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# The Kentucky Divorce Statute: A Call for Reform

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# THE KENTUCKY DIVORCE VENUE STATUTE: A CALL FOR REFORM

## INTRODUCTION

The venue of a case is defined as “the place of trial, the particular county or territorial area, within the state or district in which the cause is properly brought or tried.”<sup>1</sup> In 1852, the Kentucky General Assembly enacted a statute providing that venue for divorce actions in the Commonwealth shall be in the county of the wife’s residence.<sup>2</sup> While the numerical designation of the statute has changed several times over the past 125 years,<sup>3</sup> the substance and impact of the statute remain the same.<sup>4</sup> This comment examines that statute on venue in divorce actions in three general sections. The first section explores the social and legal environment of divorce when the statute was enacted in 1852 and compares that environment with the status of divorce in the Commonwealth today, especially in light of Kentucky’s 1972 reform of the divorce laws.<sup>5</sup> The second section examines the Kentucky approach to venue in divorce suits in comparison with that of other states. The third and final section examines potential constitutional challenges to the statute, specifically under the Equal Protection Clause of the United States Constitution. As will become evident, while the statute may once have had an important purpose, it no longer serves a viable function in divorce actions in the Commonwealth today and should be reformed.

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<sup>1</sup> Stevens, *Venue Reform in Kentucky—A Proposal*, 40 Ky. L.J. 58, 59 (1951).

<sup>2</sup> This statute was originally enacted in the 1851-52 session. Revised Statutes of Kentucky, ch. 47, art. III, § iv (1860).

<sup>3</sup> Under various statutory compilations, the basic provisions of this statute have appeared in the following: General Statutes, ch. 52, art. 3, § 4 (1873); Carroll’s Kentucky Statutes Annotated, § 2120 (1936); Carroll’s Kentucky Codes, § 76 (1932); and currently Ky. REV. STAT. § 452.470 (1975) [hereinafter cited as KRS].

<sup>4</sup> KRS § 452.470 (1975) provides: “An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this state; if not, in the county of the husband’s residence.”

For clarity, all references in the text will be to the modern section.

<sup>5</sup> KRS §§ 403.010-.350 (1972).

## I. RATIONALE OF THE DIVORCE VENUE STATUTE

### A. *Historical Background*

When the Kentucky General Assembly adopted the divorce venue provision in 1852,<sup>6</sup> it was primarily in response to the social, economic and legal status of women. That the statute was designed for the convenience of women is fairly clear, and one court recognized this in stating:

The real object, we have no doubt, was to so regulate the jurisdiction as to subserve the convenience and possibly the interest of the wife by making the jurisdiction local to that county in which she should, at the time of the commencement of the suit have an actual residence.<sup>7</sup>

This early interpretation of legislative intent has not been refuted, and has in fact been expressly followed in subsequent cases.<sup>8</sup> For a clear understanding of why the Kentucky legislature felt compelled to enact a statute protecting women, it is necessary to examine the position of married women in the mid-nineteenth century, the legal doctrines affecting them, and the typical divorce case for which the statute was designed.

In the mid-nineteenth century, a woman's position was defined solely in terms of her status as a wife and mother.<sup>9</sup> A woman was merely an extension of her husband and "was expected to embrace her husband's religion, to confine her activities to the home and make her husband's pleasure her guiding star. Ignorant of her husband's business, subordinate in the church, banned from politics and possessing a scanty or silly education . . .,"<sup>10</sup> a woman was wholly dependent on her husband.

Legally, as well as economically, a woman had no individ-

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<sup>6</sup> When the statute was enacted, the venue provision was part of the entire statute dealing with divorce; it was not separately codified as it is today.

<sup>7</sup> *Johnson v. Johnson*, 75 Ky. (12 Bush) 485, 488 (1877).

<sup>8</sup> See, e.g., *Williamson v. Williamson*, 209 S.W. 503 (Ky. 1919); *Cummings v. Cummings*, 117 S.W. 289 (Ky. 1909); *Gooding v. Gooding*, 42 S.W. 1123 (Ky. 1897).

<sup>9</sup> "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

<sup>10</sup> 2 A. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY* 83 (1918).

ual position.<sup>11</sup> The husband "held the external powers of the family with reference to property. . . . [The wife] could not sue alone, nor execute a deed or other instrument to bind herself and property. . . . She forfeited all personal control over her property so long as the marriage lasted."<sup>12</sup> With the wife totally dependent on her husband, it seems clear why the legislature in 1852 felt that if the husband was leaving his wife, she needed the protection of a venue statute which forced the divorce to be litigated in her home county.

Insofar as particular legal doctrines operating in 1852 contributed to the statute's design, divorce and alimony actions<sup>13</sup> at that time were separate claims and could be filed independently.<sup>14</sup> While alimony as an action separate from divorce was clearly recognized in Kentucky for many years,<sup>15</sup> today the action has been abolished.<sup>16</sup>

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<sup>11</sup> *Id.* at 91. "The reality of woman's bondage is made vivid by a case in New York City in which a husband recovered ten thousand dollars damages from persons that had . . . sheltered his wife after she left him." *Id.*

<sup>12</sup> *Id.* at 93.

<sup>13</sup> M. PAULSEN, W. WADLINGTON, & J. GOEBEL, *DOMESTIC RELATIONS—CASES AND MATERIALS* 416-19 (1970) [hereinafter cited as PAULSEN] gives a discussion of the two types of divorces available to a married couple. Divorce *a mensa et thoro* was a partial divorce which did not extinguish any right or responsibilities attached to the marriage bond, or give freedom to remarry. Divorce *a vinculo* was an absolute divorce, and in early times was granted infrequently and only under extreme circumstances. This system developed in the English divorce system and was generally adopted in the United States. For a complete discussion of the history of divorce in the United States see N. BLAKE, *THE ROAD TO RENO* (1962). Alimony was basically a remedy provided by the English courts in a divorce *a mensa et thoro*, based on the husband's common law duty to support his wife. For a concise discussion of alimony and its history, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (1968).

<sup>14</sup> R. PETRILLI, *KENTUCKY FAMILY LAW* § 25.27 (1969): "By statute of 1812 . . . wives could sue and recover alimony without divorce." Note, when the Civil Code of Practice was operating in Kentucky, there were special forms for alimony suits alone. See Carroll's Kentucky Codes (1932), forms 149., 150-1., 151. See note 20, *infra* for Petrilli's comment on the separation of alimony and divorce actions.

There are several reasons a wife might choose to file for alimony but not for divorce. The main reason is that a wife who was divorced had to give up her dower interest in the husband's property. 28 C.J.S. *Dower* § 53 (1941). Other possible reasons include a hope for reconciliation or simply distaste for the stigmas attached to divorce in the mid-nineteenth century. Finally, a wife might limit her action to alimony if the legal requirements for divorce could not be met.

<sup>15</sup> *Breen v. Breen*, 91 S.W. 251 (Ky. 1906).

<sup>16</sup> R. PETRILLI, *supra* note 14, at § 25.27 (Supp. 1974): "[I]t is a reasonable conclusion that an action for alimony no longer exists. . . ." Professor Petrilli notes that "dissolution; legal separation; maintenance following dissolution; or, divorce from bed and board [are] now to be substituted." *Id.*

The fact that actions for alimony and divorce could be filed separately was closely related to the concept of abandonment.<sup>17</sup> Abandonment, as it developed, was not limited to desertion. The husband could legally abandon the wife by treating her in such a manner as to force her to leave him—in effect constructive abandonment.<sup>18</sup> Part of the reason the venue statute was structured to favor the wife was the assumption that if the wife filed only for alimony, the husband was at fault for abandoning her either physically or constructively because the wife could not file for alimony unless she and her husband were living separately.

Moreover, since most wives in this period were not economically independent,<sup>19</sup> their mobility was more limited than the husband's. The venue statute took account of this situation and allowed the wife to file her action wherever she resided after separation from her husband.

The cases involving the venue statute present a clear and regular pattern of events: The husband abandons the wife, either literally or constructively, and the wife seeks refuge in the home of friends or relatives.<sup>20</sup> For example in *Williamson v. Williamson*,<sup>21</sup> the wife left her husband when he mistreated her children from a previous marriage. The wife took the children to her former home in Pike County.<sup>22</sup> In her subsequent

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<sup>17</sup> This relationship is evidenced by one of the earliest divorce and alimony statutes in Kentucky. See W. LITTEL, DIGEST OF THE STATUTE LAWS OF KENTUCKY, ch. 1, § 1 (1822). That statute, entitled "Abandonment," gave the wife the right to sue for alimony, and ultimately divorce, if her husband abandoned her for a religious sect which required him to renunciate the marriage covenant, such as the Shakers.

<sup>18</sup> *Williamson v. Williamson*, 209 S.W. 503 (Ky. 1919); *Lockridge v. Lockridge*, 33 Ky. (3 Dana) 28 (1835). The wife, having left the husband because of cruel treatment, was labeled "abandoned."

<sup>19</sup> See discussion in text accompanying notes 9 through 12, *supra*, for a brief historical analysis of the legal and financial positions of women in the nineteenth century.

<sup>20</sup> *E.g.*, *Luvall v. Luvall*, 15 S.W.2d 433 (Ky. 1929); *Miller v. Miller*, 133 S.W. 588 (Ky. 1911); *Steele v. Steele*, 29 S.W. 17 (Ky. 1895); *Hulett v. Hulett*, 80 Ky. 364 (1882); *Lockridge v. Lockridge*, 33 Ky. (3 Dana) 28 (1835).

<sup>21</sup> 209 S.W. 503 (Ky. 1919).

<sup>22</sup> This pattern of the wife leaving the husband for a new residence is still evident although the wife today may rent her own apartment instead of moving in with her family. See, *e.g.*, *Calhoun v. Peek*, 419 S.W.2d 152 (Ky. 1967) and *Whitaker v. Bradley*, 349 S.W.2d 831 (Ky. 1961). This change by itself indicates that women are no longer as financially dependent on their husbands as in the past and that they are capable of providing their own necessities.

suit for alimony, the court stated: "[A] suit for alimony may be maintained independent of and without regard to a divorce, where the husband treats the wife with cruelty and compels her to leave him . . . and although the abandonment may not have continued long enough to entitle her to a divorce."<sup>23</sup> In another case where the husband abandoned the wife, the court explained that "the only place she had to go was the house of her father. . . ."<sup>24</sup> Obviously, the courts were as aware of the limitations imposed on women as was the legislature when they enacted the venue statute.

### B. *The New Kentucky Law on Dissolution*

The legal status of women has changed today. One significant change came in 1972 when Kentucky adopted the Uniform Marriage and Divorce Act.<sup>25</sup> This Act radically changed both the substantive and procedural requirements of a divorce action.<sup>26</sup> The most significant change wrought by the Act is that a couple need no longer prove particular grounds for divorce. Under the old law, depending upon which party filed for the divorce, grounds to be alleged included, among others, impotence, abandonment, adultery, cruel and inhuman treatment, or insanity.<sup>27</sup> In contrast, the sole basis for dissolution under

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<sup>23</sup> 209 S.W. at 504. The court here reiterated the legislative intent expressed in *Johnson v. Johnson*, 75 Ky. (12 Bush) 485 (1877), which is quoted in text accompanying note 7, *supra*.

<sup>24</sup> *Steele v. Steele*, 29 S.W. 17, 17 (Ky. 1895).

<sup>25</sup> NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM MARRIAGE AND DIVORCE ACT 177 (1970); codified in Kentucky at KRS § 403.010-.350 (1977). For a complete discussion of the new divorce laws, see Note, *Kentucky's New Dissolution of Marriage Law*, 61 KY. L.J. 980 (1973) and Comment, *Kentucky Divorce Reform*, 12 J. FAM. L. 109 (1973). And, for a discussion of no-fault divorce, see generally New Topic Service AM. JUR. 2d, *No-Fault Divorce* (1977).

<sup>26</sup> However, some commentators caution against complete acceptance of the Uniform Marriage and Divorce Act. See Foster, *Divorce Reform and the Uniform Act*, 18 S.D.L. REV. 572, 576 (1973):

In the past, the varied patterns of divorce throughout the United States and the gap between statutory law and the "living law" of divorce have been such that it was difficult to achieve a consensus. Today, however, there is overwhelming public support for more realistic laws of divorce, and the danger may be that state legislatures may tend to accept any product which is offered that comes along with reputable sponsorship.

<sup>27</sup> KRS § 403.020 (1970) (repealed 1972). The divorce laws of the United States have been criticized for many years:

James (later Lord) Bryce, a keen observer of American life at the turn of this

the new Act is irretrievable breakdown.<sup>28</sup>

The new Act also provides that either spouse may receive maintenance support,<sup>29</sup> while under previous law only the wife had such a right.<sup>30</sup> This Act has also equalized the division of property provisions.<sup>31</sup> Today, it is the party most deserving of financial support who will receive it; no longer is there the presumption that the wife alone is the party in need.

These changes in the divorce laws indicate a legislative awareness not only of the needs of the law to deal with modern reality, but also of the inequalities inherent in the older law. Putting men and women on an equal basis in a given legal situation often necessitates major statutory reform.<sup>32</sup> In replac-

century remarked in 1901 that our various state legislative formulations for divorce constituted "the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing communities have ever tried."

PAULSEN, *supra* note 13, at 419.

<sup>28</sup> KRS § 403.170 (Supp. 1976) provides:

(1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken. . . .

. . . .

(3) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

KRS § 403.110 (Supp. 1976) states: "This chapter shall be liberally construed and applied to promote its underlying purposes, which are to:

(5) Make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis for its dissolution."

<sup>29</sup> KRS § 403.200 (Supp. 1976) provides: "(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse."

<sup>30</sup> KRS § 403.060 (1970) (repealed 1972).

<sup>31</sup> Compare KRS § 403.060 (1970) (repealed 1972) with KRS § 403.190 (Supp. 1976).

<sup>32</sup> See Foster, *supra* note 26, at 576-77, where the author states:

[R]ealism impels us to acknowledge that statutory provisions have minimal impact upon the stability of marriage and that economic conditions, psychological tensions, and the increasing independence of women, changes in religious attitude, high mobility, urban anonymity, and other factors all have more to do with marriage stability and the incidence of divorce than does the statutory framework. This does not mean, however, that marriage and divorce law need not express a sound public policy, nor that statutory terms are largely irrelevant.

ing standards based on out-dated beliefs with workable principles formulated to reflect current ideas, the legislature keeps up with a changing society.<sup>33</sup> However, even in light of changed laws, the venue statute on divorce remains the same. It would seem that this venue statute is a remnant of the mid-nineteenth century, when the condition of women and the existing legal doctrines were very different from today.<sup>34</sup> The assumption that women have no alternatives for financial support except their husbands has for the most part been rejected by society<sup>35</sup> as well as the law.<sup>36</sup> If it is indeed the intent of the Kentucky legislature to base the laws of this state on "the realities of matrimonial experience,"<sup>37</sup> the venue statute should be reformed to conform with the new egalitarian divorce laws.

## II. VENUE IN OTHER STATES COMPARED TO KENTUCKY

Divorce is characterized as a transitory action,<sup>38</sup> and in general the venue for transitory actions is determined by the court which has jurisdiction over the defendant.<sup>39</sup> Other states define the venue in a divorce action to allow the suit to be

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<sup>33</sup> R. SUMMERS, A. CAMPBELL & G. HUBBARD, *THE AMERICAN LEGAL SYSTEM: UNIT III LAW AND SOCIAL CHANGES* 17 (1974):

Indeed, social stability through law has such value that most societies, including our own, have set up lawmaking machinery that tends to favor leaving things as they are (the status quo) rather than change. Indeed, it often seems that our legal institutions—legislatures, regulatory agencies, courts—are terribly slow to make changes in the law that reflect the changing needs and values of American society.

<sup>34</sup> See discussion in text accompanying notes 13 through 18, *supra*, on the prior availability of maintaining separate actions for alimony and divorce.

<sup>35</sup> N. BLAKE, *supra* note 13, at 227. In discussing divorce in the modern context, the author states, "The modern wife was less in awe of her husband, expected better treatment, and was quicker to seek relief in the divorce court than her grandmother had been. She was also less dependent economically on her husband and readier to take her chances on self-support." *Id.*

<sup>36</sup> See discussion of recent legislative reforms promoting sexual equality in text accompanying notes 64 through 72, *infra*.

<sup>37</sup> KRS § 403.110(5) (Supp. 1976), stating a purpose for which the Kentucky General Assembly adopted the No-Fault Divorce Act.

<sup>38</sup> 27A C.J.S. *Divorce* § 83 (1959). Contrast this concept with local actions which arise in only one place. See also 77 AM. JUR. 2d *Venue* § 2 (1975).

<sup>39</sup> Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930): "An accepted criterion is, whether the action is one that might have happened anywhere. If so it is transitory. . . . Local actions can be tried only where they arise; transitory actions in whatever court has jurisdiction over the defendant or his property."



brought in the county of the plaintiff's residence,<sup>40</sup> the county of the defendant's residence or where he may be found,<sup>41</sup> or the county where either party resides.<sup>42</sup> Some states have special provisions allowing the suit to be brought where the defendant does business<sup>43</sup> or where the couple resided last before separation.<sup>44</sup> Kentucky is the only jurisdiction which rejects the usual criteria for venue, placing it exclusively in the county of the wife's residence whether she be plaintiff or defendant.

Aside from the fact that no other state currently seems to recognize the rationale behind Kentucky's divorce venue statute,<sup>45</sup> there are other reasons the Kentucky statute should be revised to adopt the general venue criteria used in other states. While Kentucky has recently reformed both its divorce laws<sup>46</sup> and court system,<sup>47</sup> the entire venue code has been operating since 1852.<sup>48</sup> The venue provisions now require some attention:

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<sup>40</sup> ARIZ. REV. STAT. § 12-401 (13) (1956); ARK. STAT. ANN. § 34-1204 (1962); CAL. CIV. PROC. CODE § 395 (West 1973); HAW. REV. STAT. § 580-1 (1968); KAN. STAT. § 60-607 (1976); MINN. STAT. ANN. § 518.09 (West Supp. 1977); OHIO REV. CODE ANN. Rule 3(b)(9) (Page Supp. 1976); R.I. GEN. LAWS § 15-5-13 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 1995(16) (Vernon Supp. 1976-77).

<sup>41</sup> ALA. CODE tit. 6, § 6-3-2 (1959); ALASKA STAT. § 22.10.030 (1976); COLO. REV. STAT. Rule 98(c) (1974); FLA. STAT. ANN. § 47.011 (West 1976); GA. CODE ANN. § 2-4301 (1976); IDAHO CODE § 5-404 (1948); MICH. COMP. LAWS ANN. § 600.1621 (Supp. 1977-78); MISS. CODE ANN. § 11-5-1 (1972); N.J. STAT. ANN. § 2 A 34-8 (West Supp. 1977-78); N.D. CENT. CODE § 28-04-05 (1974); UTAH CODE ANN. § 78-13-7 (1953); VA. CODE § 20-96 (Supp. 1970); WASH. REV. CODE § 4.12.025 (1976); W. VA. CODE § 48-2-8 (1976); WIS. STAT. ANN. § 801.50 (West 1977); WYO. STAT. § 1-37 (1959).

<sup>42</sup> CONN. GEN. STAT. § 52-42 (1975); DEL. CODE tit. 13, § 1507 (1974); ILL. ANN. STAT. ch. 40, § 6 (Smith-Hurd 1976); IND. CODE § 31-1-11.5-6 (1976); IOWA CODE ANN. § 598.2 (West Supp. 1977-78); LA. CODE CIV. PRO. ANN. art. 3941 (West 1961); ME. REV. STAT. tit. 4, § 155 (1964); MD. ANN. CODE art. 16, § 30 (1973); MASS. ANN. LAWS ch. 208, § 6 (Michie/Law. Co-op. Supp. 1977); MO. ANN. STAT. § 452.300 (Vernon 1977); MONT. REV. CODES ANN. § 93-2904 (1964); NEB. REV. STAT. § 42-348 (1974); NEV. REV. STAT. § 125.020 (1975); N.H. REV. STAT. ANN. § 458:9 (1968); N.M. STAT. ANN. § 22-7-3 (Supp. 1975); N.Y. CIV. PRAC. LAW § 503 (McKinney 1976); OKLA. STAT. ANN. tit. 12, § 1272.1 (West Supp. 1976-77); OR. REV. STAT. § 14.070 (1975); S.C. CODE § 20-106 (1962); S.D. COMPILED LAWS ANN. § 25-4-30.1 (1976); TENN. CODE ANN. § 36-804 (1977); VT. STAT. ANN. tit. 15, § 593 (1974).

<sup>43</sup> *E.g.*, MICH. COMP. LAWS ANN. § 600.1621 (Supp. 1977-78).

<sup>44</sup> MASS. ANN. LAWS ch. 208, § 6 (Michie/Law. Co-op Supp. 1977); S.C. CODE § 20-106 (1962).

<sup>45</sup> See text accompanying note 7, *supra*, for a statement of that rationale.

<sup>46</sup> For a discussion of the new divorce laws, see text accompanying notes 25 through 31, *supra*.

<sup>47</sup> KRS chaps. 21-34 (Supp. 1976).

<sup>48</sup> Fortune, *Venue of Civil Actions in Kentucky*, 60 Ky. L.J. 497, 500 (1971): "The

In order for the new court system to operate at maximum efficiency, the regulation of venue should have an "emphasis on simplicity and fairness to the litigants."<sup>49</sup> Confining the proper venue for divorce actions to the county of the wife's residence promotes neither simplicity, efficiency nor fairness.

Insofar as a venue statute should operate to promote simplicity and efficiency, the Kentucky statute has failed as it generates confusing interpretive problems in determining the county of the wife's residence. Since residence has been defined as actual residence rather than legal residence,<sup>50</sup> the wife's intent to establish a new residence is a significant factor.<sup>51</sup> This interpretation has in turn led to questions of what constitutes intent,<sup>52</sup> and what length of time serves to establish actual residence.<sup>53</sup> For example in *Martin v. Fuqua*,<sup>54</sup> the wife moved from one county to another. Two days later, both the husband and wife filed for divorce, the husband in the county where they had previously lived together and the wife in the county of her new residence.<sup>55</sup> Since the courts in both counties accepted the case, and indeed came to opposite conclusions, the case was appealed to the Kentucky Court of Appeals. The Court of Appeals ruled in favor of the wife, since the question of venue was reached first in her action, but the case illustrates the confusion generated when venue is determined on the basis of the wife's intent to establish an actual residence.

If the statute fails to promote efficiency and simplicity, neither does it promote fairness. Fairness is not served by a statute so inflexible that it allows no leeway for a case-by-case

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venue code was designed for practice in 1851, not 1951, and had not been particularly inspired in the beginning."

<sup>49</sup> *Id.* at 559.

<sup>50</sup> *Gross v. Ward*, 386 S.W.2d 456, 457 (Ky. 1965).

<sup>51</sup> *Brumfield v. Baxter*, 210 S.W.2d 972 (Ky. 1948). The court held that the facts presented ample proof that a woman who had lived in the county for five days intended to change her residence.

<sup>52</sup> *Steward v. Yager*, 272 S.W.2d 674 (Ky. 1954) (where wife removed only one-half or her personal belongings to another county, the court held she had not abandoned her old residence.)

<sup>53</sup> *Carter v. Carter*, 273 S.W.2d 823 (Ky. 1954) (one day was held sufficient).

<sup>54</sup> 539 S.W.2d 314 (Ky. 1976).

<sup>55</sup> The wife's intent to establish residence was based on minimal and conflicting facts. *Cf. Calhoun v. Peek*, 419 S.W.2d 152 (Ky. 1967) (court inferred wife's intent to establish new residence in Calloway County even though wife still worked in Trigg County and brought her children daily to Trigg County schools).

approach or the presence of special circumstances.<sup>56</sup> Moreover, it seems fairly clear that the statute operates to give the wife an advantage.<sup>57</sup>

Professor William Fortune has suggested a possible reform; it is his view that “[c]ases involving status [e.g., divorce suits] would be proper in the county of the defendant’s residence or in the county in which the status exists. This would have the effect of permitting a divorce action to be filed in the county of bona fide residence of either husband or wife.”<sup>58</sup> Professor Fortune further suggests that the legislature might fear that a revised statute would “prompt an unseemly race to the courthouse.”<sup>59</sup> However, if an unseemly race to the courthouse is the legislature’s primary reservation against adopting the usual venue approach, it is ironic because the current Kentucky approach encourages just such a race, although it is a race to define the county of the wife’s residence. *Burke v. Tartar*<sup>60</sup> provides an extreme example. In *Burke*, the wife left her husband early in the morning on June 23, 1961. She drove from her home in Pulaski County to Lexington, in Fayette County, where she rented an apartment. Later that day she filed for divorce in Fayette County. Meanwhile, the husband had filed his divorce action in Pulaski County at 9:30 a.m. The court held that since the husband’s suit was filed before the wife could establish an actual residence in Fayette County, the proper venue was Pulaski County. It seems that had the husband been slower or the wife quicker, the results would have been quite different.<sup>61</sup> This case is clearly extreme,

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<sup>56</sup> An extreme example would be where a couple lives in Paducah and the wife leaves the husband and moves to Ashland. In order either to initiate or answer a divorce suit, the husband would have to travel approximately 350 miles to appear in court. Professor Petrilli suggests that the courts may not apply the venue statute as rigidly as in the past if the wife is not economically dependent on the husband. Telephone conversation with Professor Petrilli (October 10, 1977).

<sup>57</sup> Although the advantages to the wife may not necessarily be substantial in terms of the outcome of the litigation, the wife’s access to the forum and to her attorney would undoubtedly create less of a hardship for her in the amount of time, energy, and money expended than it would for the husband forced to maintain the action away from his own residence.

<sup>58</sup> Fortune, *supra* note 48, at 561.

<sup>59</sup> *Id.*

<sup>60</sup> 350 S.W.2d 146 (Ky. 1961).

<sup>61</sup> *Cf. Martin v. Fuqua*, 539 S.W.2d 314 (Ky. 1976), where husband and wife filed suit on the same day, but wife, having moved to another county the day before, was

but the fact remains that the current statute does engender its own race to the courthouse.

### III. CONSTITUTIONAL PROBLEMS WITH THE VENUE STATUTE

In 1972, the House of Representatives of the General Assembly of Kentucky passed a proposal directing the Legislative Research Commission (LRC) to undertake a comprehensive study of Kentucky statutes with regard to sex discrimination.<sup>62</sup> The proposal was impelmented by the LRC and in 1974 the revisions were incorporated into the laws of the state.<sup>63</sup> Although the original proposal stated, "the General Assembly recognizes its responsibility to the *women* of Kentucky and reaffirms its committment to the principle of equality for all,"<sup>64</sup> the changes made by the LRC indicate that men as well as women were being discriminated against in certain areas of the law.<sup>65</sup> One example of this discrimination against men was a statute dealing with exemptions of inheritable interests. In the

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considered a resident of that county.

<sup>62</sup> 1972 Ky. Acts ch. 381.

A JOINT RESOLUTION directing the Legislative Research Commission to undertake a comprehensive study of Kentucky laws with regard to sex discrimination.

WHEREAS, the General Assembly, by numerous enactments of law, has affirmed its commitment to the equality and civil rights of all persons; and

WHEREAS, the public and its representatives are cognizant of the existence of discrimination on the basis of sex in many areas; and

WHEREAS, the existence of sex discrimination is often authorized or mandated by law, including laws of this Commonwealth; and

WHEREAS, the General Assembly recognizes its responsibility to the women of Kentucky and reaffirms its commitment to the principle of equality for all;

NOW THEREFORE,

Be it resolved by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the Legislative Research Commission shall undertake a comprehensive study of the Kentucky Revised Statutes to determine where equality is involved and where discrimination on the basis of sex is directly or indirectly authorized or mandated therein.

*Id.*

<sup>63</sup> 1974 Ky. Acts ch. 386.

<sup>64</sup> 1972 Ky. Acts ch. 381 (emphasis added). The proposal is reprinted in note 62, *supra*.

<sup>65</sup> As compared to the original proposal, the actual amendments, 1974 Ky. Acts. ch. 386, stated: "An Acr relating to equal rights for men and women."

old version, only the "wife" was given a tax exemption on \$10,000 of inherited property.<sup>66</sup> Today, the "surviving spouse" has a right to the exemption.<sup>67</sup>

Generally, the LRC made the modification by changing gender-oriented terms to status-oriented terms. Thus the word "wife" was changed to "spouse,"<sup>68</sup> and the designations "male" and "woman" were changed to "person."<sup>69</sup> By replacing the gender-based classifications with the broader terminology, the legislature has managed to minimize the discrimination inherent in the old statutes. Although it is clear that the Kentucky legislature is committed to formulating laws that treat all citizens equally,<sup>70</sup> the divorce venue statute has yet to be changed. Eliminating the preferential treatment accorded the wife under this statute seems crucial if the state is to avoid a charge of reverse discrimination.

"Reverse discrimination" in terms of racial equality has received a great deal of attention in recent years.<sup>71</sup> Although reverse discrimination in terms of sexual equality has never achieved a pitch of controversy akin to that of the *DeFunis* or *Bakke* cases,<sup>72</sup> the United States Supreme Court has formu-

<sup>66</sup> KRS § 140.080 (1971) (amended 1974), stated: "There shall be free from any tax under the preceding provisions of this chapter the following inheritable interests: (a) wife . . . \$10,000; . . ."

<sup>67</sup> KRS § 140.080 (Supp. 1976): "(a) Surviving spouse, \$20,000. . . ." Two of the more interesting changes which operate to put men on equal footing with women are contained in the statutes dealing with slander and specific tortious acts. Under a strict construction of the slander statute before the revision, only a female had a cause of action against someone who accused her of incest, fornication or adultery. Now, "any person" may institute such an action. KRS § 411.040 (Supp. 1976) (amended 1974). Further, while actions for seduction were heretofore characterized in terms of a female plaintiff, now the statute merely refers to the "victim" of the act. KRS § 411.030 (Supp. 1976) (amended 1974).

<sup>68</sup> KRS § 18.212 (Supp. 1976) (dealing with rights of a disabled veteran's spouse).

<sup>69</sup> KRS § 37.170 (Supp. 1976) (providing for an active militia); KRS § 91.470 (Supp. 1976) (on the procedure for collecting unpaid taxes); and KRS § 402.210 (Supp. 1976) (dealing with parental permission for minors to marry).

<sup>70</sup> See statement of the purpose of the change in note 62, *supra*. E.g., KRS § 95.440 (Supp. 1976) in which the qualifications for members of police and fire departments are set forth. The recent revision struck out "male" and replaced it with "person."

<sup>71</sup> See *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of California v. Bakke*, 46 U.S.L.W. 4896 (U.S. June 28, 1978) (No. 76-811). See also *NEWSWEEK*, July 10, 1978.

<sup>72</sup> For a discussion of recent reverse discrimination cases in the area of sex, see Erickson, Kahn, Ballard, and Wiesenfeld: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 *BROOKLYN L. REV.* 1 (1975) [hereinafter cited as *Erick-*

lated guidelines for determining when a particular law discriminates against a person on the basis of sex so as to violate the Equal Protection Clause.<sup>73</sup> In constructing the tests to be applied when the constitutionality of a statute is challenged as a denial of equal protection, the Supreme Court in *McDonald v. Board of Election Commissioners*<sup>74</sup> stated that:

The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.<sup>75</sup>

This statement of the law has come to be known as the traditional test.<sup>76</sup>

In *Reed v. Reed*,<sup>77</sup> following *McDonald*, the Court broadened the compelling state interest test by holding that "[a] classification must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>78</sup>

It seems unlikely that the venue statute would withstand analysis under the traditional, or "rational relationship" test

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son]. See also *Stanley v. Illinois*, 405 U.S. 645 (1972) (unwed father's right to child after mother's death: Supreme Court held Illinois statute barring fitness hearing violated father's rights); *Friedrich v. Katz*, 341 N.Y.S.2d 932 (Sup. Ct. 1973) (New York law requiring signature of parents on marriage license of man less than 21 years old and of woman less than 18 years old was not violative of male plaintiff's constitutional rights).

<sup>73</sup> U.S. CONST. amend. XIV reads in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>74</sup> 394 U.S. 802 (1969). Inmates of Cook County jail were denied absentee ballots for a primary election by an Illinois statute. The Supreme Court held the statute was constitutional.

<sup>75</sup> *Id.* at 809.

<sup>76</sup> *Johnston v. Hodges*, 372 F. Supp. 1015 (E.D. Ky. 1974).

<sup>77</sup> 404 U.S. 71 (1971).

<sup>78</sup> *Id.* at 76, quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *Reed* condemned an Idaho statute denying letters of estate administration to a woman where there was a qualified man for the position.

as formulated by the Supreme Court in *McDonald* and expanded by *Reed*. In order for the wife in a divorce action to be treated more favorably, or differently, than the husband, the state would have to demonstrate that there is a valid justification for so doing, *i.e.*, that the state has a legitimate purpose for requiring that divorce suits be initiated in the county of the wife's residence.

The enactment of the Uniform Dissolution of Marriage Act is the clearest indication that the Kentucky legislature intended to equalize the status of both parties in a divorce action. The old presumptions that the husband was financially superior to the wife, that the wife provided a more stable environment for the raising of children, or that the wife's proprietary interests needed greater protection have all been legislatively negated by the act.

Why, then, should the wife, who may not even be initiating the divorce, be given the benefit of having the suit brought where it is most convenient for her? It would appear that the legislature's answer to such a question would not satisfy the criteria proposed by the Supreme Court under the traditional test.

Although in 1973, a majority of the court declined to include sex in the category of suspect classifications requiring strict scrutiny,<sup>79</sup> lower federal courts in Kentucky have seemingly grasped at language in the opinion<sup>80</sup> to require strict scru-

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<sup>79</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973). The *Frontiero* judgment, reversing the lower court, was a majority decision. However, only three of the justices, Mr. Justice White, Mr. Justice Douglas and Mr. Justice Marshall concurred with Mr. Justice Brennan's opinion that sex is a suspect classification. Mr. Justice Stewart, concurring in the judgment, based his opinion strictly on discrimination grounds.

Mr. Justice Powell's opinion, with whom the Chief Justice and Mr. Justice Blackmun concurred, stated:

It is unnecessary for the Court in this case to characterize sex as a suspect classification with all of the far-reaching implications of such a holding. *Reed v. Reed*, 404 U.S. 71 (1971), which . . . supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect.

*Frontiero v. Richardson*, 411 U.S. 677, 691-97 (1973).

The Supreme Court has not deemed it necessary to expand its position in subsequent sex discrimination cases.

For a critical view of the Court's failure to hold sex a suspect classification see Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. Rev. 235 (1975).

<sup>80</sup> For example, in *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973), it was stated:

tiny for statutes based upon sexual classifications.<sup>81</sup> In *Robinson v. Board of Regents of Eastern Kentucky University*,<sup>82</sup> the court applied the compelling state interest test and found that regulations imposing dormitory curfews and other restrictions on female students but not on male students were proper because the safety of the female students was a legitimate concern of the University.<sup>83</sup> In contrast, the Court in *Johnston v. Hodges*<sup>84</sup> held that no compelling state interest was furthered by a statute which required the father's signature on a minor child's drivers license application. The statute was thus voided as a violation of the Equal Protection Clause.<sup>85</sup>

Because the compelling state interest test is more exacting than the traditional test, it is very doubtful that the divorce venue statute could withstand a constitutional challenge under this test, should it be applied. While it is clear that the statute once served an important state purpose—protection of women from a financial hardship they were not prepared to bear—this state interest is no longer valid in view of the changed economic status of women today. As one court pointed out, "Forty percent of the American work force is female. Over 57% of all American women between the ages of 20 and 24, and 45% of those between 25 and 34, are in the wage earning work force."<sup>86</sup>

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And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to the ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

The case dealt with a woman in the armed forces who claimed her husband as a dependent. The Supreme Court struck down the law, prohibiting this action as a violation of the plaintiff's equal protection rights.

<sup>81</sup> In *Robinson v. Board of Regents*, 475 F.2d 707, 710 (6th Cir. 1973), the court said: "The test, which becomes applicable when a fundamental right of the aggrieved party is at issue or a suspect classification . . . is used, requires that to justify the classification, the state must demonstrate a compelling state interest."

See also *Johnston v. Hodges*, 372 F. Supp. 1015 (E.D. Ky. 1974). In the *Johnston* decision, however, the court acknowledged that the judicial attitude towards the "compelling state interest" test has not been entirely uniform. *Id.* at 1018 nn. 11, 12, & 13.

<sup>82</sup> 475 F.2d 707 (6th Cir. 1973).

<sup>83</sup> *Id.* at 710.

<sup>84</sup> 372 F. Supp. 1015 (E.D. Ky. 1974).

<sup>85</sup> *Id.* at 1020.

<sup>86</sup> *Healy v. Edwards*, 363 F. Supp. 1110, 1114 (E.D. La. 1973), quoted in *Johnston*



Therefore it is clearly arguable that the state's interest—the assumption that women as a class are incapable of assuming a greater financial responsibility—is no longer valid today.<sup>87</sup> Neither does it seem likely that the divorce venue statute may be defended on the basis of administrative convenience. In *Johnston*, the state argued that administrative hardships would result if either parent were allowed to give consent for their child's drivers license. The Court categorically rejected that argument, quoting the United States Supreme Court:

[O]ur prior decisions make clear that although efficacious administration of government programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency . . ." And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality.<sup>88</sup>

Further, it is unclear whether the current venue statute actually does promote administrative convenience. As the cases demonstrate, there is often confusion and delay as the county of the wife's actual residence is determined.<sup>89</sup>

Venue statutes have been infrequently challenged under the Equal Protection Clause,<sup>90</sup> but a general rule as to their validity has been formulated:

Classifications for purposes of venue may be based upon the nature of the litigants as corporations or natural persons, or

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v. Hodges, 372 F. Supp. 1015, 1019 (E.D. Ky. 1974).

<sup>87</sup> And if women are no longer financially dependent, they should no longer be accorded preferential treatment. "There is no constitutional right for any [sex] to be preferred. The years of [living under common law disabilities] did more than retard the progress of [women]. Even a greater wrong was done to [men] by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior [sex]. There is no superior person by constitutional standards." Erickson, *supra* note 72, at 17 n.82.

<sup>88</sup> *Johnston v. Hodges*, 372 F. Supp. 1015, 1019-20 (E.D. Ky. 1974), (*quoting* *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

<sup>89</sup> See discussion of this factor in text accompanying notes 50 through 55, *supra*.

<sup>90</sup> Professor Petrilli suggests that the reason the venue statute has never been seriously challenged is because Kentucky is not a large state and the inconvenience to the husband is minimal. Telephone conversation with Professor Petrilli (Oct. 10, 1977). *But see* hypothetical posed by the author in note 56 *supra*. See also *McClung v. Pulitzer Publishing Co.*, 214 S.W. 193 (Mo. 1919), where a venue statute which discriminated against a corporation was held invalid.

upon the basis of the non-residence of a party, or upon the type of action involved: the test is whether there is any reasonable and adequate basis for the classification made. One which is arbitrary and burdensome may violate guarantees of the Fourteenth Amendment.<sup>91</sup>

### CONCLUSION

The Kentucky statute which limits venue in divorce actions to the county of the wife's residence is arbitrary and burdensome. It no longer serves the function for which it was designed; it is contrary to the general principles of venue used by the other states; and it arguably violates the Fourteenth Amendment by denying the husband the equal protection of the laws. For these reasons the statute should be reformed to equalize the status of the parties in a divorce suit. The most equitable solution would be to allow a divorce action to be initiated in the county where either the plaintiff or the defendant resides.

*Richard D. Simms*

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<sup>91</sup> 77 AM. JUR. 2d *Venue* § 3 (1975).