Leveck was not. The court of appeal's focus on the relative "empty-handedness" of the two women emphasizes that *Inman* merely permitted treatment of the license or degree as marital property because of the equities of the case, rather than holding that such an asset is *al-*

⁴⁸ See, e.g., *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980) (Court affirmed maintenance award in amount of mortgage payment due on property allocated to nonsupporting spouse, shifting tax benefit of interest deductions to the nonsupporting spouse). Spouses who pay maintenance may deduct those payments from their income. I.R.C. §§ 71, 215 (1981). No similar deduction is available for property settlements. For a discussion of the tax implications of divorce, see FOOTE, LEVY & SANDERS, *CASES AND MATERIALS ON FAMILY LAW* 916-35 (2d ed. 1976).

⁴⁹ An award of maintenance may be modified upon a showing of changed circumstances so substantial and continuing as to make the terms of the prior award unconscionable. KRS § 403.250(1) (Cum. Supp. 1980).

⁵⁰ *Inman v. Inman*, 578 S.W.2d at 269.

ways marital property.⁵¹

The difference between a rule that an educational degree is marital property and that it *may be treated as* marital property is more than mere semantics. It signals extreme caution on the part of Kentucky appellate courts. If a degree may be property in one case but not in another, the rule allowing compensation is based more firmly in equity notions than in property definitions. The actual award received by Sue Inman bore no relationship to a property division of the degree. It was intended by the court to alleviate an inequitable situation. Recognition that the basis for an *Inman* award is equity makes clear that Kentucky courts are unlikely to extend the holding of *Inman* in the near future.

B. *Military Benefits*

When educational degrees and professional licenses are involved in a divorce, courts must determine whether those assets possess sufficient property characteristics to be recognized in allocating assets accumulated during the marriage. Government benefits present other problems.⁵² Although government benefits may be more easily recognized as property,⁵³ federal laws creating the benefits often prevent some benefits from being classified as marital property. Further limitations derive from state marital property law.

Military retirement benefits have recently joined railroad retirement benefits as federally-created property rights not subject

⁵¹ *Id.* at 266. See Harris & Donoho, *supra* note 2, at 753, 755. For a discussion of the equitable distribution of marital property, see note 31 *supra* and the accompanying text.

⁵² The rise in divorce litigation concerning government benefits reflects not only the rising divorce rate, but also the increase in federal government outlays for income security benefits. Between 1970 and 1979, the total federal expenditure for such benefits increased from nearly 160 million to \$200 million. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 334 (101st ed. 1980). Of the 1979 expenditures, social security accounted for over \$100 million. *Id.*

Veteran's benefits and military retirement payments each accounted for approximately \$10 million. *Id.*

⁵³ Government benefits have long been recognized as property for purposes of the fourteenth amendment. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, the Kentucky Court of Appeals in *Inman* relied upon the Supreme Court's treatment of such assets as property, in explaining its view that the term "property" may be given various meanings, depending upon the statutory context in which the term is used. 578 S.W.2d at 269.

to division under state community property laws. In 1979 in *Hisquierdo v. Hisquierdo*,⁵⁴ the United States Supreme Court declared that a statutory anti-assignment clause prevented division of railroad retirement benefits as community property. In 1981 in *McCarty v. McCarty*,⁵⁵ the Court held that the division of military retirement benefits under community property principles could not be permitted because that division threatened clear and substantial federal interests.⁵⁶ The Kentucky Court of Appeals had considered a similar case, *Russell v. Russell*,⁵⁷ in 1980 and held military retirement benefits were separate property under the Kentucky marital property statute. Thus *McCarty* does not change the outcome of Kentucky divorce settlements, but it demonstrates the trend toward increased federal control over the classification of benefits derived from federal sources.

The *McCarty* Court concluded that allowing division of military retirement benefits as marital property would threaten the substantial interests of the federal government in the management of its active military personnel.⁵⁸ In support of this conclusion the Court relied heavily upon a perceived Congressional intention that military retirement benefits remain the "personal entitlement" of military personnel.⁵⁹ That perception was derived from the following statutory features: (1) service personnel are permitted to designate the beneficiaries to receive unpaid portions upon their death; (2) service personnel *may* but are *not*

⁵⁴ 439 U.S. 572 (1979). The Kentucky Court of Appeals used *Hisquierdo* as precedent in *Frost v. Frost*, 581 S.W.2d 582 (Ky. Ct. App. 1979). In addition to railroad retirement benefits and military retirement pay, the United States Supreme Court has preempted state marital property law on only four other occasions. See *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964) (federal treasury regulations governing U.S. Savings Bonds override state community property rules governing disposition upon the death of one of the spouses); *Free v. Bland*, 369 U.S. 663 (1962) (federal treasury regulations governing U.S. Savings Bonds override state intestacy rules); *Wissner v. Wissner*, 338 U.S. 665 (1950) (National Servicemen's Life Insurance Act permitting service personnel to designate beneficiary takes precedence over state community property rule allocating one-half of the proceeds to surviving spouse); *McCune v. Essig*, 199 U.S. 382 (1905) (Federal Homestead Act allowing surviving spouse to patent homestead claim takes precedence over state community property law designating surviving child as partial owner of claim).

⁵⁵ 101 S. Ct. 2728 (1981).

⁵⁶ *Id.* at 2741-42.

⁵⁷ 605 S.W.2d 33 (Ky. Ct. App. 1980).

⁵⁸ 101 S. Ct. at 2741-42.

⁵⁹ *Id.* at 2741.

required to provide an annuity for a spouse; and (3) widows are deliberately favored over divorced spouses.⁶⁰

Justice Rehnquist, in his dissent in *McCarty*, argued that none of the features cited by the majority satisfied the *Hisquierdo* requirement of an express prohibition of division of a benefit.⁶¹ This argument has particular force. The statute involved in *Hisquierdo* expressly prohibited assignment or attachment of the benefit except to satisfy maintenance and child support obligations.⁶² The prohibition in *McCarty*, on the other hand, is inferred from Congressional silence on the issue.⁶³ It appears, therefore, that the Court in *McCarty* has gone a step beyond the requirements of *Hisquierdo*. Additionally, the federal interest deemed substantial in *McCarty*—an interest in personnel management—is an interest that may undergird almost any federal program.⁶⁴ *McCarty* thus signals that almost any identifiable federal interest may be sufficient to preclude division of federal benefits.

In Kentucky, state marital property law independently limits benefit divisibility.⁶⁵ In *McGlone v. McGlone*,⁶⁶ the Kentucky

⁶⁰ *Id.* at 2737-38.

⁶¹ *Id.* at 2743 (Rehnquist, J., dissenting).

⁶² The anti-assignment clause involved in *Hisquierdo* was 45 U.S.C. § 231m (1976). The section provides in pertinent part:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated

Although the anti-attachment statute provides for no exceptions, Congress enacted an exception to all federal benefit plans to permit attachment to satisfy legal obligations for child support or alimony. 42 U.S.C. § 659 (1976). Alimony is defined to exclude property divisions between spouses. 42 U.S.C. § 462(c) (1976).

⁶³ 101 S. Ct. at 2743 (Rehnquist, J., dissenting). Although *McCarty* prohibits division of military retirement benefits, some divorced persons will receive social security based on the contributions of their former military spouses. See 42 U.S.C. § 402(a)-(f) (1976).

⁶⁴ 101 S. Ct. at 2741-42.

⁶⁵ Prior to the United States Supreme Court's decisions in *McCarty* and *Hisquierdo*, some states recognized the separate property nature of non-compensatory governmental benefits. See, e.g., *In re Marriage of Butler*, 543 S.W.2d 147 (Tex. Civ. App. 1976) (disability pension is veteran's separate property).

⁶⁶ 613 S.W.2d 419 (Ky. 1981).

Supreme Court held that the value of a Veteran's Administration grant awarded for the purpose of constructing a home designed for a veteran confined to a wheelchair would not be considered divisible property because it was a "gift" and as such excluded from the statutory definition of "marital property" in KRS section 403.190(2).⁶⁷ The Court first found that the plain language of the veteran's benefit legislation indicated that such grants were not entitlements for military service.⁶⁸ Rather, the legislation authorized the Veterans Administration to make the grants in its discretion.⁶⁹ Secondly, the Court defined the term "gift" in the common law sense for purposes of the statutory exclusion from marital property.⁷⁰ Because the grant was a gift, it was non-divisible.

Although the Court in *McGlone* looked to the federal statute authorizing the benefit to determine the benefit's nature, once the benefit was determined to be a gift, the Court looked to state law to determine whether the gift was marital or separate property. Thus, the decision in *McGlone* rests independently upon the state law characterization of a gift as separate property

⁶⁷ KRS § 403.190 (Cum. Supp. 1980). For the provisions of this section, see note 72 *infra*.

⁶⁸ 613 S.W.2d at 420.

⁶⁹ *Id.*

⁷⁰ The Kentucky Supreme Court rejected the Kentucky Court of Appeals' reliance on *Commissioner v. Duberstein*, 363 U.S. 278 (1960), to resolve whether a grant was a gift or not. In *Duberstein*, the United States Supreme Court, quoting language from prior decisions, stated: "A gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses.' . . . [T]he most critical consideration . . . is the transferor's 'intention.'" *Id.* at 285-86 (footnotes omitted):

The Kentucky Supreme Court, noting that the term "gift" was not defined in KRS §403.190 (Cum. Supp. 1980), which governs treatment of property in divorce actions, deferred to its common law meaning: "A 'gift' in a common, ordinary, popular sense is a voluntary and gratuitous giving of something by one without compensation to another who takes it without valuable consideration." *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. Ct. App. 1977) (quoting *Bowman's Adm'r v. Bowman's Ex'r*, 192 S.W.2d 955 (Ky. 1946)).

rather than upon the supremacy of the federal law creating the benefit.⁷¹

C. *Income From the Sale of a Separate Asset*

Kentucky statutes do not specifically characterize income from separate property as marital or separate property.⁷² However, the Kentucky Supreme Court has ruled that such income is marital property. In *Sousley v. Sousley*,⁷³ the Court pointed out that the statutory designation as separate property of the *increase* in value of pre-marital property not due to the joint efforts of the parties did not apply to *income* derived from property acquired before the marriage.⁷⁴ Thus, while an increase in value due to general economic conditions is separate property, income from the disposition of separate property is marital property.⁷⁵

Although the *Sousley* rule treats income in the manner envisioned by the drafters of the UMDA,⁷⁶ the case posed peculiar

⁷¹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) established the rule that if a case rests upon an independent state ground, the Supreme Court won't consider the federal ground.

⁷² KRS § 403.190 (Cum. Supp. 1980), modeled after § 307 of the UMDA, provides that all property acquired by a spouse after marriage is marital property except:

- (a) Property acquired by gift, bequest, devise, or descent;
- (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
- (c) Property acquired by a spouse after a decree of legal separation;
- (d) Property excluded by valid agreement of the parties; and
- (e) *The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.*

Id. (emphasis added).

KRS § 403.190 (Cum. Supp. 1980) also provides that property acquired prior to the marriage is generally nonmarital, or separate, property.

⁷³ 614 S.W.2d 942 (Ky. 1981).

⁷⁴ *Id.* at 943. See *Sharp v. Sharp*, 491 S.W.2d 639 (Ky. 1973). In *Sharp*, the Court stated that increases in the value of property acquired before the marriage, which are attributable to general economic conditions, are nonmarital and "follow" the property. *Id.* at 644. Conversely, if an increase in value results from "team efforts" or "team funds," the increase is subject to division as marital property. *Id.* See also *Smith v. Smith*, 497 S.W.2d 418 (Ky. 1973); *Beggs v. Beggs*, 479 S.W.2d 598 (Ky. 1972); *Colley v. Colley*, 460 S.W.2d 821 (Ky. 1970).

⁷⁵ 614 S.W.2d at 943.

⁷⁶ As noted by the Court, the meaning of KRS § 403.190(2)(e) was underscored by

problems in the application of the rule. During the marriage both of the Sousleys worked in the operation of the disputed business. The business had been created through the use of capital stock owned by Curtis Sousley prior to the marriage.⁷⁷ Curtis sold the stock of the corporation⁷⁸ during the marriage and Pamela Sousley argued that the difference between the value of the corporation as it began and its sale value was attributable to joint efforts and was therefore marital property.⁷⁹ The trial court held that no portion of the increased value was attributable to joint efforts and that the increase in value due solely to economic conditions was separate property.⁸⁰ The court of appeals found that the "evidence sustained the findings of the trial court."⁸¹ The Kentucky Supreme Court granted discretionary review to decide the legal issue of "whether the income from the sale of a nonmarital asset is marital property within the meaning of KRS 403.190."⁸²

The Supreme Court affirmed the finding by the trial court and court of appeals that the evidence did not establish that Curtis Sousley had realized a profit on the sale. The Court also found, however, that if he had realized income from the sale, it would have been marital property. The Court expressly held "that income produced from nonmarital property is, in fact, marital property pursuant to the directives of KRS 403.190."⁸³

The holding is simple to state but difficult to apply because the opinion does not make clear exactly what will be considered income. The Court stated that if Curtis Sousley had realized a profit on the sale, he would have had income; but the Court im-

the authors of the UMDA: "The phrase, 'increase in value' . . . is not intended to cover the income from property acquired prior to marriage. Such income is marital property. Similarly, income from nonmarital property acquired after the marriage is marital property." UMDA § 307 commissioners' note, 9A U.L.A. 144 (1979) (emphasis added).

⁷⁷ 614 S.W.2d at 943. "[T]he stock of the corporation, including the \$30,000 cash infusion [made by Dr. Sousley], was solely the property of Dr. Sousley prior to the marriage and was, therefore, nonmarital." *Id.* (citing KRS § 403.190(1) (Cum. Supp. 1980)).

⁷⁸ 614 S.W.2d at 943.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 944.

plied that it would also be income on the separate theory that Curtis was an entrepreneur and "[t]his was the way he earned a living."⁸⁴ Thus there are two possible interpretations of the *Sousley* holding. One is that the profitable postmarriage sale of non-marital capital stock produces income which is always marital property. Another is that profitable sales *by entrepreneurs* will be held to generate income, and, therefore, marital property. The distinction may be important in determining what income is marital property. For instance, an individual who is not an entrepreneur could sell assets acquired before marriage and retain as separate property a portion of the assets' increased value because of a Kentucky rule permitting an asset to be deemed both marital and separate in proportion to the respective contributions made by each spouse.⁸⁵ An entrepreneur, on the other hand, would retain none of the increased value as separate property under the second interpretation of *Sousley*. Logically, the character of assets as marital or separate should not depend on the occupation of one of the spouses, and thus the first interpretation of *Sousley* seems preferable.⁸⁶

D. Appreciated Property

The Kentucky divorce statute states that property acquired

⁸⁴ *Id.* at 943.

⁸⁵ See the text accompanying notes 87-104 *infra* for a discussion of the proportionality rule.

⁸⁶ An important issue, though only briefly discussed in *Sousley*, is the validity of antenuptial agreements in Kentucky. The Sousleys had signed an antenuptial agreement providing for payment of money upon divorce. 614 S.W.2d at 944. Antenuptial agreements contingent upon divorce are void in Kentucky as against public policy. *Stratton v. Wilson*, 185 S.W. 522 (Ky. 1916). Although the Court indicated some displeasure with the *Stratton* rule, it declined to decide the current validity of the policy in the context of the *Sousley* facts. 614 S.W.2d at 944. More recently, the court of appeals has upheld an antenuptial agreement providing for "decent support" because the agreement made no mention of divorce. *Jackson v. Jackson*, 626 S.W.2d 630 (Ky. Ct. App. 1981).

With the rising divorce rate, there is a growing trend in other jurisdictions to allow prospective marriage partners to determine their support and property rights. See, e.g., *Spector v. Spector*, 531 P.2d 176 (Ariz. Ct. App. 1975); *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Valid v. Valid*, 286 N.E.2d 42 (Ill. App. Ct. 1972); *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. Ct. App. 1979). For a further discussion on this subject, see Casenote, *Antenuptial Contracts Contingent Upon Divorce Are Not Invalid Per Se*, 46 MO. L. REV. 228 (1981).

before the inception of a marriage is the separate property of the acquiring spouse.⁸⁷ While this rule is simple to apply to some kinds of property, its application to real property is often complicated by two factors. First, marital funds are often used to reduce a mortgage on property purchased prior to marriage. Second, real property rarely retains a constant value over a period of several years.⁸⁸ Both inflation and improvements to the property may contribute to an increase in its value.⁸⁹ In many instances, these two factors unite to produce appreciated property purchased prior to a marriage, but subject to a mortgage reduced during marriage.

Kentucky courts have solved the problem of determining what is "property" at the time of acquisition by defining property as equity, and they have solved the problem of dividing up subsequent appreciation by adopting a proportionate approach.⁹⁰ In dealing with the time of acquisition, the Kentucky Court of Appeals has ruled that property means equity.⁹¹ Property subject to a mortgage is, therefore, acquired before the marriage only to the extent of the equity accumulated by the acquiring spouse. If the mortgage is reduced after the marriage through the use of marital funds, some portion of the property will be marital.⁹² The courts' definition of property as equity does not solve the problem of dividing the value of appreciation. That di-

⁸⁷ KRS § 403.190 (Cum. Supp. 1980).

⁸⁸ The Consumer Price Index indicates that in 1980 the average urban consumer was required to spend 14.8% more to purchase a home than he or she would have spent in 1979. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 486 (101st ed. 1980).

⁸⁹ Conversely, it is at least theoretically possible for real property to decrease in value. No such decrease has occurred for the last ten years, however. *Id.*

⁹⁰ See *Newman v. Newman*, 597 S.W.2d 137; *Woosnam v. Woosnam*, 587 S.W.2d 262 (Ky. Ct. App. 1979); *Robinson v. Robinson*, 569 S.W.2d 178 (Ky. Ct. App. 1978); *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App. 1978).

⁹¹ 569 S.W.2d at 178. The *Robinson* formula states that the net "equity in . . . property shall be considered nonmarital property at the time of separation in that proportion which this equity bore to the value of the property at the time of the marriage." *Id.* at 181. The spouse claiming nonmarital property in *Robinson* had paid \$19,000 of a \$30,000 purchase price at the time of the marriage. Therefore, 19/30th of the property was nonmarital. A mathematical representation of *Robinson* is:

$$\frac{\text{equity in the property at the time of marriage}}{\text{value of the property at time of marriage}} = \text{nonmarital interest}$$

⁹² *Id.* at 181.

vision, which designates increases from joint efforts as marital property, is statutorily mandated.⁹³

The Kentucky Court of Appeals recently reaffirmed the propriety of a proportionate approach in *Brandenburg v. Brandenburg*.⁹⁴ The *Brandenburg* trial court had allocated to the husband as separate property certain property purchased by him prior to the marriage but subject to a mortgage reduced during the marriage.⁹⁵ The appellate court's reversal adopted a proportionate approach.⁹⁶ The *Brandenburg* formula, like its predecessors in *Robinson v. Robinson*⁹⁷ and *Newman v. Newman*,⁹⁸ establishes ratios between the nonmarital/separate contribution and the total contribution and between the marital contribution and the total contribution.⁹⁹ For purposes of the formula a separate contribution is defined as not only the equity in the property at the time of the marriage, but also any amount expended by either spouse from traceable, separate funds either to reduce mortgage principal or to improve the property.¹⁰⁰ Marital contributions are similarly defined to include both mortgage reductions and any improvements attributable to marital funds.¹⁰¹ Spousal contributions that do not proceed from marital funds, such as the contribution of a spouse as a homemaker,¹⁰² may not

⁹³ KRS § 403.190(2)(e) (Cum. Supp. 1980). The statute provides that property which has appreciated due to joint efforts is to be classified as marital, while property that has appreciated from other causes is separate. *Id.* In *Newman v. Newman*, 597 S.W.2d at 139, the Kentucky Supreme Court left standing an application of the *Robinson* formula to appreciated property. The *Newman* formula may be mathematically stated as:

$$\frac{\text{equity in property at the time of marriage}}{\text{value of the property at time of marriage}} \times \text{value at separation} = \text{nonmarital share}$$

⁹⁴ 617 S.W.2d 871 (Ky. Ct. App. 1981).

⁹⁵ *Id.* at 872.

⁹⁶ The *Brandenburg* formula may be mathematically represented as:

$$\frac{\text{nonmarital contribution}}{\text{total contribution}} \times \text{equity} = \text{nonmarital property}$$

$$\frac{\text{marital contribution}}{\text{total contribution}} \times \text{equity} = \text{marital property}$$

⁹⁷ 569 S.W.2d 178 (Ky. Ct. App. 1978).

⁹⁸ 597 S.W.2d 137 (Ky. 1980).

⁹⁹ *Brandenburg v. Brandenburg*, 617 S.W.2d at 872.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² For a further discussion of spousal contribution as a homemaker, see note 24 *supra*.

be counted in determining the marital portion of the property.¹⁰³ Rather, such contributions are later considered in determining each spouse's share of the marital property.¹⁰⁴

Although *Brandenburg* appears to firmly entrench a proportionate approach for the resolution of marital property disputes in Kentucky, a concurring opinion by Judge Gudgel raised significant questions concerning the formula's use. Judge Gudgel first argued that the majority's formula abandoned formulas previously approved by the court of appeals.¹⁰⁵ Second, he contended that the majority had misjudged the Kentucky Supreme Court's opinion in *Newman*, which he felt did not mandate the adoption of a particular formula.¹⁰⁶ Third, he chided the majority for adopting formulas for use in determining separate shares of property because such appellate level formulations discourage trial court discretion.¹⁰⁷

The *Brandenburg* formula does expand prior formulations because it provides more complete definitions of both marital and separate contributions. Despite this addition of detail, the formula retains the most essential characteristic of earlier formulations because it looks to the source of the funds used to acquire property. *Brandenburg* is less an abandonment of *Robinson* than a refinement of it. Further, its refinements are dictated by case law which permits courts to trace separate property.¹⁰⁸

Appellate level courts are correctly concerned with preserving trial court discretion in the division of marital property.¹⁰⁹

¹⁰³ *Brandenburg v. Brandenburg*, 617 S.W.2d at 873.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 875 (Gudgel, J., concurring).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *Turley v. Turley*, 562 S.W.2d 665 (Ky. Ct. App. 1978). A spouse who used traceable, nonmarital funds to reduce a mortgage or to fund an improvement could also be entitled to the increased property value under a statutory argument. The increased property value attributable to improvements made with nonmarital funds could be regarded as property acquired in exchange for the traceable, nonmarital funds. See KRS § 403.190(1) (Cum. Supp. 1980). Kentucky appellate opinions have generally regarded improvements made with marital funds as marital property. *Sharp v. Sharp*, 491 S.W.2d at 644. The sole difference in treatment of improvements made with nonmarital funds is that the claimant spouse has the burden of proof to show that the expended funds were nonmarital. KRS § 403.190(3) (Cum. Supp. 1980). At times a spouse may have difficulty tracing nonmarital funds. See *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978).

¹⁰⁹ See *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978).

That discretion, however, is not all encompassing. The divorce statute calls for division of marital property in "just proportions considering all relevant factors," including those dictated by statute and excluding marital misconduct.¹¹⁰ Yet a trial court has no similar discretion when determining whether an asset is marital or separate. The definitional section of the statute does not incorporate any language mandating discretion.¹¹¹ The majority in *Brandenburg* recognized this distinction when it noted that it would not prohibit other methods of property division as long as the adopted method established a relationship between the contributions of the parties to the property.¹¹²

In spite of some dissatisfaction with the present formulation, it is unlikely that the Kentucky Supreme Court would overrule this state's prior cases in favor of an alternative approach to the characterization of separate and marital property. Even though the proportionality rule depends on the court's own interpretation of the word "property"¹¹³ as used in the statute, and is not, therefore, statutorily mandated, several factors militate against wholesale change. Not the least of these factors is respect for precedent. In addition, abandonment of the proportionality rule would force the court to consider an inception of title rule under which the character of property as separate or marital would be determined as of the time of acquisition and would thereafter remain immutable.¹¹⁴ The inception of title rule has been criticized

¹¹⁰ KRS § 403.190(1) (Cum. Supp. 1980).

¹¹¹ See KRS § 403.190(2) (Cum. Supp. 1980).

¹¹² 617 S.W.2d at 873. Judge Gudgel complained that the *Brandenburg* formula was not mandated by the Kentucky Supreme Court's opinion in *Newman*. *Id.* at 875 (Gudgel, J., concurring). Although the precise *Newman* issue was the propriety of a maintenance award, the statutory schemes for property division and maintenance are so interrelated that a correct award of maintenance depends upon correct property division. A spouse seeking maintenance must demonstrate that he or she lacks sufficient property apportioned to him or her to meet his or her reasonable needs. KRS § 403.200 (Cum. Supp. 1980).

¹¹³ See *Robinson v. Robinson*, 569 S.W.2d at 181. In *Robinson* the court defined the term property as used in KRS § 403.190 (Cum. Supp. 1980) to mean equity. *Id.*

¹¹⁴ For example, a spouse in an inception of title jurisdiction retains as his or her separate property real estate purchased before the date of marriage even though the real estate is subject to a substantial indebtedness reduced after marriage. See *Cain v. Cain*, 536 S.W.2d 866 (Mo. Ct. App. 1976); *Gillespie v. Gillespie*, 506 P.2d 775 (N.M. 1973);

for ignoring the shared enterprise or partnership theory of marriage. If marriage is viewed as a partnership, critics argue, then both the marital and separate estates should profit proportionately when equity is acquired in real property.¹¹⁵

Although Kentucky's rule requiring proportionality may raise problems for future trial courts,¹¹⁶ it is preferable to the inception of title rule.¹¹⁷ Both Kentucky case law¹¹⁸ and its adoption of the UMDA¹¹⁹ evidence an intention to treat marriage as a shared enterprise and to maintain the necessary flexibility required to deal with the changing equities that are involved in thousands of divorce cases each year. The present rule, which looks to the source of the funds used to acquire an asset, accomplishes that objective while maintaining flexibility in the actual award of marital property.

III. CHILD CUSTODY

Child custody disputes affect nearly one million children

Hodge v. Ellis, 268 S.W.2d 275 (Tex. Civ. App. 1954). For an explanation of the rule's antecedents, see W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 130-33 (2d ed. 1971). The non-owner spouse may retain a claim to reimbursement for some portion of the marital funds expended. 536 S.W.2d at 875.

¹¹⁵ See generally Recent Cases, *Dissolution of Marriage Division of Property which has Increased in Value*, 42 MO. L. REV. 479, 485 (1977). It is possible, at least in theory, for a spouse in an inception of title jurisdiction to receive a larger award than a Kentucky spouse whose award proceeded from the source of the funds rule. An inception of title spouse would only have to receive a larger percentage as reimbursement than the percentage the Kentucky spouse received as marital property.

¹¹⁶ One major problem with the current formulation is that it does not account for varying rates of inflation. The formula assumes that the proportion of the asset attributable to inflationary increase and that due to increases from joint efforts remains constant.

¹¹⁷ The real difference between the two rules lies in the amount of flexibility available to the court. For example, under the Kentucky rule a court need not award the property to the purchasing spouse. However, a court in an inception of title state would be required to award the marital home to the purchasing spouse even though custody of minor children was to be awarded to the nonpurchasing spouse. Kentucky allows the courts to consider the "desirability of awarding the family home . . . to the spouse having custody of any children." KRS § 403.190(1)(d) (Cum. Supp. 1980).

¹¹⁸ Even before Kentucky's adoption of the UMDA, Kentucky courts had adopted the partnership view of the marital relationship in *Colley v. Colley*, 460 S.W.2d at 821. For examples of Kentucky decisions applying the proportionality rule, see note 90 *supra*.

¹¹⁹ For a list of other jurisdictions which have adopted the UMDA, see note 1 *supra*.

every year.¹²⁰ The courts, which have the burdensome task of determining the futures of children, take into account a variety of psychological and socio-economic factors. The underlying principle applied in a custody case is: "What will be in the child's best interest?"¹²¹

A. *Jurisdiction*

Every year, thousands of children are moved from state to state, family to family, while their parents wage custodial battles in the courts.¹²² Children needing stability in their environment are seriously harmed by these conflicts. For years laws did nothing to deter this practice and actually facilitated it.¹²³ Claimants could sue in the courts of any state where the child was physically present to seek custody or modification of a prior custody decree, notwithstanding a pending action in another state.¹²⁴ This confu-

¹²⁰ NATIONAL COUNCIL OF ORGANIZATIONS FOR CHILDREN AND YOUTH, AMERICA'S CHILDREN 1976, at 61 (1976).

¹²¹ The "best interests of the child" standard is the prevailing standard in the United States today. UMDA § 402 commissioners' note, 9A U.L.A. 197 (1979). KRS § 403.270(1) (Cum. Supp. 1980) specifically enumerates a list of factors that must be considered by trial courts in determining an award of custody. Such factors include: the desires of both the child and parents; the child's interaction with his parents, siblings, and any other person in close contact with the child; the child's adjustment to his home, school, and community; and the mental and physical health of the child and the proposed custodian. *Id.* For a recent decision applying these factors, see *Stafford v. Stafford*, 618 S.W.2d 578 (Ky. Ct. App. 1981).

Courts in the following states give consideration to the child's wishes: Alaska, Arizona, Connecticut, Colorado, Georgia, Illinois, Kentucky, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Utah, Washington, and Wisconsin. Freed & Foster, *supra* note 24, at 262. While KRS § 403.270 (Cum. Supp. 1980) does not specify any age limit, several states require that a child attain a certain age before his choice of parent is entitled to any weight (for example, Georgia (14 or older); New Mexico (14 or older); Ohio (12 or older)). Freed & Foster, *supra* note 24, at 262.

¹²² UCCJA commissioners' prefatory note, 9 U.L.A. 111 (1979).

¹²³ *Id.* at 112. The United States Supreme Court, in *Halvey v. Halvey*, 330 U.S. 610 (1947), held that full faith and credit need not be given to sister state child custody decrees. A sister state "has at least as much leeway to disregard the judgment [of another state in custody matters], to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615.

¹²⁴ Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 203 (1981). Kentucky was among those states wherein the basis of jurisdiction hinged on the bona fide residence or domicile of the child in the state. R. PETRILLI, KENTUCKY FAMILY LAW § 26.1 (1969).

sion led a majority of states, including Kentucky,¹²⁵ to adopt the Uniform Child Custody Jurisdiction Act (UCCJA).¹²⁶ This Act is designed to promote interstate cooperation in matters of child custody, to discourage continuing controversies over child custody, and to deter child snatching, thus promoting a stable environment for the child.¹²⁷

Despite the fact that the UCCJA is aimed at promoting "interstate stability in custody awards,"¹²⁸ the Kentucky Supreme Court, in *Shumaker v. Paxton*,¹²⁹ viewed the Act as providing guidance in *intra-state* custody disputes as well.¹³⁰ The parties, after obtaining a decree of dissolution in Union County, Kentucky, established residence in McCracken County, Kentucky.¹³¹ A petition for a modification of the existing child custody decree to allow for joint custody¹³² was filed by the husband in McCracken County.¹³³ Rejecting the wife's contentions that continuing and exclusive jurisdiction attaches to the circuit court making the initial custody determination,¹³⁴ Justice Aker—writing for a

¹²⁵ KRS §§ 403.400-.630 (Cum. Supp. 1980). Prior to 1980, the Kentucky General Assembly had only adopted § 3 of the UCCJA. See KRS § 403.260 (1972) (repealed 1980) (pertaining to jurisdictional matters). KRS § 403.260 (1972) was almost identical to § 3 of the Act except that the provision giving jurisdiction over an absent child whose home was within the state six months prior to the commencement of proceedings was deleted by the 1976 legislature. In 1980 the entire Uniform Act was passed by the legislature. KRS § 403.260 (1972) was thereby repealed and replaced by KRS § 403.420 (Cum. Supp. 1980) which again includes the "home state within six (6) months" clause.

¹²⁶ As of 1980, approximately 42 states had adopted the Act into law. Those jurisdictions which have not done so include: Massachusetts, New Mexico, Texas, West Virginia, South Carolina, the District of Columbia and Puerto Rico. Freed & Foster, *supra* note 24, at 259.

¹²⁷ *Id.* See also UCCJA commissioners' prefatory note, 9 U.L.A. 111, 114 (1979). For a critical analysis of the jurisdictional provisions of the Act and conflicting interpretations, see Bates & Holmes, *The Uniform Child Custody Jurisdiction Act: Progress and Pitfalls*, 17 GA. ST. B.J. 72 (1980); Bodenheimer, *supra* note 124.

¹²⁸ UCCJA commissioners' prefatory note (1979), 9 U.L.A. 111, 113 (1979) (emphasis added).

¹²⁹ 613 S.W.2d 130 (Ky. 1981).

¹³⁰ *Id.* at 132. The authors have found no other decision in which a court relied on the Act to resolve intrastate custody disputes.

¹³¹ *Id.* at 131.

¹³² For a full discussion of custody arrangements and their impact on children, see Bratt, *Joint Custody*, 67 KY. L.J. 271 (1978-79). See also Freed & Foster, *Joint Custody: Legislative Reform*, 16 TRIAL 22 (1980).

¹³³ 613 S.W.2d at 131.

¹³⁴ The theory of continuing and exclusive jurisdiction was first enunciated in *McNees v. McNees*, 30 S.W. 207 (Ky. 1895). In *McNees*, the Court held that jurisdiction

unanimous court—found that no statute prohibited the McCracken Circuit Court from assuming jurisdiction of the case, especially since all of the parties and most of the evidence were in McCracken County.¹³⁵

The *Shumaker* holding parallels decisions in cases involving choice of jurisdiction among different states. Once the custodial parent and child take up residence in another state the noncustodial parent often institutes modification proceedings in the state of original jurisdiction. No easy solution is available to aid the courts in preventing the noncustodial parent from thereby enjoying an unfair advantage.¹³⁶ However, if the facts are such that the new home state has optimum access to relevant evidence for determining what is in the child's best interest, the forum state should decline to exercise jurisdiction.¹³⁷ In one recent Kentucky case, *Williams v. Williams*,¹³⁸ the court of appeals relinquished its jurisdiction to the new home state of the child and custodial parent under the doctrine of *forum non conveniens*.¹³⁹ The *Williams* decision is consistent with the purpose of the UCCJA provision governing jurisdiction in child custody mat-

attaches to the circuit court once a custody determination is made, and that the court will not lose jurisdiction for purposes of modifying its order until the child reaches the age of majority. *Id.* at 207. As noted by the Court in *Shumaker*, case law and statutory law have largely eroded this doctrine. 613 S.W.2d at 131. See *Honigsberg v. Goad*, 550 S.W.2d 471 (Ky. 1976) (court cannot retain jurisdiction over custody of children indefinitely even if original custody order states otherwise); *Turley v. Griffin*, 508 S.W.2d 764 (Ky. 1974) (removal of child from forum state divested state of jurisdiction due to insufficient contacts).

¹³⁵ 613 S.W.2d at 132. At the time of this action, all parties lived in McCracken County and had done so for over two years. *Id.* at 131.

The legitimacy of the Court's analysis is demonstrated in the situation where the parties, after litigating child custody in one county, move to another county across the state. The Court declared: "There could be little, if any, justification in requiring the parties to travel the length of the state to litigate a custody modification matter." *Id.* at 132. Further support can be found in the commissioners' note to § 3 of the UCCJA which states: "[J]urisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family." UCCJA § 3 commissioners' note, 9 U.L.A. 122, 124 (1979).

¹³⁶ UCCJA § 3 commissioners' note, 9 U.L.A. at 123 (1979).

¹³⁷ *Id.* See also *Turley v. Griffin*, 508 S.W.2d 764 (Ky. 1974). See note 135 *supra* for a discussion of the commissioners' emphasis on the courts' relative access to evidence.

¹³⁸ 611 S.W.2d 807 (Ky. Ct. App. 1981).

¹³⁹ *Id.* at 809. Other state courts have refused jurisdiction under the doctrine of *forum non conveniens*. See, e.g., *Moore v. Moore*, 546 P.2d 1104 (Or. Ct. App. 1976). Cf.

ters, that is, to "limit jurisdiction rather than to proliferate it."¹⁴⁰ Therefore, "maximum rather than minimum contact with the state" is required.¹⁴¹

In contrast to the *Williams* situation, there are instances when the custodial parent is given an unfair advantage if the noncustodial parent's local court is made unavailable.¹⁴² Jurisdiction may be exercised by the original court in such a case. Under the doctrine of *forum non conveniens*, the facts of each case must be considered, and while a refusal to exercise jurisdiction is appropriate or even necessary in some cases, that is not always so. For instance, if the custodial parent attempts to frustrate visitation rights in a court in the new home state, the noncustodial parent should have the opportunity to utilize the courts in the state of original jurisdiction to reaffirm his or her visitation rights or even to request a change of custody if the grounds are serious enough.¹⁴³ Otherwise, the noncustodial parent can do little to prevent loss of all contact with the child.¹⁴⁴

B. *Sexual Preference*

In determining the best environment for a child, courts are confronted with unusual problems in child custody disputes in-

Siegel v. Siegel, 417 N.E.2d 1312 (Ill. 1981) (recognized validity of using doctrine of *forum non conveniens* but refused jurisdiction on other statutory grounds).

See also KRS § 403.460 (Cum. Supp. 1980). This statutory section, identical to § 7 of the UCCJA, concerns considerations of a convenient forum in custody disputes. Despite the fact that this section was not in effect at the time of this action, the *Williams* court applied the theory of the section. Factors considered by the *Williams* court in declining jurisdiction included: (1) the children were not present in Kentucky; (2) one child had completed a year of schooling in the new home state of New Hampshire; (3) New Hampshire had assumed jurisdiction in the matter; and (4) evidence concerning the children's best interest was best obtained in New Hampshire. 611 S.W.2d at 809.

¹⁴⁰ *Turley v. Griffin*, 508 S.W.2d at 766 (citing the UCCJA).

¹⁴¹ *Id.*

¹⁴² *Bodenheimer*, *supra* note 124, at 222.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 222-23. *But cf.* *Siegel v. Siegel*, 417 N.E.2d 1312. In *Siegel*, the mother, after moving out of the forum state with the child, applied for modification of the child-visitation provisions in the new home state of California. The Illinois Supreme Court, while noting the inconvenience and expense placed on the father by having to litigate in California, held that California was the proper forum for determining child custody matters. *Id.* at 1319.

volving a homosexual parent.¹⁴⁵ The Kentucky Court of Appeals addressed such a problem in *S. v. S.*,¹⁴⁶ which involved a father's bid for modification of a divorce decree which had vested child custody with the lesbian mother. Less than one year after the parents had obtained the divorce, the mother became involved in a homosexual relationship.¹⁴⁷ The court found that "[t]he extent of the relationship included working at a lesbian bar, moving the female companion into the house with the child, and exchanging vows and rings with the friend in a mock wedding ceremony at the wife's place of employment."¹⁴⁸ The appellate court, in reversing the circuit court's denial of modification, held that the mother's lesbianism was sufficient, *on the facts presented*, to warrant a change in custody.¹⁴⁹ Nevertheless, the court refused to

¹⁴⁵ In recent years a number of articles have been written on this subject. For a comprehensive background on the lesbian factor in custody disputes, see Armanno, *The Lesbian Mother: Her Right to Child Custody*, 4 GOLDEN GATE L. REV. 1 (1973); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigating Strategy*, 25 BUFFALO L. REV. 691 (1976); Comment, *Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1981) [hereinafter cited as Comment, *Bezio*]; Comment, *Custody: Lesbian Mothers in the Courts*, 16 GONZ. L. REV. 147 (1980).

¹⁴⁶ 608 S.W.2d 64 (Ky. Ct. App. 1980).

¹⁴⁷ *Id.* at 65. "Normally, the mother obtains custody after divorce and the lesbian factor emerges when the father later petitions for a custody modification. The basis for modification of the initial custody agreement is 'substantial change in circumstances.'" Comment, *Bezio*, *supra* note 145, at 339.

The absence of statistical data on how parental homosexuality influences custody decisions is due in large part to the minimal documentation of such cases. "[T]he issue is rarely mentioned above the level of a whisper, and the few cases that reach the appellate level are almost always ordered excluded from official and unofficial reports." Armanno, *supra* note 145, at 5.

¹⁴⁸ 608 S.W.2d at 65.

¹⁴⁹ *Id.* A growing number of courts are retreating from the traditional view that a lesbian mother is unfit per se and are focusing on homosexuality as only one factor to be considered in determining the best interests of the child. See, e.g., *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (Ct. App. 1967); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980); *M.P. v. S.P.*, 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978).

It is interesting to note the lack of custody cases involving homosexual fathers. Few reported decisions allow a homosexual father to retain custody. See, e.g., *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973) (homosexual father was allowed to maintain custody of his two sons). However, custody in *A. v. A.* was conditioned on the father not living with his homosexual companion. See also *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

find a lesbian mother unfit per se.¹⁵⁰

KRS section 403.340 prohibits changing custody within two years following a decree unless the situation is one in which the child's environment *may* endanger his or her physical, mental, moral, or emotional health.¹⁵¹ The court of appeals observed that the statute prescribes a "potentiality for . . . danger" test that does not require courts "to wait until the damage is done."¹⁵² In examining the nexus between a parent's sexual preference and its potential harmful effect on the "best interests" of the child,¹⁵³ the court in *S. v. S.* relied in part upon the observations and recommendations of a court-appointed psychologist. The psychologist concluded that the father should be awarded custody because otherwise the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future."¹⁵⁴ The court

¹⁵⁰ 608 S.W.2d at 65. For further discussion, see note 149 *supra* and the accompanying text. *But cf.* *Immerman v. Immerman*, 1 Cal. Rptr. 298, 301 (Ct. App. 1959) (homosexuality was material consideration); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979).

See also *In re Jane B.*, 380 N.Y.S.2d 848 (N.Y. Sup. Ct. 1976) (court returned custody of the child to the father). While the court did not go so far as to find the mother unfit as a matter of law, it did, however, hold that "the home environment with her homosexual partner in residence [was] not a proper atmosphere in which to bring up this child or in the best interest of this child." *Id.* at 858. In a number of recent cases the custody rights of a lesbian mother have been maintained on the condition that she not live together with her homosexual partner. See, e.g., *Townsend v. Townsend*, [1974-75] 1 FAM. L. REP. (BNA) 2830 (Portage County, Ohio, Ct. C.P. Mar. 14, 1975).

¹⁵¹ KRS § 403.340(1) (Cum. Supp. 1980) provides in pertinent part:

No motion to modify a custody decree may be made earlier than two years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

The purpose of this statutory section is to maximize the finality and conclusiveness of child custody judgments so as to provide custodial continuity for the child without jeopardizing the interests of the child. The person seeking the modification must overcome a presumption in favor of the present custodian. UMDA § 409 commissioners' note 9A U.L.A. 211, 212 (1979). See *Wilcher v. Wilcher*, 566 S.W.2d 173, 175 (Ky. Ct. App. 1978).

¹⁵² 608 S.W.2d at 65. As stated by the Kentucky Court of Appeals:

We do not perceive that [the] word ["may"] connotes that the injury to the "physical, mental, moral or emotional health" must have already occurred or be occurring at the present time. The potentiality for such danger is the test and the courts are not required to wait until the damage is done.

Id.

¹⁵³ For further discussion of the best interest analysis, see note 121 *supra* and the accompanying text.

¹⁵⁴ 608 S.W.2d at 66. See also *In re Jane B.*, 380 N.Y.S.2d 848 (court justified its

noted, in deciding in favor of the father, "that the lesbianism of the mother, because of the failure of the community to accept and support such a condition, forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers."¹⁵⁵

The court of appeals in *S. v. S.* failed to explain fully the factors that sustained the conclusion that parental homosexuality would be likely to affect the child.¹⁵⁶ Since the decision did not state a clear legal standard for deciding future custody disputes in which one parent is a homosexual, the opinion cannot be considered a landmark decision. The case may merely be another example of judicial bias against lesbian mothers.

modification order on the basis of expert testimony). As pointed out by the court-appointed psychologist in *S. v. S.*, there is no empirical data to substantiate the theory that children are more likely to be adversely affected when raised in a homosexual household. 608 S.W.2d at 66. For an in-depth analysis of the psychiatrist's role in the lesbian child custody process, see Comment, Bezio, *supra* note 145, at 348-54.

¹⁵⁵ 608 S.W.2d at 66. This language intimates the court's bias against the mother's lesbianism. As one commentator pointed out:

In order to minimize the prejudicial effects surrounding judicial homophobic attitudes, there should be a requirement that all findings of fact be recorded in detail in the record. This requirement would operate as a safeguard against judicial carelessness in custody suits involving lesbian mothers . . . [and would serve to protect] those who may be subject to judicial bias.

Comment, Bezio, *supra* note 145, at 344.

Cf. Bezio v. Patenaude, 410 N.E.2d at 1216. In *Bezio*, the court stated that "[t]he State may not deprive parents of custody of their children 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.'" *Id.* (quoting *Custody of a Minor*, 393 N.E.2d 379, 383 (Mass. 1979)).

¹⁵⁶ For a further discussion of these factors, see the text accompanying note 148 *supra*.