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Kentucky Law Survey: Domestic Relations

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DOMESTIC RELATIONS

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In recent years Domestic Relations has been a heavily litigated and rapidly changing[1] area of the law. This survey year has been no exception as the Kentucky appellate courts rendered significant decisions regarding marital property divisions, maintenance and support, and termination of parental rights. This article will consider the recent developments in each of these areas.

I. DIVISION OF MARITAL PROPERTY

The Uniform Marriage and Divorce Act, which has been adopted in Kentucky and four other states,[2] reflects a shared enterprise or partnership theory of marriage. Kentucky's version of the Act, which is similar to the law of partnership,[3] provides that all property acquired by either spouse during a marriage is presumed to be marital property regardless of how title is held,[4] and when the marriage "partnership" is dissolved, marital assets must be distributed by the court.[5] While

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[1] The family law practitioner must keep abreast of recent developments to protect himself from malpractice exposure. In Smith v. Lewis, 530 P.2d 589 (Cal. 1975), an attorney was held liable to his client for malpractice in the sum of $100,000 for failing to research and argue the then open question of whether federal military retirement pay was divisible marital property.

[2] The other states are Arizona, Colorado, Illinois and Montana. 9A UNIFORM LAWS ANN., Uniform Marriage and Divorce Act, 91 (1979). Kentucky's divorce law was patterned after the divorce portion of the Uniform Marriage and Divorce Act promulgated by the National Conference of Commissioners on Uniform State Laws and is contained in KY. REV. STAT. §§ 403.010 to .350 (Cum. Supp. 1980) [hereinafter cited as KRS].

[3] "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property." Section 8(1) Uniform Partnership Act, 6 UNIFORM LAWS ANN., Uniform Partnership Act, 115 (1969).

[4] KRS § 403.190(3) (Cum. Supp. 1980).

[5] Casenote, *Domestic Relations Law - Dissolution of Marriage - Property Provisions of New Illinois Marriage and Dissolution of Marriage Act are Constitutional - The Exact Nature of the Interest of the Nontitle Holding Spouse During the Marriage Still Needs Clarification,* 1978 S. ILL. U.L.J. 598, 601. In many jurisdictions the trial judge, after hearing testimony from appraisers and accountants follows a three

the distribution must be an equitable one, it will not necessarily be in equal shares. The court may consider, for example, the contribution each spouse made to the marital estate[6] and the amount of pre-marital or otherwise exempt property owned by each.[7] Property division under the Act replaces alimony[8] as the primary means of support for divorced persons.[9] Recognizing that support payments often serve only to continue unwanted relationships, the Act strictly limits their use. Several statutory exceptions to marital property, such as gifts and certain types of pensions, may significantly thwart this goal, however, by requiring the court to provide for maintenance payments.

A. *The Gift Exception to Marital Property*

Since gifts are not considered marital property under the Kentucky version of the Uniform Marriage and Divorce Act,[10] they are not generally divisible upon dissolution of a marriage. A gift from a third party to one spouse during the marriage, for instance, is treated on divorce simply as nonmarital property.[11] A possible exception to this rule may arise when Kentucky courts consider the situation where such a gift was made to both spouses.[12] In that case, it may be much more reasonable to divide the gift than to determine whom the donor intended to benefit.

Intraspousal gifts also create a problem under the statute. The Kentucky Court of Appeals addressed this issue in

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step approach in making an equitable distribution of marital property:

(1) decide specific property of each spouse subject to equitable distribution;

(2) determine its value for purpose of equitable distribution; and

(3) decide on most equitable allocation of the property.

Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution*, 56 N.D. L. REV. 201, 204 (1980).

[6] KRS § 403.190(1) (Cum. Supp. 1980).

[7] KRS § 403.190(2) (Cum. Supp. 1980).

[8] *See* KRS § 403.190(1) (Cum. Supp. 1980).

[9] "Maintenance" is substituted in the new act for the old term "alimony." See text accompanying notes 71 to 90 *infra* for a discussion of maintenance.

[10] 9A UNIFORM LAWS ANN., Uniform Marriage and Divorce Act, 93 (1979) (Commissioners' Prefatory Note).

[11] *See* KRS § 403.190(2)(a) (Cum. Supp. 1980).

[12] *See, e.g.*, Brunson v. Brunson, 569 S.W.2d 173 (Ky. Ct. App. 1978).

O'Neill v. O'Neill,[13] in which jewelry worth $50,900 was purchased by a husband with his salary and given on various occasions to his wife. Mrs. O'Neill argued successfully before the circuit court that the jewelry came within the gift exemption of Kentucky Revised Statutes (KRS) section 403.190(2)(a) and thus was nonmarital property that she was entitled to keep without credit being given to her husband upon division of the marital property.[14] The Kentucky Court of Appeals reversed, however, holding that the "transfers were not a gift within the meaning of the statute and . . . [t]o hold otherwise would completely ignore the contribution of Dr. O'Neill in the acquisition of the property, a factor that must be considered under KRS Chapter 403."[15]

Although the *O'Neill* court stated that the classification of property as gift or non-gift should be based on the pertinent facts in each case,[16] it identified several factors that might suggest a finding of marital property. First, the money used to purchase the gift was a marital asset such as a spouse's salary; second, the gift was motivated by things other than donative intent,[17] such as expected appreciation in value; third, the marital relationship was strong at the time of the gift; and fourth, the spouses had not agreed that the gift would be excluded from marital property.[18] The *O'Neill* court placed heavy emphasis on Dr. O'Neill's testimony that the jewelry was purchased as an investment and was also impressed with the value of the jewelry as compared with the rest of the marital estate. The decision underscores the importance of viewing gifts in the context of the marriage and indicates that neither spouse can lay claim to significant assets as nonmarital property merely because that spouse personally uses the property.

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[13] 600 S.W.2d 493 (Ky. Ct. App. 1980).

[14] *Id.* at 495.

[15] *Id.* at 496.

[16] *Id.* at 495.

[17] *See* Leatherman v. Leatherman, 256 S.E.2d 793, 797 (N.C. 1979).

[18] *Id. See* Ghali v. Ghali, 596 S.W.2d 31 (Ky. Ct. App. 1980). In *Ghali*, the factors considered in *O'Neill* were not present, and the *Ghali* court held two rings to be gifts and thus not part of the marital property.

B. *Pensions as Marital Property*

Pensions are considered in most jurisdictions today as part of the marital property.[19] Kentucky courts have followed this trend in their treatment of noncontributory private pension plans that have accrued totally during the marriage[20] but have not adopted this position in two other pension areas: nonvested pension plans[21] and vested, noncontributory government-funded pension plans.[22]

1. *Nonvested Pension Plans*

Amounts contained in nonvested pension plans were found not to be marital property in *Ratcliff v. Ratcliff*.[23] The Kentucky Court of Appeals, while recognizing that courts are authorized under KRS section 403.190(1) to consider all relevant factors, including economic circumstances,[24] found the interest too speculative to be divided.[25] The court in reaching this decision, however, failed to adequately consider the special significance of pensions to a marriage. As one commentator has stated:

> [P]ension rights are for many families the most substantial single asset acquired by the parties. The important expectations attached to this asset by both husband and wife can-

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[19] Common law property states, such as Kentucky, have been faced increasingly with the issue of considering a pension as part of the marital estate. Common law jurisdictions must look to the community property states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington for guidance in this area. In community property states "each party to the marriage has a legal claim to half of all property acquired during marriage." Note, *Pensions as Property Subject to Equitable Division Upon Divorce in Oklahoma*, 14 TULSA L. J. 168 n.6 (1978).

[20] *See* Frost v. Frost, 581 S.W.2d 582, 583 (Ky. Ct. App. 1979).

[21] A number of jurisdictions recognize spousal claims to even nonvested benefits. *See* In re Marriage of Brown, 544 P.2d 561 (Cal. 1976); Stern v. Stern, 331 A.2d 257 (N.J. 1975); Clearly v. Clearly, 544 S.W.2d 661 (Tex. 1976).

[22] A pension plan is vested, and thus considered a property right, when the employee has rights to the funds in the plan which cannot be forfeited by the happening of an event such as discharge or resignation of the employee prior to retirement. Note, *supra* note 19, at 174-75; Casenote, *Domestic Relations - Husband's "Vested" Interest in Retirement Plan is Divisible as Marital Property*, 42 Mo. L. REV. 143, 145 (1977).

[23] 586 S.W.2d 292 (Ky. Ct. App. 1979).

[24] *Id.*

[25] *Id.* at 293.

> not be overstated. They involve, after all, the fundamental belief by both spouses that their mutual security in later years will be protected by pension benefits. They also involve an assumption of interdependence and wealth sharing that has almost certainly been held jointly by both husband and wife during their years of marriage. As between the two spouses, it would seem unfair to deny to one of them the security and the sharing that both assumed would occur, at least where there are available adequate and fair judicial tools for measuring, valuing and allocating the interests involved.[26]

By simply exercising its authority under KRS section 403.190(1) and by retaining supervisory powers over the case as divorce courts frequently do,[27] the problem of speculative value could have been easily avoided.[28]

2. *Vested, Noncontributory Government-Funded Pension Plans*

Kentucky treats vested, noncontributory *private* pension plans as marital property subject to division upon dissolution of marriage.[29] However, in *Russell v. Russell*,[30] the Kentucky Court of Appeals held a similar military pension that had accrued totally during the marriage[31] to be nonmarital property not subject to division between the spouses. Only the fact that the plan was government financed kept the statutory pension in *Russell* from being deemed marital property.[32]

The *Russell* court examined the congressional intent underlying the federal military pension statutes, finding that Congress viewed military retirement pay as personal in na-

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[26] Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings*, 29 DEPAUL L. REV. 1, 16 (1979).

[27] In Graham v. Graham, 595 S.W.2d 720 (Ky. Ct. App. 1980), the court permitted the wife to live at the marital home until the youngest child reached the age of 18, or until the wife remarried or died. On the occurrence of one of those events, the property was to be sold and the proceeds divided between husband and wife. *See* Bonavich, *supra* note 26, at 15.

[28] Bonavich, *supra* note 26, at 15.

[29] *See* 581 S.W.2d at 583.

[30] 605 S.W.2d 33 (Ky. Ct. App. 1980).

[31] *Id.* at 35.

[32] *Id.* at 36.

ture. Amendments to the military retirement statute permitted a serviceman to voluntarily participate in an annuity program to benefit his surviving spouse, but her interest in the annuity ended upon death or subsequent remarriage. The *Russell* court thus determined that the federal interest of insuring a serviceman's spouse does not include supporting a serviceman's ex-spouse[33] and then concluded that "the purpose of the plan was 'to safeguard the participant's future retired pay when . . . a divorce occurs.' "[34]

In formulating its decision, the *Russell* court relied upon *Hisquierdo v. Hisquierdo*,[35] in which the United States Supreme Court held that benefits under the Railroad Retirement Act could not be considered community property because the benefits were governed by federal statute. Thus the *Russell* court found that the conflict between the federal interest of providing income to a serviceman and Kentucky's interest in providing an equitable distribution of marital property must be resolved in favor of the federal interest under the Supremacy Clause.[36] The court, in acknowledging that several jurisdictions[37] have held military retirement pay to be community or marital property and that *Hisquierdo* could be distinguished as involving the Railroad Retirement Act rather than military pay,[38] stated: "These cases are persuasive, but they are not binding in [Kentucky]."[39]

By defining military pensions as nonmarital property, the *Russell* decision conflicts with the Uniform Marriage and Divorce Act policy of favoring property division over mainte-

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[33] *Id.*

[34] *Id.*

[35] 439 U.S. 572 (1979).

[36] 605 S.W.2d at 36.

[37] In re Marriage of Fithian, 517 P.2d 449 (Cal.), *cert. denied*, 419 U.S. 825 (1974); Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975); Kruger v. Kruger, 375 A.2d 659 (N.J. 1977); Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App.), *cert. denied*, 409 U.S. 1028 (1972). The *Russell* court also cited jurisdictions holding military pensions not to be marital property. Cose v. Cose, 592 P.2d 1230 (Alaska 1979), *appeal pending*, 446 U.S. 933 (1980); Fenney v. Fenney, 537 S.W.2d 367 (Ark. 1976); Ellis v. Ellis, 552 P.2d 506 (Colo. 1976).

[38] 605 S.W.2d at 35.

[39] *Id.*

nance payments.[40] While this has the positive effect of allowing division of future as well as accumulated pension earnings,[41] the negative consequences are far greater. For example, it can be argued that "a pension is deferred compensation which is earned during each day or month of military service or other work."[42] This compensation "would have been available to the parties during their marriage to be invested in stocks, bonds, savings account, annuity and/or other investments."[43] This deferred compensation could have been used during the marriage, not only to augment the marital estate but also to raise the standard of living.[44] Furthermore, in Kentucky a maintenance award is discretionary,[45] and, unlike a property division, it may even be based partially on the misconduct of one spouse.[46] Thus, if a pension is to be considered only in determining the maintenance award and if the court in its discretion makes no award for maintenance, the spouse with the pension may end up with a secure future while the other spouse receives nothing.[47] The *Russell* court did recog-

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[40] See the text accompanying note 9 *supra* for the Uniform Marriage and Divorce Act's view of maintenance awards and property division. See the text accompanying notes 71 to 90 *infra* for a discussion of maintenance and support generally.

[41] If the pension is considered income, the entire pension account is available for maintenance purposes since a court can award maintenance in the amount it deems just; KRS § 403.200(2) (Cum. Supp. 1980); but if the pension is considered marital property, only the amount accumulated during the marriage is subject to division. KRS § 413.190(3) (Cum. Supp. 1980).

[42] Light v. Light, 599 S.W.2d 476, 478 (Ky. Ct. App. 1980). The *Light* court held, however, that even though a military pension may be considered deferred compensation *Russell* precludes finding a military pension to be marital property.

[43] Hutchins v. Hutchins, 248 N.W.2d 272, 277 (Mich. Ct. App. 1976).

[44] *See* Scherzer v. Scherzer, 346 A.2d 434 (N.J. Super. Ct. App. Div. 1975), *cert. denied*, 354 A.2d 319 (N.J. 1976).

[45] Browning v. Browning, 551 S.W.2d 823 (Ky. Ct. App. 1977).

[46] Chapman v. Chapman, 498 S.W.2d 134, 138 (Ky. 1973). KRS § 403.200(2) omits the language "without regard to marital misconduct" which is present in § 308(b) of the Uniform Marriage and Divorce Act. 9A UNIFORM LAWS ANN., Uniform Marriage and Divorce Act, 160 (1979). Marital property is divided in Kentucky without regard to marital misconduct. KRS § 403.190(1) (Cum. Supp. 1980).

[47] *See* In re Marriage of Brown, 544 P.2d 561, 567 (Cal. 1976). The *Brown* court answered the husband who insisted that an award of alimony would compensate his wife for not receiving a share of his pension benefits. "Alimony, however, lies within the discretion of the trial court; the spouse should not be dependent upon the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right." *But see* Baker v. Baker, 546 P.2d 1325 (Okla. 1976). The

nize this inequity, stating that a military pension may often be the only significant asset in a family, and "a spouse must not be left destitute and without some support, simply because the pension is not divisible property."[48]

C. *Valuation of Marital Property*

A trial court faces a valuation problem when property is purchased with both marital and nonmarital funds. This problem is compounded when the property appreciates in value during the marriage. The Kentucky Supreme Court faced this problem in *Newman v. Newman,*[49] in which a home and lot had been purchased for $68,000. Of this amount, $55,000 in nonmarital assets had been supplied by the husband,[50] and $13,000 in marital assets had been borrowed to finance construction of the house. The trial court noted that 19.12% of the original price was paid with marital assets and determined that of the $125,000 appreciated value, the same percentage, or $23,900, should be considered marital property on divorce. The trial court then awarded 60% of the marital property to the husband because the accumulation of the estate was primarily and indisputedly the result of his efforts.[51] Mrs. Newman's interest in the home and lot was therefore 40% of $23,900, or $9,560.[52]

Mrs. Newman argued on appeal that her share of the marital interest should have been determined by subtracting her husband's original contribution of $55,000 from the appreciated value of $125,000 and multiplying the difference by her 40% interest. According to this formula, her share would amount to $28,000.[53] The formula used by the trial judge and

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Oklahoma view is that it is not fair to divide the retirement fund and then to make the husband pay alimony for support out of his portion.

[48] 605 S.W.2d at 36.

[49] 597 S.W.2d 137 (Ky. 1980).

[50] This calculation was based on the premise that inherited property is nonmarital. KRS § 403.190(2)(a) (Cum. Supp. 1980).

[51] See text accompanying notes 6-7 *supra* for a discussion of the principle that equitable distribution does not necessarily mean an even distribution.

[52] 597 S.W.2d at 138-39.

[53] *Id.* at 139.

affirmed by the Kentucky Supreme Court[54] is clearly the better formula because it treats property acquired with combined marital and nonmarital assets in the same way as distinct marital and nonmarital properties: any appreciation attributed to an original asset remains a part of that asset. Just as personal, nonmarital property is awarded to the owner spouse on divorce regardless of any appreciation, the nonmarital portion of any property should not be limited to its original, unappreciated value.

It should be noted that KRS section 403.190(2)(e) provides a remedy for a spouse who contributes little to the acquisition of property, but who contributes greatly to improvements. If the increase in value of nonmarital property is attributable to the joint efforts of the spouses, such increases are considered marital property subject to division.[55]

D. *Marital Property After Separation*

Property or property interests acquired after a separation but before a divorce may not be subject to division. The Supreme Court of Kentucky confronted this issue in *Stallings v. Stallings*.[56] After being married for over thirteen years, Gay and Bob Stallings separated on January 1, 1976. Neither party obtained a decree of legal separation under KRS section 403.140(2), however, and the marriage was not officially dissolved until June 16, 1978.[57]

Three items of property had increased in value during the two and one-half year separation: the undistributed profits of a law partnership, an individual retirement account, and a

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[54] *Id.*

[55] *See* Angel v. Angel, 562 S.W.2d 663 (Ky. Ct. App. 1978). The court in *Angel* held that the portion of the proceeds from the sale of a farm attributable to the investment of the husband's $1400 inheritance constituted nonmarital property while that portion of the proceeds from the sale attributable to the improvements and the payment of the balance of the purchase price for the land which was made as a "team effort" constituted marital property. *But see* Brunson v. Brunson, 569 S.W.2d 173, 178 (Ky. Ct. App. 1978). The *Brunson* court held that *any* accumulation of income from a husband's nonmarital property constituted marital property to be divided by the court.

[56] 606 S.W.2d 163 (Ky. 1980).

[57] *Id.* at 163-64.

one-half interest in a Florida condominium.[58] The court of apppeals held that "only the values at separation were includable in the marital estate because the later increments in value were the product of [the husband's] individual earning capacity rather than the 'team or joint efforts' of the parties."[59] The Kentucky Supreme Court, however, reversed, stating that KRS section 403.190(2)[60] clearly requires that in order to be excluded from a marital estate property must be acquired after a legal separation decree under KRS section 403.190(2). The mere actual or physical separation in *Stallings*, therefore, would not fulfill the statutory requirement.[61]

While both the explicit language in KRS section 403.190(2)(c)[62] and the *Stallings* interpretation provide certainty, the result may prove unfair in some situations. For example, when it is obvious that a marriage is no longer viable and property is acquired during a lengthy separation, it would appear that the property should be considered marital property subject to division.[63] Nevertheless, it is clear that lawyers

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[58] The values of the assets at the applicable times are as follows:

Property	Value at Separation	Value at Dissolution
Undistributed profits of law partnership	$61,046.51	$100,161.00
Individual Retirement Account	$ 1,500.00	$ 5,025.76
One-half equity in Florida condominium	$ -0-	$ 4,750.00

Id. at 164.

[59] *Id.*

[60] KRS § 403.190(2) (Cum. Supp. 1980) provides in relevant part:

> For the purpose of this chapter, 'marital property' means all property acquired by either spouse subsequent to the marriage except:
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> . . .
>
> (c) Property acquired by a spouse after a decree of *legal separation.*

Id. (emphasis added).

[61] 606 S.W.2d at 164.

[62] It can certainly be argued that the statute is forewarning.

[63] Brandenburg v. Brandenburg, 400 A.2d 823, 826 (N.J. Super. Ct. App. Div. 1979). *See also* In re Marriage of Smith, 128 Cal. Rptr. 410, 412 (Cal. Ct. App. 1976). The *Smith* court held that by statute the date of separation determines the extent of the community interest in property and property acquired subsequent to a separation

must advise their clients in accordance with the *Stallings* decision. Without a KRS section 403.140(2) decree of legal separation, property acquired by a spouse during actual separation will be considered marital property subject to division between the spouses upon divorce.

E. *Marital Debts*

Under KRS section 403.190(3) all property acquired after a marriage by either spouse is presumed to be marital property. In *Bodie v. Bodie,*[64] however, the Kentucky Court of Appeals held that KRS section 403.190(3) did not create a presumption that all debts acquired during marriage are marital debts. The court further refused to judicially imply such a presumption in the statute.[65] In *Bodie,* the spouse who claimed that the debts were marital failed to produce any evidence as to their marital nature and also refused to answer questions concerning the debts. The *Bodie* court held that the spouse had thus failed to meet his burden of proof that the debts were marital, and he was therefore individually liable for the debts.[66]

Although *Bodie* may be justifiable on its facts, it is arguable that under a "partnership" theory of marriage, assets and liabilities should be treated the same.[67] Additionally, the *Bodie* court may have incorrectly distinguished *Bruton v.*

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of any kind is the separate property of the individual spouse. This is interesting because common law equitable distribution jurisdictions, such as Kentucky, usually turn to community property jurisdictions, such as California, for guidance in dividing marital property.

[64] 590 S.W.2d 895 (Ky. Ct. App. 1979).

[65] *Id.* at 896.

[66] *Id.*

[67] See note 3 *supra* and accompanying text for a discussion of the partnership theory of marriage under the Uniform Marriage and Divorce Act. Under section 15(b) of the Uniform Partnership Act all partners are jointly liable for all debts and obligations of the partnership. 6 UNIFORM LAWS ANN., Uniform Partnership Act, 174 (1976). Under the partnership theory, if property acquired after marriage is presumed to be marital, then debts acquired after marriage should also be presumed marital. *But see* Note, *Determining the Liability of Community Property* - Cockerham v. Cockerham, 29 BAYLOR L. REV. 608, 611 (1977). "[T]he owing of a debt is a liability incurred and is not a property interest acquired by the debtor." *Id.*

Bruton,[68] in which the court refused to allow a spouse to disclaim liability for debts known to the spouse which were incurred during the marriage. In *Bodie,* while the spouse seeking to have the debts declared nonmarital had no knowledge of the debts,[69] a crucial factor, as in *Bruton,* was that the spouse did enjoy the benefits of the indebtedness. In such a case, lack of knowledge should not be sufficient to prevent liability on a debt.[70]

II. MAINTENANCE AND SUPPORT

A. *Statutory Requirements of Maintenance*

Awarding of maintenance is a matter within the discretion of the trial court.[71] Maintenance may be granted to a spouse under KRS section 403.200(1)(a) and (b) only if that spouse has insufficient property to provide for his or her reasonable needs[72] and has insufficient employment as a result of rearing a child.[73]

The Kentucky Court of Appeals took a strict position on the question of maintenance in *Richie v. Richie.*[74] In that case, no significant property rights were involved, and one trial court assigned the wife an open-ended $20.00 per week maintenance award.[75] Although Mrs. Richie had not worked outside her home since the birth of her infant daughter because she had felt the need to be at home to care for her child, the court applied the statute[76] strictly and reversed the award.[77] The court reasoned that Mrs. Richie had a comparable education to that of her husband and that with necessary training she could work outside her home and still care for her

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[68] 569 S.W.2d 182 (Ky. Ct. App. 1978).

[69] 590 S.W.2d at 896.

[70] *See* 569 S.W.2d at 182.

[71] 551 S.W.2d at 825.

[72] Since the word "and" instead of "or" is used between subparts (a) and (b), it is clear that both parts of the test are to be met in order for a court to award maintenance.

[73] KRS § 403.200(1)(a) and (b) (Cum. Supp. 1980).

[74] 596 S.W.2d 32 (Ky. Ct. App. 1980).

[75] *Id.* at 33.

[76] KRS § 403.200(1)(a) and (b) (Cum. Supp. 1980).

[77] 596 S.W.2d at 33-34.

daughter who was ready to enter school.[78] The court did not indicate whether its decision would have been different if the infant daughter had been of pre-school age.

The Kentucky Court of Appeals continued this strict view of maintenance in *Graham v. Graham.*[79] At the time of dissolution, the parties had been married for twelve years and had two infant children. Mrs. Graham had been a housewife for most of the marriage, employed only briefly in a series of jobs. At the time of dissolution, she had a job earning $112.00 per week and she was attending college; Mr. Graham was earning $200.68 per week. After separating nonmarital property, the trial court divided marital property and awarded custody of the children and $300.00 per month child support to Mrs. Graham. She was also allowed to live in the marital home during the children's minority or until she remarried or died.

On appeal, Mrs. Graham claimed the circuit court erred by not awarding her maintenance for four years while she finished college.[80] The Kentucky Court of Appeals held that maintenance can be awarded only if both the lack of property and employment requirements in KRS section 403.200(1)(a) and (b) are met.[81] The court stated that "[t]here appears to be no requirement under the statute for the trial court to make a finding as to the wife's reasonable needs if it finds that she is able to support herself through appropriate employment."[82] Thus if a spouse is able to support herself, the court will not look further to see whether she lacks sufficient property to provide for her reasonable needs. This is a strict appli-

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[78] *Id.* at 34.

[79] 595 S.W.2d 720 (Ky. Ct. App. 1980).

[80] *Id.* at 721.

[81] KRS § 403.200 is identical to Uniform Marriage and Divorce Act § 308. See text accompanying notes 72 and 73 *supra* for the two part test for maintenance awards. The Commissioners' Comment to § 308 implies that the reason for the strict two part test for an award of maintenance is to encourage courts to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. 9A UNIFORM LAWS ANN., Uniform Marriage and Divorce Act, 161 (1979). This is in line with the Act's policy which favors ending unwanted relationships by providing financial independence through property division rather than preserving them by making one spouse dependent on another for support through a maintenance award.

[82] 595 S.W.2d at 722.

cation of the statute and could lead to inequitable results where, for example, a wife postpones her own college education to support her college-attending spouse. Upon divorce, if this wife is able to work, she may miss the opportunity for a college education since the court will be reluctant to award her maintenance under the statute.

B. *Nonvested Pensions as a Basis for Maintenance*

Notwithstanding its holding in *Ratcliff* that nonvested pensions are too speculative to be divided as marital property,[83] the Kentucky Court of Appeals nevertheless held in *Light v. Light*[84] that a nonvested, and therefore contingent, military pension may form the basis for a maintenance award.[85] The court found that the total economic circumstances of the parties in *Light* demanded some amount of maintenance. In that case, there was little marital property[86] and the wife would have been left with little to show for her twenty-two and one-half years of marriage, while the husband would have had his military pension and the ability to earn money in civilian employment as the result of his army training.[87] Thus the court declared that maintenance based on the current monthly benefit amount of a pension could be awarded for as long as the husband was eligible to receive the benefits. The wife was not entitled to a lump sum disposition,[88] since the husband's rights and benefits in the pension were prospective only. This avoids the problem of determining a present cash value for the entire pension and also avoids the need for application of property principles to an indefinite and contingent asset.

While admitting that rigid formulas for pension benefit division are untenable since circumstances vary among marriages, the *Light* court offered the following guidelines to gov-

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[83] See text accompanying notes 8-48 *supra* for a discussion of pensions as marital property.

[84] 599 S.W.2d 476 (Ky. Ct. App. 1980).

[85] *Id.* at 478.

[86] *Id.* at 477.

[87] *Id.* at 478.

[88] *Id.* at 478-79.

ern maintenance awards based on prospective pension benefits: (1) the settlement should be as final as possible at the time of the divorce; (2) the amount and starting point for the pension must be determined since dissolution may occur long before payment eligibility and immediate maintenance might be required; (3) the value of the pension and the amount to be paid as maintenance must be determined as of the time of the dissolution since the primary purpose is to share an asset; and (4) any maintenance based on the husband's pension should be limited if the wife is accruing pension and social security benefits through a job of her own.[89] Acknowledging that ongoing maintenance should be avoided since it ties the divorcing parties together, the court stated that equity may require speculative divisions of contingent pensions as a last resort.[90]

III. TERMINATION OF PARENTAL RIGHTS

A. *Neglected and Abandoned Children*

By statute, parental rights of the parents of dependent,[91] neglected, or abused[92] children may be involuntarily termi-

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[89] *Id.* at 479.

[90] *Id.* at 480.

[91] KRS § 199.011(5) (Cum. Supp. 1980) defines a dependent child as "any child who is under improper care, control or guardianship that is not due to the negligence of the parent or guardian, provided that the child is not an abused or neglected child."

[92] KRS § 199.011(6) (Cum. Supp. 1980) defines an abused or neglected child as follows:

> a child whose health or welfare is harmed or threatened with harm when his parent, guardian or other person who has the permanent or temporary care, custody or responsibility for the supervision of the child: inflicts or allows to be inflicted upon the child, physical or mental injury to the child by other than accidental means; creates or allows to be created a risk of physical or mental injury to the child by other than accidental means; commits or allows to be committed an act of sexual abuse upon the child; willfully abandons or exploits such child; does not provide the child with adequate care and supervision; food, clothing and shelter; education; or medical care necessary for the child's well-being; provided, however, that a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This exception, however, shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.

Id.

nated. KRS section 199.603(1) provides:

> In a proceeding involving a dependent, neglected or abused child . . . the circuit court may terminate all parental rights of the parent of such child, and declare the child to be a ward of the state and vest the care, custody and control of the child in the department [for human resources], or in any licensed child-caring or child placing agency or institution, if facilities are available to receive the child, and if it is pleaded and proved by preponderance of the evidence in a private hearing that the termination is in the best interest of the child based on the existence of one (1) or both of the following conditions: (a) The child has been abandoned; or (b) The child has been substantially or continuously or repeatedly neglected or abused.

Part (b) of this statute, clearly the more difficult part to prove, was considered by the Kentucky Supreme Court in *Department for Human Resources v. Pinkleton.*[93] In that case, the Department for Human Resources brought an action to terminate parental rights of Sam Chapman and Vivian Pinkleton as to their illegitimate son Andre. The Department was successful in terminating Sam's rights but was unsuccessful in ending Vivian's and thus appealed the trial court decision.[94] Evidence was presented by the Department that the infant had various physical and emotional defects; his IQ was described as educable mentally handicapped, and he had arrested encephelitis. The record indicated that the roach and mouse infested apartment where Vivian and Andre lived was dirty and cluttered, and food was left lying about. Furthermore, it was shown that Andre was kept in a high chair too much, which deprived him of the opportunity to improve his motor skills. The child was temporarily placed with his aunt and was later committed to the Department. The Department decided to terminate the mother's parental rights because of the substandard home conditions, the child's emotional and medical needs, the mother's lack of visitation, and the absence of a relative's home for placement.[95]

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[93] No. 79-SC-465-DG (Ky. June 24, 1980).

[94] *Id.*, slip op. at 1.

[95] *Id.*, slip op. at 3-4.

The trial court held that these conditions did not constitute such improper parental care or neglect as to establish grounds for terminating the mother's parental rights. The court of appeals affirmed the decision, but the Supreme Court reversed, stating that additional facts should have been considered by the trial court. The Supreme Court perceived as an important factor that the juvenile court had provided temporary foster care.[96] The Court also considered the mother's indifference and lack of affection for Andre and stated: "The plight of Vivian is not the result of poverty; on the other hand her condition is the result of her placing little value or importance on the proper care of Andre."[97]

The test the Court developed in *Pinkleton* for involuntarily terminating parental rights is not that "the proof be conclusive to justify the termination; but rather [that] it is only necessary that the evidence show that the termination would be for the child's welfare."[98]

While the facts in *Pinkleton* strongly support the Court's holding, a further exploration of alternatives to removal of the child from his home was warranted. Serious psychological injury may result from placing a child in a state institution or foster home[99] that may be no better than the home from which he was removed, and the frequent relocation of the child may cause additional psychological harm.[100] Existing social services such as parental training or counseling, homemaking services, and home supervision[101] may provide a less

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[96] *Id.*, slip op. at 5.

[97] *Id.*

[98] *Id.* The Court applied a "best interest of the child" analysis, although it did not use the phrase. The term "best interest of the child" persists despite the work of J. GOLDSTEIN, A FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973), in which it is urged that courts adopt the "least detrimental alternatives" formula. Under such a formula all the applicable alternatives would be viewed by the court and the one that would have the least detrimental effects on the child would be chosen. *Id.* at 53.

[99] *Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1320 (1980).

[100] *Id.*

[101] *Id.* at 1321. *But see* Spaeth, *The Limits of Family Law*, 51 PENN. BAR ASS'N Q. 125, 129-31 (1980). Judge Spaeth discusses the problems of state supervision in this area, such as understaffed social services agencies and the continued effectiveness of a judge's order.

traumatic solution to the problem of abusive or neglectful parents. These alternatives should be explicitly considered by courts in applying KRS section 199.603(1).

In *Hafley v. McCubbins*,[102] the court of appeals was faced with an abandonment question of first impression in Kentucky. The court stated: "What we seek is an acceptable criteria [sic] for civil matters involving recovery of damages or benefits by a parent as opposed to a custodial nonparent where it is alleged that the natural parent has 'abandoned' the offspring."[103] In *Hafley*, the new mother of twin boys moved in with the McCubbins and after six weeks moved away, leaving the twins to be raised by the couple as their own. Although there was some evidence that the mother had orally agreed to an adoption by the McCubbins, formal adoption was never accomplished. Upon reaching the age of sixteen, one twin was told of his true parentage, and he visited with his mother, even residing with her for short periods of time. After serving in the army, returning home, and then reenlisting, he was killed in a nonmilitary incident. Both the mother and the McCubbins claimed the right to a $20,000 life insurance policy.[104]

Upon examining the Serviceman's Group Life Insurance statute, the *Hafley* court concluded that a mother who abandoned her child is not entitled to any recovery from the insurance proceeds.[105] Thus the primary issue became what constitutes abandonment of a child. Abandonment had been previously considered in Kentucky in the criminal law area but had never been examined in the context of a civil case.[106] The *Hafley* court adopted the New York definition of abandonment as used in wrongful death cases: neglect and refusal to perform natural and legal obligations to care and support.[107] The court stated: "From the standpoint of her intent to abandon her child, we need look no further than her oral

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[102] 590 S.W.2d 892 (Ky. Ct. App. 1979).
[103] *Id.* at 894.
[104] *Id.* at 893.
[105] *Id.* at 895.
[106] *Id.* at 894.
[107] *Id.*

agreement to permit adoption by the McCubbins."[108]

The *Hafley* definition of abandonment leaves much discretion to the trial court and may be overly broad. Entrusting the care and custody of a child to a third party does not necessarily imply desertion, nor does it constitute a waiver of any expectancy by the parent of future assistance from the child. It might be better to define abandonment as a failure to support at the time of the minor's death, whether or not this failure existed at some previous time.

B. *Third Party Termination of Natural Parents' Rights*

In *Lapinsky v. Shant*,[109] a child's stepfather filed a petition to adopt the child and to terminate the parental rights of the child's natural father who was in prison at the time. Over the natural father's objections, the trial court permitted both the adoption and the termination, and the court of appeals affirmed. The Kentucky Supreme Court, applying the "best interest of the child" test,[110] affirmed the decision on adoption. It reversed the decision on the termination of parental rights, however, holding that under KRS section 199.600(b), only parents and certain specified public concerns could involuntarily terminate parental rights.[111]

KRS section 199.600(b) has now been repealed[112] and the above limitation is no longer applicable. The question of terminating parental rights is now resolved as the adoption question is resolved, through the application of the "best interest of the child" test. That test would require an evaluation of whether the exercise of parental rights would be damaging to the child. In *Lapinsky*, as in other situations, this will depend on the scope of parental rights. One author has enumerated these rights as:

> the right to physical possession of the child, the right to visit the child, the right to determine education and religious up-

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[108] *Id.* at 895.

[109] No. 79-SC-228-DG (Ky. June 3, 1980).

[110] *Id.*, slip op. at 5.

[111] *Id.*, slip op. at 2.

[112] The repeal was effective June 17, 1978. Involuntary termination of parental rights is now governed solely by KRS § 199.603 (Cum. Supp. 1980).

> bringing, the right to discipline the child, the right to choose medical treatment, the right to the child's services, the right to determine domicile, and the right to appoint guardians and consent to adoption.[113]

Arguably, in *Lapinsky*, the retention of these parental rights by the natural father would be detrimental to the child. Thus the outcome in *Lapinsky* might have been different under the "best interest of the child" test.

A collateral problem in cases such as *Lapinsky* is that an incarcerated natural parent may not be able to attend the adoption proceedings. In such a case, courts must carefully scrutinize the effectiveness of that parent's attorney. In *Lapinsky*, while the natural father did argue ineffective counsel at the adoption hearing, there was no indication of ineffectiveness, and the court found the trial to be a fair one.[114]

C. *Change of Name*

Under a 1974 statute[115] a mother had a right to petition a court to change the surnames of her minor children to that of her new husband. The Kentucky Court of Appeals in *Burke v. Hammonds*,[116] however, held that a mother can be permanently enjoined from doing so where, after a full evidentiary hearing, the proposed change is found to be contrary to the best interests of the children.[117]

Rejecting the divorced mother's contention that a trial court did not have the jurisdiction to enjoin her permanently from exercising her right under state law to change the surnames of her two children, the *Burke* court stated that a trial court has continuing jurisdiction over custody-related matters attendant upon divorce. The court is mandated by state law to "safeguard family relationships and mitigate potential harm" to parents and children.[118] The court further stated:

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[113] Note, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*, 6 NEW ENG. J. PRISON L. 61, 64 (1979).

[114] Lapinsky v. Shant, No. 79-SC-228-DG, slip op. at 6.

[115] KRS § 401.020 (Cum. Supp. 1980).

[116] 586 S.W.2d 307 (Ky. Ct. App. 1979).

[117] *Id.* at 309.

[118] *Id.*

"No one can seriously argue that changing a child's name from that of his natural father to that of his stepfather could not be seriously weaken the emotional bond between the child and his father, or that such a change would necessarily be in the child's best interests."[119]

The *Burke* court stated that "a natural father has a protectable right to have his child bear his name . . . and injunctive relief is the only remedy by which that right can be adequately protected."[120] The court held that the mother's statutory right to apply for a name change for her children was insubstantial when compared with the "public policy of favoring preservation of family relationships."[121] In 1980 the General Assembly revised this statute, and it now reflects the opinion of the courts. Under the revised statute if both parents are living, they may petition for the child's name to be changed, or if one parent is deceased, the other may petition for the change. This statute, however, does not extend the right to petition to a divorced parent if the other natural parent is still alive.

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[119] *Id.* Even though the parent's emotional well-being is considered, the best interest of the child takes precedence.

[120] *Id.*

[121] *Id. Cf.* 75 Op. Att'y Gen. 94 (1975).