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Kentucky Law Survey: Domestic Relations

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Domestic Relations

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The rising divorce rate[1] has transformed the area of domestic relations into one of the most active in the law. Recent Kentucky cases reflecting this national trend illustrate that division of property, and child custody and visitation rights are frequently the two crucial issues to be resolved in domestic litigation. These two areas provide the focal point for this year's survey of Kentucky family law.

I. PROPERTY DIVISION UPON DISSOLUTION OF MARRIAGE

A. *Status of Property as Marital or Nonmarital*

1. *Professional Degree*

Courts in a number of jurisdictions have been confronted recently with the issue of whether an educational degree—with its concomitant capacity for increased future earnings—constitutes marital property divisible between the parties upon dissolution of marriage.[2] The Kentucky Court of Appeals was squarely confronted with this question in *Inman v. Inman*.[3] At the time of their divorce, the Inmans had been married for seventeen years. Mrs. Inman worked throughout most of the marriage, helping to put her husband through dental school in the early years. Although some property had been accumulated during the marriage, the marital estate was so heavily encumbered at the time of separation that the

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[1] *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 40 (100th ed. 1979).

[2] *See In re* Marriage of Aufmuth, 152 Cal. Rptr. 668 (Ct. App. 1979); Todd v. Todd, 78 Cal. Rptr. 131 (Ct. App. 1969); *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978); Greer v. Greer, 510 P.2d 905 (Colo. Ct. App. 1973); Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. Ct. App. 1977); *In re* Marriage of Horstman, 263 N.W.2d 885 (Iowa 1978); *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. Ct. App. 1976); Wheeler v. Wheeler, 228 N.W.2d 594 (Neb. 1975); Stern v. Stern, 331 A.2d 257 (N.J. 1975); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

[3] 578 S.W.2d 266 (Ky. Ct. App. 1979).

couple's net worth was inconsequential.[4] The trial court, classifying Dr. Inman's license[5] to practice dentistry as marital property, awarded the wife most of the marital assets and allocated to the husband the financial burden of the marital indebtedness.[6] On appeal, the court of appeals recognized the difficulties of treating a professional license (or degree) as marital property,[7] but nevertheless felt that to refuse to do so in certain instances would be inequitable.[8] Kentucky thus became the first jurisdiction to expressly classify a professional degree or license as marital property.[9] The court of appeals

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[4] *Id.* at 267.

[5] "License", "degree" and "education" were used interchangeably by the *Inman* Court. However, in the latter part of its opinion, the court distinguishes these terms from a "professional practice." *See id.* at 269.

[6] *Id.* at 267.

[7] One such difficulty noted by the *Inman* court was that an educational degree lacks one of the traditional characteristics of property—alienability.

> [An educational degree] does not have an exchange value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by mere expenditure of money. 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.

Id. at 268 (quoting *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)).

Perhaps the greatest problem in categorizing a degree as property is the difficulty of placing a value on the degree. See notes 12-13 *infra* and accompanying text for a discussion of valuation.

[8] 578 S.W.2d at 268.

[9] Although *Inman* is the only case to date to characterize an educational degree as marital property, other jurisdictions have not been insensitive to the plight of the spouse who works while the other spouse obtains a degree. Various approaches have been used in other jurisdictions to compensate the spouse for her contribution to her husband's professional degree. The court in *In re Marriage of Graham,* while explicitly refusing to classify a degree as property, considered the working spouse's contribution to the degree as one factor to be considered in the property settlement. 574 P.2d 75, 77 (Colo. 1978). In recognition of the wife's support during the husband's schooling, the court in *In re* Marriage of McManama, 368 N.E.2d 953 (Ind. Ct. App. 1977), after dividing the marital property, made an additional cash award to the working wife to compensate her for her expenditure of marital assets solely for her husband's education. These approaches, of course, adequately compensate the spouse only if there is a marital estate to distribute. One jurisdiction has taken an unusual approach, refusing to consider a degree an item of property but classifying concomitant future earnings as an asset to be distributed upon divorce. *In re* Marriage of

primarily was concerned that to hold otherwise where there had been little marital property accumulated would confer a "windfall" on the spouse who received the degree or license while denying the spouse who had contributed to the other's increased earning capacity the benefit of her "investment".[10] The court made clear that a professional license would not always constitute marital property. It enumerated several circumstances where the classification of the license or degree as marital property and its consequent division would be manifestly unfair. For example, where a sizeable marital estate has been accumulated (present fruits of the license), where reciprocal aid was given in obtaining a "saleable skill" or where there is eligibility for maintenance (future fruits of the license), the need to classify a degree as marital property may not arise.[11]

The unwillingness of other jurisdictions to classify a professional degree as property may be attributable in part to the difficulty in valuation.[12] Two possible methods of valuation

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Horstman, 263 N.W.2d 885 (Iowa 1978).

The efforts of the working spouse may also be a factor in awarding alimony. Greer v. Greer, 510 P.2d 905 (Colo. Ct. App. 1973) (alimony payments in lieu of rights in husband's degree not terminated upon remarriage); Inman v. Inman, 578 S.W.2d 266, 271 (Ky. Ct. App. 1979) (Wilhoit, J., dissenting); Moss v. Moss, 264 N.W.2d 97 (Mich. Ct. App. 1978) (alimony awarded to wife as compensation for investment in husband's degree, despite the wife's income being greater than the husband's). *See* note 10 *infra* for further discussion of these cases.

[10] 578 S.W.2d at 268. Typically, in the situation in which one spouse has worked to put the other through school, she will not be compensated for her efforts by an award of maintenance as it is unlikely that the spouse could make a compelling case that she is unable to support herself or that she is otherwise entitled to maintenance. *See* Ky. Rev. Stat. § 403.200 (Supp. 1978) [hereinafter cited as KRS]. *But cf.* Moss v. Moss, 264 N.W.2d 97 (Mich. Ct. App. 1978) (wife awarded alimony as compensation for "investment" in husband's degree even though wife's income was larger than husband's). In the event maintenance is awarded, absent an agreement by the parties or an order of the court, it terminates upon remarriage of the wife, precluding full compensation. *See* KRS § 403.250(3) (Supp. 1978). *But cf.* Greer v. Greer, 510 P.2d 905 (Colo. Ct. App. 1973) (alimony payments in lieu of rights in husband's degree not terminated upon remarriage).

[11] 578 S.W.2d at 269. For an ironic illustration of reciprocal aid, see Colvert v. Colvert, 568 P.2d 623 (Okla. 1977). There both parties earned professional degrees during the course of the marriage. The wife was granted an interest in the husband's degree, but the husband was not awarded an interest in the wife's degree because of the statutory obligation of the husband to support the wife.

[12] *See* Todd v. Todd, 78 Cal. Rptr. 131 (Ct. App. 1969).

appear to be available: the value of the educational degree can be equated with the cost of obtaining the education, or in the alternative, an attempt to calculate the increased earning capacity attributable to the advanced degree can be made.[13] In addressing this issue, the *Inman* court determined that the value of the spouse's interest "should be measured by his or her monetary investment in the degree, but not equivalent to recovery in quasi-contract to prevent unjust enrichment."[14] Mrs. Inman's interest in the license, therefore, was limited to her out-of-pocket expenses for the direct support and schooling of her husband plus interest, with an adjustment for inflation.[15]

The *Inman* court also distinguished between an interest in a professional license and an interest in a professional practice. Notwithstanding the concern that an award of an interest in both the license and the practice could result in double recovery, the court remanded the case to the circuit court to determine if the wife had made an additional contribution to the establishment of the practice.[16]

Unfortunately, *Inman* raises more problems than it solves. The court classified Dr. Inman's dental license and its future earning capacity as marital property, but one is left with the question of whether this is truly a landmark decision or merely a facade behind which to work equity. Moreover, it should be noted that the aforementioned exceptions may severely limit the applicability of *Inman.*

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[13] See Comment, *The Interest of the Community in a Professional Education,* 10 CAL. WEST. L. REV. 590, 602-12 (1974) for a detailed discussion of the cost and future earnings methods of valuation.

[14] 578 S.W.2d at 269.

[15] *Id.* Despite the apparent rejection of the future earnings valuation method, the court curiously directed the trial court on remand to ascertain not only the monetary cost of the degree, but also the value of Dr. Inman's increased earning capacity. *Id.* at 270.

[16] *Id.* A related issue, not discussed in *Inman,* is the classification of another intangible asset—goodwill of a professional practice—as marital property. The trend is to classify goodwill as marital property and thus subject to division between the parties in a divorce action. *See In re* Marriage of Fortier, 109 Cal. Rptr. 915 (Ct. App. 1973); Stern v. Stern, 331 A.2d 257 (N.J. 1975); *In re* Marriage of Goger, 557 P.2d 46 (Or. Ct. App. 1976); *In re* Marriage of Fleege, 588 P.2d 1136 (Wash. 1979). *But see* Nail v. Nail, 486 S.W.2d 761 (Tex. 1972).

2. *Pension Benefits*

There has been increasing debate over whether pension rights are an asset subject to division at divorce. Most community property jurisdictions hold that vested pension rights are divisible.[17] Two such jurisdictions, California[18] and Texas,[19] recognize spousal claims to even nonvested benefits. Moreover, a few common law states have recognized that vested retirement benefits are a divisible asset.[20] In *Beggs v. Beggs*,[21] a 1972 case involving a basic contributory teacher's retirement plan, Kentucky aligned itself with those jurisdictions holding vested retirement benefits to be marital property. Seven years later in *Frost v. Frost*,[22] the Kentucky Court of Appeals modified this stance and reluctantly refused to award the wife an interest in the husband's Railroad Retirement benefits, citing the recent United States Supreme Court case of *Hisquierdo v. Hisquierdo*[23] as dispositive of the issue.

In *Hisquierdo*, the Supreme Court held that the antiassignment clause of the Railroad Retirement Act of 1974[24] prohibited the division of an employee's expectation of receiving benefits under that Act in a state dissolution of marriage proceeding.[25] Although *Hisquierdo* presumptively affects only benefits payable under the Railroad Retirement Act, its effect may be far reaching, precluding division in a dissolution proceeding of other federal benefits such as Social Security,[26] mil-

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[17] *See In re* Marriage of Fithian, 517 P.2d 449 (Cal. 1974); Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975); Swope v. Mitchell, 324 So.2d 461 (La. Ct. App. 1975); Otto v. Otto, 455 P.2d 642 (N.M. 1969); Angott v. Angott, 462 S.W.2d 73 (Tex. Ct. App. 1970); Wilder v. Wilder, 534 P.2d 1355 (Wash. 1975).

[18] *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976).

[19] Clearley v. Clearley, 544 S.W.2d 661 (Tex. 1976).

[20] *See* Hutchins v. Hutchins, 248 N.W.2d 272 (Mich. Ct. App. 1976); Kruger v. Kruger, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976); Schafer v. Schafer, 87 N.W.2d 803 (Wis. 1958). *But see* Ellis v. Ellis, 552 P.2d 506 (Colo. 1976).

[21] 479 S.W.2d 598 (Ky. 1972).

[22] 581 S.W.2d 582 (Ky. Ct. App. 1979).

[23] 439 U.S. 572 (1979).

[24] 45 U.S.C. §§ 231-231t (1976).

[25] 439 U.S. at 590.

[26] Umber v. Umber, 591 P.2d 299, 301-02 (Okla. 1979) (citing *Hisquierdo* for the proposition that social security benefits are the separate property of the recipient spouse and are not to be considered in determining a property settlement).

itary retirement benefits[27] and benefits payable under an ERISA qualified plan.[28] Indeed, state court decisions differ on the applicability of *Hisquierdo*.[29]

The court of appeals' attitude towards pension benefits was clearly reflected in *Frost* when it "caution[ed] . . . that the result was dictated by the atypical circumstances of coverage by the Railroad Retirement Act."[30] But for the preemption of the federal statute, the court would have "willingly accept[ed] [the] contention that . . . future retirement benefits should be treated as marital property."[31]

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[27] The issue of the divisibility of military retirement benefits confronted at least five state courts after *Hisquierdo*. The Alaska Supreme Court, in Cose v. Cose, relying on *Hisquierdo*, held that the federal statutory scheme preempts state law and prohibits the distribution of military benefits. 592 P.2d 1230 (Alaska 1979). Kentucky's intermediate appellate court likewise held that military retirement benefits were not divisible upon dissolution of a marriage. Russell v. Russell, 27 KY. L. SUMM. 6, 2 (Ky. Ct. App. Apr. 25, 1980). California, however, has adhered to its established law that military retirement payments constitute community property divisible upon divorce. In Gorman v. Gorman, 153 Cal. Rptr. 479 (Ct. App. 1979), the court held that *Hisquierdo* was not controlling as it was based on the unique history and structure of the Railroad Retirement Act. Likewise, courts in Arizona and Illinois have held that *Hisquierdo* is inapplicable to the question of whether military retirement benefits constitute marital property. Czarnecki v. Czarnecki, 600 P.2d 1098 (Ariz. 1979); *In re* Marriage of Musser, 388 N.E.2d 1289 (Ill. App. Ct. 1979).

[28] ERISA (Employment Retirement Income Security Act of 1974), 29 U.S.C. §§ 1001-1381 (1976), is a federal regulatory scheme for private pension plans. The Supreme Court has yet to address the question of whether ERISA precludes state courts from dividing benefits payable under such a plan as marital property. In *Hisquierdo*, the Court stated that its holding was not indicative of its position in regard to benefits payable under a private pension plan subject to federal regulation, expressly referring to ERISA. 439 U.S. at 590 n.24.

In Pilatti v. Pilatti, 157 Cal. Rptr. 594 (Ct. App. 1979), the California Court of Appeals held that ERISA does not preempt California community property law as applied to the division of retirement benefits. "*Hisquierdo* emphasizes the Railroad Retirement Act provides a total statutory scheme for the maintenance of a retirement fund resembling public welfare. The benefits may be modified, or even terminated, by Congress at any time. . . . ERISA, on the other hand, merely regulates private pension programs to prevent their maladministration." *Id.* at 597.

[29] See the cases discussed in note 27 *supra* for an illustration of the differing viewpoints.

[30] 581 S.W.2d 582, 583 (Ky. Ct. App. 1979).

[31] *Id.*

During the past survey year, the court of appeals had two other pension benefit cases before it. In *Foster v. Foster*, 589 S.W.2d 223 (Ky. Ct. App. 1979), the court held that a vested non-contributory ERISA qualified pension plan was marital property. While noting that the pension plan "was part of the consideration earned by the

3. *Interests in Closely-Held Corporations*

During marriage one spouse frequently acquires or expands an interest in a family owned corporation. Under Kentucky's statute,[32] property acquired by a spouse by gift during marriage will not be classified as marital property. Upon divorce it is therefore necessary to determine whether the interest in the closely-held corporation was acquired as a gift[33] or was received as consideration for services.

In *Browning v. Browning*,[34] at the time of the divorce the husband owned an undivided interest in mineral property which he had acquired during marriage in exchange for stock in a closely-held corporation. Rejecting the husband's claim that his interest was nonmarital, the court of appeals ruled that the husband failed to show by clear and convincing proof that he acquired the property by gift and accordingly held it to be marital property.[35] One year later in *Adams v. Adams*,[36] the same court, on facts similar to *Browning*, classified stock held by the husband in a family-owned corporation as nonmarital property. In distinguishing its earlier decision, the court noted that in *Browning* the work performed by the husband as an employee of the corporation, for which he received no salary, was consideration for his interest in the corpora-

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husband during marriage," it primarily rested its decision on the fact that the plan was vested, and thus "the husband was entitled to receive monthly payments upon termination for any cause, with only the amount to be fixed." *Id.* at 224. Although Foster's pension plan was qualified under ERISA, the court did not address the issue of whether the federal act preempted Kentucky property settlement law.

The court of appeals in Ratcliff v. Ratcliff, 586 S.W.2d 292 (Ky. Ct. App. 1979), held that the nonvested amounts in the husband's pension fund were "too speculative to treat as marital property." *Id.* at 293. The court noted, however, that the nonvested fund can be viewed as an "economic circumstance" under KRS § 403.190(1)(d) (Supp. 1978) for purposes of determining a just division of the marital property. *Id.*

[32] KRS § 403.190(2)(a) (1972).

[33] "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'rs v. Bowman's Ex'r, 192 S.W.2d 955 (Ky. 1946)).

[34] *Id.*

[35] *Id.* at 825.

[36] 565 S.W.2d 169 (Ky. Ct. App. 1978).

tion, thus precluding its designation as a gift.[37] Although the shareholder-husband in *Adams* was also employed by the family-owned corporation, he received a salary for his services. The *Adams* court felt that this distinction warranted a finding of a nonmarital gift,[38] reasoning that since the husband was already compensated on a salaried basis, the work performed could not be consideration for the stock. Unfortunately, as in *Inman,* the court of appeals failed to provide any concrete guidelines for valuing the property interest. Presumably, the court could turn to an existing buy-out agreement or the factors listed in Revenue Ruling 59-60[39] for a determination of the stock's value.

4. *Insurance*

Before the 1978 case of *Ping v. Denton,*[40] it was well settled in Kentucky that divorce barred a spouse's recovery as a designated beneficiary of life insurance on her ex-spouse's life.[41] Such a result was mandated by the now repealed restoration statutes[42] which returned to a spouse all property "not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."[43] When the General Assembly repealed the restoration statutes,[44] replacing them with Kentucky Revised Statutes (KRS) section 403.190 which directs distribution of property upon divorce, a question arose as to whether this new provision would also divest a person of the right to collect such life insurance proceeds subsequent to divorce. As recently as 1977, the court of appeals held that there was "no meaningful change in the effect of the

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[37] *Id.* at 171.

[38] *Id.*

[39] 1959-1 C.B. 237.

[40] 562 S.W.2d 314 (Ky. 1978).

[41] *See* Shellman v. Independence Life & Accident Ins. Co., 523 S.W.2d 221 (Ky. 1975); Bissell v. Gentry, 403 S.W.2d 15 (Ky. 1966); Sea v. Conrad, 159 S.W. 622 (Ky. 1913).

[42] 1952 Ky. Acts, ch. 84, § 1.

[43] R. PETRILLI, KENTUCKY FAMILY LAW § 24.6 (1969) [hereinafter cited as PETRILLI].

[44] 1972 Ky. Acts, ch. 182, § 29.

new law."[45] Thus it was somewhat surprising when, a year later in *Ping v. Denton,*[46] the Kentucky Supreme Court held that the spouse owning the policy could change the beneficiary if he chose to do so, but if no change was made, the former spouse/beneficiary was entitled to the proceeds.[47]

The Court's decision raises the question of whether one spouse's beneficial interest in an insurance policy on the other spouse's life is marital property and thus divisible upon divorce. While declaring it unnecessary in this case to decide the question, the *Ping* Court noted without comment that the trial court had ruled that such an interest was not property and therefore not within the purview of the statute.[48] Such a decision seems incongruous in light of earlier cases holding that a beneficial interest in a life insurance policy with a cash surrender value is property.[49] Moreover, if the policy has been acquired or maintained with marital funds it should be classified as marital property and thus should be subject to distribution by the court upon dissolution of marriage.[50]

5. *Date of Acquisition*

The date assets are acquired is determinative not only of the classification of the property as nonmarital or marital at the outset of a marriage, but also during its twilight. In *Culver*

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[45] Denton v. Travelers Ins. Co., 555 S.W.2d 825, 827 (Ky. Ct. App. 1977). *Accord* Kentucky Cent. Life Ins. Co. v. Willett, 557 S.W.2d 222 (Ky. Ct. App. 1977).

[46] 562 S.W.2d 314 (Ky. 1978).

[47] *Id.* at 317.

[48] *Id.*

[49] Warren v. Spurlock's Adm'r., 167 S.W.2d 858, 859 (Ky. 1943). The term "property" has long been broadly interpreted. In a leading Kentucky case, Button v. Drake, 195 S.W.2d 66 (Ky. 1946), the Court stated:

> The term (property) is therefore said to include everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, everything which has an exchangeable value, or which goes to make up one's wealth or estate.

Id. at 69 (quoting Commonwealth v. Kentucky Distilleries & Whse. Co., 136 S.W. 1032 (Ky. 1911)).

[50] *But see* PETRILLI, *supra* note 43 at § 24.7 (Supp. 1977). Professor Petrilli suggests that a beneficiary's interest in a life insurance policy could be considered a gift and thus designated nonmarital property. *Id.*

v. Culver,[51] the court of appeals held that KRS section 403.190(3), which provides that any property acquired by a spouse after the marriage but before a decree of legal separation is presumptively marital property, should be strictly construed.[52] Therefore, even though the parties have separated, any property acquired after the separation but before the marriage is dissolved or a decree of legal separation is granted is presumptively marital property.[53] The date of separation, however, determines the cut-off date of "joint efforts" by the parties; any appreciation in the net worth of the parties after the separation which is attributable to the efforts of one of the parties is the nonmarital property of that party.[54] If, however, the post-separation increase in value results from passive appreciation of marital property, it is considered marital property.[55] While this classification system may work within the confines of the statute, as a matter of practicality, attorneys and trial courts need a definite date prior to dissolution to facilitate settlement negotiations and appraisals by expert witnesses. The need for a definite date is especially great in cases involving property such as real estate developments, stocks, options or futures, the value of which is subject to rapid change.

B. *The Effect of Marriage on Nonmarital Property*

Litigation involving property continues to provide many knotty problems for the courts and the practicing bar. Property division in a divorce proceeding is hampered by the uncertain requisites of the valuation process[56] and by the diffi-

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[51] 572 S.W.2d 617 (Ky. Ct. App. 1978).

[52] *Id.* at 620.

[53] *Id.*

[54] *Id.* at 623.

[55] *Id.*

[56] In Robinson v. Robinson, 569 S.W.2d 178 (Ky. Ct. App. 1978), the requirements for valuation witnesses, first enunciated in condemnation cases, were extended to all valuations in divorce proceedings. In *Robinson*, the court of appeals held that ownership of property in and of itself does not qualify a party to testify as to value. There must be some basis, such as "a knowledge of property values generally" or being "acquainted with property values in the vicinity," before a party can express his opinion as to the market value of his property. *Id.* at 179-80. If inadequate proof of value has been presented, the trial court is directed to obtain expert opinion at the

culties inherent in tracing nonmarital property. The court of appeals has been active, if not decisive, in an effort to interpret and consistently apply Kentucky's property division statute, KRS section 403.190.

The requirement of tracing nonmarital or separate property[57] is a troublesome aspect of the distribution of property; in fact tracing has been described as "inimical to the spirit of marriage."[58] While KRS section 403.190 does not expressly require tracing, it has become apparent that for nonmarital property to remain separate it must be traceable to specific assets owned at the time of separation.[59] The recent case of *Allen v. Allen*[60] represents a retreat by the Kentucky courts from the strict tracing requirement.

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parties' expense or to order the property sold. *Id.* If the owner possesses personal qualifications beyond mere ownership, he may testify as to the property's value. Roberts v. Roberts, 587 S.W.2d 281 (Ky. Ct. App. 1979).

Such problems are intensified by the current but "universally disapproved" practice of assigning the "winning attorney" the task of preparing the findings of fact. Brunson v. Brunson, 569 S.W.2d 173, 175 (Ky. Ct. App. 1978). While *Robinson* directed itself to improving the trial court's fact-finding capability, *Brunson* encouraged improvement of the trial court's method of recording the facts. The court in *Brunson* expressed strong disfavor for the widespread practice of assigning the preparation of the findings of fact to counsel for the successful party, but intimated that it would be acceptable for the attorneys to choose from sets of findings submitted by both sides. Callahan v. Callahan, 579 S.W.2d 385 (Ky. Ct. App. 1979) went further in condemning this practice, holding that the trial judge committed reversible error in failing to draft his own findings.

[57] Nonmarital property, by negative implication, is defined in KRS § 403.190(2)(a)-(d) (Supp. 1978) as:

(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.

Id.

[58] Turley v. Turley, 562 S.W.2d 665, 669 (Ky. Ct. App. 1978) (Vance, J., concurring). Judge Vance argued that the interjection of a tracing requirement into the marital property statute interferes with the spirit of sharing essential to marriage, since "each partner must keep in the back of his mind the possible advantage to be obtained by keeping up with and being able to trace every penny brought into the marriage." *Id.*

[59] *See* Munday v. Munday, 584 S.W.2d 596 (Ky. Ct. App. 1979); Brunson v. Brunson, 569 S.W.2d 173 (Ky. Ct. App. 1978); Turley v. Turley, 562 S.W.2d 665 (Ky. Ct. App. 1978).

[60] 584 S.W.2d 599 (Ky. Ct. App. 1979).

In *Allen,* the husband withdrew $22,000 from his retirement plan; of this amount, $5,428.23, the husband's interest in the plan at the time of marriage, constituted nonmarital property. The couple subsequently deposited $8,000 of the withdrawn cash in a savings account. Commingled with this amount were the proceeds from the sale of a farm. During the course of the marriage, money was withdrawn from the savings account, but the balance never fell below the amount representing the husband's nonmarital property.[61] The court of appeals ordered $5,248.23 restored to the husband as separate property, stating, "we think the requirement of tracing should be fulfilled, at least as far as money is concerned, when it is shown that nonmarital funds were deposited and commingled with marital funds and that the balance of the account was never reduced below the amount of the nonmarital funds deposited."[62]

The decision in *Allen* is a step in the proper direction. "The purpose of the classification of property as marital and nonmarital is to facilitate restoration to each party of his property which was acquired outside of the marriage and to divide that which was accumulated during the marriage."[63] Thus, regardless of whether property previously owned or property acquired by gift or inheritance during the marriage can be strictly traced, the purpose of the distribution statute would seem to be served by returning the value of that property even when the nonmarital property can no longer be traced.

Allen does not, however, answer the more complex problem of how the growth during marriage of non-cash, nonmarital assets is to be treated. *Robinson v. Robinson*[64] illustrates the problem caused when nonmarital property is encumbered when brought into the marriage. In *Robinson,* the husband brought into the marriage a restaurant purchased for $30,000, but subject to a lien of $11,000. Prior to the couple's

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[61] *Id.* at 600.

[62] *Id.*

[63] Turley v. Turley, 562 S.W.2d 665, 670 (Ky. Ct. App. 1978) (Vance, J., concurring).

[64] 569 S.W.2d 178 (Ky. Ct. App. 1978).

separation, the indebtedness had been paid off through the joint efforts of the parties. Equating the word "property" with equity, the court of appeals ruled that the net "equity [$19,000] in that 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 [$30,000]."[65] Accordingly, 19/30 of the value of the property at the time of separation was assigned to the husband as nonmarital property.[66]

The problems of property distribution are compounded when property bearing a proportional nonmarital interest is exchanged or sold and the proceeds reinvested during the marriage.[67] In *Woosnam v. Woosnam*,[68] the wife brought into the marriage a house with an existing mortgage indebtedness. The house was later sold and the proceeds, less the balance of the mortgage, were used to purchase a more expensive residence. Attempting to devise a method to allow the "spouse having a nonmarital interest in property at the date of marriage to realize additional appreciation in the value of that interest after reinvestment, in proportion to its value at the date of separation,"[69] the *Woosnam* court formulated a three step process.

First, the value of the nonmarital interest in the property

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[65] *Id.* at 181.

[66] *Id.* A mathematical representation of the *Robinson* formula would be:

$$\frac{\text{Equity in property at time of marriage}}{\text{Value of property at time of marriage}} \times \text{Value of Property at time of separation} = \text{Nonmarital interest}$$

This formula is also applicable if the property has declined in value during the marriage. Note that the use of this formula could result in a party being assigned less than his nonmarital investment. Assume one party owned a $40,000 house at the time of marriage with equity of $20,000. At the time of separation the house had declined in value, being worth only $30,000. The spouse will be assigned 20/40ths of $30.000 or $15,000 as his proportionate nonmarital interest—$5,000 less than his pre-marriage investment. *Id.*

[67] Property acquired in exchange for nonmarital property is specifically exempt from classification as marital property. KRS § 403.190(2)(b) (Supp. 1978).

[68] 587 S.W.2d 262 (Ky. Ct. App. 1979).

[69] *Id.* at 264.

originally brought into the marriage is ascertained as of the date that property was sold using the *Robinson* formula.[70] Once this value is calculated, it is used to devise a new ratio:

$$\frac{\text{nonmarital interest in the property sold}}{\text{purchase price of the second property}}$$

The new ratio is then applied to the value of the second property as of the date of separation to determine the nonmarital interest to be restored.[71]

This process may be further complicated when the property has increased in value due to the efforts of the spouses. KRS section 403.190(2)(e) exempts from marital property any increase in nonmarital property which is not the result of the joint efforts of the parties during the marriage.[72] What does or does not constitute an "increase resulting from team efforts," however, has been left for judicial interpretation. The payment of the balance of the purchase price and the value of permanent improvements is ordinarily considered by the courts to be an increase attributable to joint efforts and thus a marital increase.[73] In *Newman v. Newman*,[74] the court was presented with the question of whether this principle should be extended. In *Newman*, the trial court ruled that the increased value of the family residence which was purchased

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[70] See note 66 *supra* for a mathematical expression of the *Robinson* formula.

[71] 587 S.W.2d at 263-64. Perhaps the process can be more easily illustrated by an example. Assume a spouse owned at the time of marriage a house valued at $40,000. His equity in the property was $20,000 with an indebtedness of $20,000. After the mortgage was paid off, the house was sold for $60,000.00. The proceeds of this sale were reinvested in a $90,000 house. At the time of separation, this house was valued at $120,000. Using the *Robinson* formula, the nonmarital interest in the first house would be 20/40ths of $60,000 or $30,000. The new ratio, 30/90ths, would be applied to the value of the second house at separation, $120,000. Thus, the nonmarital interest to be assigned would be 30/90ths of $120,000, or $40,000.

[72] The *Robinson* formula was premised on the idea that a spouse's proportionate share of any increase of value in his nonmarital property should be awarded to him. Note, however, that income produced by nonmarital property *is* marital property. Allen v. Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979); Brunson v. Brunson, 569 S.W.2d 173 (Ky. Ct. App. 1978).

[73] *See* Woosnam v. Woosnam, 587 S.W.2d 262 (Ky. Ct. App. 1979); Allen v. Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979); Angel v. Angel, 562 S.W.2d 661 (Ky. Ct. App. 1978).

[74] 78-CA-334-MR (Ky. Ct. App. Jan. 19, 1979), *rev'd on other grounds*, 597 S.W.2d 137 (Ky. 1980).

with proceeds from the husband's inheritance was nonmarital and therefore assignable to the husband. On appeal, the wife argued that the tax payments, insurance premiums and general maintenance of the residence were attributable to team effort and that consequently the value of such payments should be divisible marital property. Since the asserted payments did not result in an increase in value, the *Newman* court rejected the argument, noting that such expenditures are usually offset by the benefits derived from the use of the property.[75]

Additionally, the *Woosnam* court recognized that the value of improvements to the nonmarital property resulting from team efforts should be deducted from the property before ascertaining a party's nonmarital interest in property.[76] When proceeds from the sale of the property brought into the marriage have been reinvested in a second piece of property, the value of improvements to the original property should be subtracted from the sale price before applying the *Robinson* formula.[77] Likewise, the value of any improvements made to the second property should be deducted from the value of that property at the time of separation before applying the proper ratio.[78]

C. *Separation Agreements*

Kentucky's "no-fault" divorce act promotes the settlement of marital disputes by agreement.[79] To effectuate this objective, KRS section 403.180(2) mandates that the terms of a separation agreement providing for the disposition of property and maintenance shall be binding on the court in a proceeding for dissolution of marriage, unless there is a finding of unconscionability.[80]

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

[76] 587 S.W.2d at 267.

[77] *Id.*

[78] *Id.*

[79] KRS §§ 403.110(2), 403.180(1) (Supp. 1978).

[80] The term "unconscionable" has been defined as "manifestly unfair or inequitable." Wilhoit v. Wilhoit, 506 S.W.2d 511, 513 (Ky. 1974). A separation agreement can also make provisions for child custody, support, and visitation; such terms, however, are not binding on the court. KRS § 403.180(2) (Supp. 1978).

Prior to divorce, the parties in *Jackson v. Jackson*[81] entered into a separation agreement in which Walter Jackson agreed to pay Mary Jackson support and maintenance and further agreed to pay certain bills. In the ensuing divorce action, the trial court adopted the commissioner's finding of fact which recommended that Mary be awarded no support. As a result, the court distributed property and awarded maintenance contrary to the terms of the agreement. On appeal, the wife argued that in the absence of a specific finding of unconscionability, the trial court was bound by the terms of the agreement. The court of appeals stated that while the word "unconscionable" should have been used in the findings of fact, those findings demonstrated a sufficient finding of unconscionability.[82]

The correct standard for reviewing a trial court's ruling on the conscionability of separation agreements was recently delineated in *Peterson v. Peterson.*[83] In *Peterson,* the court of appeals stated that the trial court's findings "should not be set aside on appeal unless there is some evidence of fraud, undue influence, overreaching, or evidence of a change of circumstances since the execution of the original agreement."[84]

A more significant aspect of the *Peterson* decision is the court of appeals' discussion of the effect of reconciliation on settlement agreements. Considering the issue for the first time since the revision of the divorce statutes, the court ruled that what effect reconciliation has turns on whether the agreement was fully executed or simply executory.[85] If the property settlement was executed, the intent of the parties as to the effect

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[81] 571 S.W.2d 90 (Ky. Ct. App. 1978).

[82] The settlement had been based on an understanding that the mother would have custody of the child; instead the court awarded custody to the father. This custody arrangement led the court to conclude that the agreement could be viewed as unconscionable. *Id.* at 92-93.

[83] 583 S.W.2d 707 (Ky. Ct. App. 1979).

[84] *Id.* at 712. The husband in *Peterson,* understanding well the economic consequences, consented to a harsh settlement, freely agreeing to pay two-thirds of his salary for child support and maintenance. Even though the court would have set aside the payments had the amount been ordered by the trial court, it would not protect the husband from the consequences of a bad bargain without some evidence of overreaching. *Id.* at 711.

[85] *Id.* at 709.

of reconciliation is determinative of whether reconciliation nullifies the agreement. If, however, the separation agreement is merely executory, a reconciliation will abrogate the provisions of the parties' agreement;[86] a subsequent separation will not revive the property settlement.[87]

After making this general statement of the law, the *Peterson* court strained to uphold an executory agreement, holding that an executory separation agreement is not abrogated unless there was mutual intent to reconcile.[88] The *Peterson* court went on to find that "brief cohabitation or occasional sexual relations between the parties" does not evidence such an intent.[89]

In *Whalen v. Whalen*,[90] the court of appeals addressed the corollary question of whether reconciliation agreements are valid and enforceable in a subsequent dissolution proceeding. After a period of separation, the parties in *Whalen* entered into an agreement contemplating a resumption of the marital relationship and providing for a property settlement should a subsequent divorce result, as it eventually did.[91] The husband first argued that if the marital relationship is resumed after execution of the reconciliation agreement, the property settlement embodied in the contract is nullified. The court, citing *Gordon v. Gordon*[92] and *King v. King*,[93] stated that the effect reconciliation would have upon an executed reconciliation agreement was to be determined from the intent of the parties.[94] The court also rejected the husband's argument that reconciliation agreements were void as contrary to public policy, noting that the law "favors any steps parties may take to settle litigation, especially those which have the

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[86] *Id.* at 709-10.

[87] *Id.* at 710.

[88] *Id.*

[89] *Id.* at 709. The facts of the case show that the Petersons separated and reconciled twice with the total time of "brief cohabitation" amounting to approximately one month. Because the couple had "merely contemplated" reconciliation, the incorporation of the agreement into the divorce decree was upheld. *Id.* at 710.

[90] 581 S.W.2d 578 (Ky. Ct. App. 1979).

[91] *Id.* at 579.

[92] 335 S.W.2d 561 (Ky. 1960).

[93] 274 S.W.2d 656 (Ky. 1954).

[94] 581 S.W.2d at 579.

effect of reuniting a family."[95] While the revised divorce statutes do not expressly provide for the use of reconciliation agreements, *Whalen* makes it clear that such agreements are enforceable.

II. CHILD CUSTODY AND VISITATION RIGHTS

A. *Child Custody*

Intense battles are often waged by divorcing parents over the custody of children. The present child custody statute delegates to the courts the difficult task of deciding custody based upon the child's best interest.[96] In making this determination, the court may inquire into "all relevant factors."[97] KRS section 403.270(2), however, prohibits consideration of "conduct of a proposed custodian that does not affect his relationship to the child."[98] With the enactment of this statute, the General Assembly injected into custody determinations a qualified no-fault concept.

> The purpose of this provision is to focus attention on the best interest of the child and preclude the introduction into the custody hearing of all the disputes and grievances between the spouses that led to divorce. The premise seems to be that the disaffected spouses are likely to treat each other badly, even maliciously, but that such conduct will not be directed toward a child for whom they have affection.[99]

The Kentucky Supreme Court recently had an opportunity to address the issue of whether KRS section 403.270(2) prohibits the admission of evidence in a custody dispute of a proposed custodian's sexual conduct. In *Moore v. Moore*[100] the

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[95] *Id.*

[96] KRS §§ 403.260-.350 (Supp. 1978).

[97] KRS § 403.270(1) (Supp. 1978).

[98] KRS § 403.270(2) (Supp. 1978).

[99] Dept. of Continuing Legal Education, University of Kentucky College of Law, Report of Seminar on Domestic Relations, 17 (Dec. 15-16, 1978).

[100] 577 S.W.2d 613 (Ky. 1979). Justice Sternberg, dissenting in *Moore*, argued that the record revealed not just evidence of the mother's week-long extra-marital affair but also disclosed evidence of other acts of indiscretion, such as kissing her paramour in public and spending twenty minutes with him on two occasions in an unlighted men's restroom. 577 S.W.2d at 614 (Sternberg, J., dissenting).

father attempted to introduce evidence in a custody dispute of an out-of-town sexual liason by the mother. The Court held that unless there is evidence that the illicit sexual behavior affected the parent/child relationship, such conduct is irrelevant and consequently inadmissible.[101] Thus, even a pattern of promiscuous sexual activity seemingly would not be a proper factor for consideration if such behavior had been circumspect since, "if a child has no immediate knowledge of or exposure to parental sexual misconduct, his or her relationship to the parent is presumably unaffected."[102]

The *Moore* court also concluded that when all factors pertaining to parental fitness are essentially equal, "the natural preference for the mother is in the best interest of the child."[103] In *Moore,* however, the original custody decree was granted prior to the effective date of the 1978 amendment[104] to KRS section 403.270 and thus was not subject to its provisions. As amended, the statute now requires that in a custody dispute both parents be given equal consideration, apparently abrogating the "tender years" presumption.[105] Under the "tender years" presumption, the mother of a child under the age of six, if otherwise a fit parent, is awarded custody unless the father can prove that she is "unfit or incapable of furnishing a suitable home for the child."[106] The recent amendment which abolishes the "tender years" presumption gives recognition to the emerging view that both parents are equally capable of performing child-rearing functions and of providing the necessary care for healthy child development.[107]

B. *Visitation Rights*

Two recent cases have extended visitation rights with mi-

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[101] *Id.* at 614.

[102] Moore v. Moore, No. CA-1365-MR, slip op. at 4 (Ky. Ct. App. Feb. 24, 1978), *aff'd.,* 577 S.W.2d 613 (Ky. 1979).

[103] 577 S.W.2d at 614.

[104] 1978 Ky. Acts, ch. 86, § 1 (effective June 17, 1978).

[105] The pertinent language of the amendment is: "and equal consideration shall be given to each parent." 1978 Ky. Acts, ch. 86, § 1 (codified at KRS § 403.270(1) (Supp. 1978)).

[106] PETRILLI, *supra* note 43, at § 2.

[107] *See* S. KATZ & M. INKER, FATHERS, HUSBANDS AND LOVERS 325-342 (1979).

nor children to persons other than the natural parents.[108] In *Simpson v. Simpson,*[109] the wife, during a divorce proceeding, requested custody of her husband's child by a previous marriage or, in the alternative, visitation rights. The trial court ruled that under KRS section 403.260, which permits persons other than a parent to institute a child custody proceeding only if neither parent has physical custody of the child,[110] it was without jurisdiction to decide the custody issue since at that time the child was living with his father.[111] In reversing the trial court, the Supreme Court noted that subsequent to the couple's separation but prior to the divorce the child had continued to reside with the stepmother, being removed by his father only after the petition requesting custody was filed.[112] The Court held that this act of "self-help" by the father was not sufficient to divest the trial court of jurisdiction of the custody issue.[113] After deciding the jurisdiction question, the Court cursorily denied custody to the mother as a matter of law since there was no proof that the natural parent was unfit.[114]

A more vexatious problem for the *Simpson* Court was the propriety of granting step-parental visitation rights. In deciding this issue, the Court was again faced with a jurisdictional question as there is no statutory grant of jurisdiction for a hearing to determine the visitation rights of a nonparent.[115] The Court held that since there is no statutory prohibition against granting visitation privileges to a nonparent, a hearing could be held to determine whether it would be in the best

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[108] Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979); Sparks v. Wigglesworth, No. 79-CA-83-MR (Ky. Ct. App. July 13, 1979), *aff'd mem.*, 27 KY. L. SUMM. 5, 13 (Ky. 1980) [hereinafter cited as KLS].

[109] 586 S.W.2d 33 (Ky. 1979).

[110] KRS § 403.260(4)(b) (Supp. 1978).

[111] 586 S.W.2d at 35.

[112] *Id.*

[113] *Id.*

[114] *Id.* Before custody is granted to a nonparent, it must be shown not only that it is in the child's best interest but also that the natural parent is unfit. Chandler v. Chandler, 535 S.W.2d 71, 72 (Ky. 1975).

[115] KRS § 403.320 (Supp. 1978), the only statutory provision applicable to the granting of visitation rights in conjunction with a divorce, speaks only of "a *parent's* visitation rights." *Id.* (emphasis added).

interest of the child for the nonparent to be granted visitation privileges, once jurisdiction is invoked for a custody action and the nonparent alleges therein that he stands *in loco parentis* to the child.[116] The Court buttressed its holding, noting that "[v]isitation is not solely for the benefit of the adult visitor but is aimed at fulfilling . . . a wholesome contribution to the child's established close relationship"[117] and that the legislature had recognized the importance of the parent-stepchild relationship in other areas.[118] Thus, since the stepmother had properly invoked jurisdiction for the custody proceeding,[119] she should have been granted a hearing.

Justice Stephenson, in a vigorous and colorful dissent, accused the majority of usurping the legislature's prerogative of enacting statutes.[120] He contended that the majority's disregard of the applicable laws had entitled "the butcher, the baker and the candlestick maker to a hearing on 'visitation' rights."[121] Despite the concern voiced by the dissent that visitation could be granted to "babysitters, nannies, housekeepers, Sunday School teachers and various others who may have formed close emotional ties with a child,"[122] there is an indication that the holding in *Simpson* may have a more limited impact. The Court's holding was premised on the idea that the relationship between a surrogate parent and child can be as close as that of a child and his natural parent.[123] Thus, the decision should be read as granting visitation rights only to nonparents who stand "*in loco parentis* and who have willingly assumed parental rights, duties and responsibilities toward the child."[124] An even more limiting aspect of the Court's holding is that before visitation is granted to one other than a parent, the nonparent must be "jurisdictionally

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[116] 586 S.W.2d at 36.
[117] *Id.* at 35 (quoting Looper v. McManus, 581 P.2d 487, 488 (Okla. 1978)).
[118] *Id.* at 36 n.2.
[119] *Id.* at 35.
[120] *Id.* at 36 (Stephenson, J., dissenting).
[121] *Id.*
[122] *Id.*
[123] *Id.* at 35-36.
[124] *Id.* at 36.

capable of litigating custody."[125] Since jurisdiction is available to a nonparent only if the child is not in the physical custody of one of his parents,[126] it is unlikely that a nonparent will often be able to invoke jurisdiction.

In *Sparks v. Wigglesworth,*[127] the court of appeals was faced with the issue of whether grandparents should be granted visitation rights over the objection of the custodial parent. Answering in the affirmative, the court ruled that the paramount criterion is whether the granting of visitation privileges is in the best interest of the child.[128]

In *Sparks,* the mother of the child was awarded custody in the divorce action. Because the father was on active duty in the United States Navy, visitation privileges were granted to the paternal grandparents. After the father's discharge from the service, he failed to support or visit the child, and consequently the mother moved to terminate the grandparents' visitation rights.[129]

On appeal from the trial court's refusal to terminate the grandparents' visitation privileges, the mother argued that since KRS section 403.320(2) speaks only of parental visitation, it was the legislature's intent to limit visitation rights to parents.[130] The mother also argued that KRS section 405.021, which grants visitation rights to grandparents when the natural parent is dead, demonstrates that the General Assembly knew how to grant visitation rights to grandparents when it desired to do so. Thus, she argued that in the absence of such a statutory grant, it is to be assumed that the legislature did not intend for grandparents to be granted visitation rights.[131] The court of appeals rejected both arguments, stating that the statutes did not expressly provide for or prohibit the granting of visitation privileges to grandparents where one parent has

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[125] *Id.* at 35.

[126] KRS § 403.260(4)(b) (Supp. 1978).

[127] No. 79-CA-83-MR (Ky. Ct. App. July 13, 1979) *aff'd mem.,* 27 KLS 5, 13 (Ky. 1980).

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

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

[130] *Id.,* slip op. at 3.

[131] *Id.*

voluntarily severed his relationship with the child.[132] Since there are instances in which granting visitation rights may be desirable,[133] the court held that the question should be resolved by looking to the best interests of the child.[134]

In making such a determination, the court of appeals noted that a trial court should consider "the closeness of the child's relationship to the nonparent and the love, attention and guidance which the nonparent may be able to afford the child . . . [and] whether the grandparent, or nonparent, has had any previous custodial or extensive visitation relationship with the child."[135] Another consideration which must be weighed is the custodial parent's objections to the granting of visitation privileges to the grandparent.[136] While these objections are a consideration, they are not determinative since "the best interest of the child is nevertheless the paramount concern."[137] The court of appeals concluded that the trial court judge had correctly weighed the factors and upheld his granting of visitation rights to the grandparents.[138]

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[132] *Id.*
[133] *Id.*, slip op. at 4.
[134] *Id.*, slip op. at 5.
[135] *Id.*, slip op. at 9.
[136] *Id.*, slip op. at 7-8.
[137] *Id.*, slip op. at 8.
[138] *Id.*, slip op. at 10.