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# Ten Years of Kentucky Domestic Relations Law, 1955-1965

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*Editor's Note—This article is a follow up of an article which appeared ten years ago in volume forty-four of the Kentucky Law Journal. In that article a survey was made of five years of domestic relations law in Kentucky. This present article covers a more extensive period of a decade and is more comprehensive. It attempts to analyze the present state of the law, discern the trends, and evaluate the law in light of current sociological concepts.*

The fall, 1955, issue of this *Journal,* devoted to recent developments in Kentucky law, includes a survey of significant Court of Appeals decisions in domestic relations matters during the five year period 1950-1955. This article is designed to continue that survey, noting both significant court decisions and legislative changes from 1955 to 1965. Though several hundred appellate judicial opinions and numerous new statutes are acknowledged, no attempt is made to be exhaustive. Rather it is sought to discuss significant statutes and cases in context with the hope that the attorney in Kentucky may view the trends and developments as a whole. It is also intended to exclude from coverage certain developments related to family law but more often thought to fall under the headings of criminal law, torts and contracts. For example, developments in areas such as sex crimes, emancipation, liabilities and immunities of parents and children in tort or contract are not discussed. Also beyond the function of this type article is a thorough discussion and comprehensive interdisciplinary treatment of family law reform proposals. If, however, the foregoing description of the decade's legal developments should evoke an awareness of any deficiencies in present law, so much the better.

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## MARRIAGE

*New Age Statute*—By far the most interesting development in the field of marriage during the past decade came about by the enactment of a new statute by the 1964 General Assembly lowering the age at which infants reach majority from twenty-one to eighteen years "for all purposes in this Commonwealth except for the purchase of alcoholic beverages and . . . treatment of handicapped children."[1] For the latter two purposes the age of majority remains the same (twenty-one). The broad ramifications and uncertainties created by this statute are currently being noted for another issue of the *Law Journal,* so our only concern here is the interpretation of this statute vis-a-vis marriage made by the Court of Appeals in *Commonwealth v. Hallahan.*[2] Before the court was the question of the effect of the new statute upon the statutory prohibition of the issuance by the county clerk of a marriage license without parental consent where one of the parties seeking to get married is under twenty-one.[3] It was held that the new statute did not repeal the requirement of parental consent under such circumstances. The new statute was interpreted so that only statutes which fail to designate age in terms of a precise number of years will be changed. Presumably the new statute would be effective to lower the age to eighteen whenever the statute in question refers to the age of majority or infancy without a specific age. The court mentioned several instances of ambiguity in the statute and reached the following conclusion:

> It is readily apparent that there is a broad and fertile area of future litigation arising out of the vague and sweeping terminology of this statutory effort to simplify something that is not simple. It moves us to suggest that it would be very desirable for the legislature to clarify or eliminate KRS 2.015 at the earliest opportunity.[4]

*Validity and Presumptions*—During the years 1955 to 1965 no significant judicial developments have been made in accepted legal doctrine relating to such matters as validity of the marriage and the interrelationship of the myriad presumptions and inferences of courts used in this area. As to the validity of marriages,

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[1] Ky. Rev. Stat. 2.015 [hereinafter cited as KRS].
[2] Commonwealth v. Hallahan, 391 S.W.2d 378 (Ky. 1965).
[3] KRS 402.210.
[4] Commonwealth v. Hallahan, 391 S.W.2d 378, 380 (Ky. 1965).

one case followed the established Kentucky judicial principle that a marriage was not invalidated merely because the marrying official had no valid license to perform the ceremony where the fact was not known to the parties who got married.[5] This view of the Kentucky courts is quite generally held. It is also to be compared with the similar holding that a solemnized marriage is valid although the parties to the marriage fail to procure the statutory license.[6]

The court has recently commented upon the presumptions of marriage,[7] but this comment was merely a restatement of the presumptions which had been developed previously. There is a strong presumption of a marriage from reputation alone,[8] and a marriage may be proved by parole evidence.[9]

*Estoppel*—Another interesting trend which is discernible is estoppel to deny a marriage. In *Sears v. Sears*,[10] where a second wife had sued for separate maintenance, the court held that the husband was estopped to deny the validity of their marriage despite the fact that the second wife knew at the time that the husband's "mail-order" divorce from the first wife was probably invalid. A reason for such a trend may be the unfavorable position that common law marriages now hold.

## DIVORCE

*Jurisdiction*—Jurisdiction of the divorcing court continues to be a lively subject of litigation. Jurisdiction generally refers to the power of the court to render its judgment, without which the judgment is void and subject to collateral attack. In Kentucky the statute requires that the plaintiff in a divorce action shall have been a resident within the state for one year next preceding the commencement of the action.[11] This requirement goes to the very existence of the jurisdiction of the court.[12] In Kentucky, and

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[5] Arthurs v. Johnson, 280 S.W.2d 504 (Ky. 1955).

[6] Haderski v. Haderski, 415 Ill. 118, 112 N.E.2d 714 (1953).

[7] See, Munsey v. Munsey, 303 S.W.2d 257 (Ky. 1957), sustaining the validity of an order setting aside a divorce decree, which order had not been entered on the judgment docket, for purposes of determining the property rights of a surviving spouse under the marriage.

[8] Vest's Adm'r v. Vest, 234 Ky. 587, 28 S.W.2d 782 (1930).

[9] Carroll v. Carroll, 251 S.W.2d 989 (Ky. 1952).

[10] 293 F.2d 884 (1961).

[11] KRS 403.035(1).

[12] Lampkin v. Lampkin, 258 S.W.2d 720 (Ky. 1952); Williams v. North Carolina I, 317 U.S. 287 (1942).

generally, the statutory residence requirement is considered to mean domocile. There must be not only the actual fixing of one's abode but also the present intention of making the state one's home either permanently or for an indefinite length of time.[13]

Several states, including Kentucky by act of the 1952 General Assembly,[14] now provide that residence at a United States military reservation within the state for the required statutory time prior to the bringing of an action for divorce shall satisfy the residence requirement and that the action may be brought in any county adjacent to the military reservation.[15] Since the serviceman plaintiff might be permanently domiciled in another state the statutory provision is tantamount to a lowering of the traditional requirement of domicile for jurisdiction to one of mere residence.

Usually the means of challenging a court's jurisdiction is by an original writ of prohibition sought from the Court of Appeals prohibiting the lower court from acting if lack of jurisdiction is determined. It is clear that this extraordinary remedy will be withheld unless the trial court is plainly without jurisdiction.[16] Thus, the Court of Appeals denied prohibition where the objection was to the lower court's venue between counties, as distinguished from the state's territorial jurisdiction based upon residence.[17]

*Collateral Attack upon Jurisdiction*—Lack of jurisdiction by the divorcing court may also be brought up in a later lawsuit attacking validity of the divorce collaterally and indirectly. For example, the original divorce decree may be challenged incidental to determination of property rights which turn upon whether or not the marriage still exists or was effectively dissolved. The voidness of a purported divorce decree for want of jurisdiction may be thus determined for the first time in a collateral pro-

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[13] St. John v. St. John, 291 Ky. 363, 163 S.W.2d 820 (Ky. 1942).

[14] Ky. Acts 1952, ch. 84, § 1.

[15] KRS 403.035(1).

[16] Such writs of prohibition were considered in several situations recently by the Court of Appeals: Moreland v. Helm, 350 S.W.2d 149 (Ky. 1961) (remedy of prohibition not proper when validity of marriage is questioned); Roberts v. Osborne, 339 S.W.2d 442 (Ky. 1960) (remedy of prohibition proper to stay contempt and divorce proceedings after lower court signed order dismissing the suit); Rowley v. Lampe, 331 S.W.2d 887 (Ky. 1960) (remedy of prohibition denied when grounds alleged took place outside the state before residency was begun in Kentucky but after the residency requirement of time was begun in Kentucky but after the residency requirement of time was fulfilled).

[17] Burke v. Tartar, 350 S.W.2d 146 (Ky. 1962). *But see,* Gross v. Ward, 386 S.W.2d 456 (Ky. 1965).

ceeding, in addition to the direct attack by appeal or occasionally by a petition to the lower court itself to vacate the judgment when lack of jurisdiction is discovered.

Although no recent cases (since publication of the 1955 article) have arisen in Kentucky, a case of widespread interest arose in Alabama.[18] The court which had granted the divorce six years before vacated its judgment upon discovery, from the parties' own testimony (they being again before the court upon a question of property and alimony under the decree), that the divorce had been granted upon a fraudulent representation to the court that plaintiff had resided for one year within the state, a jurisdictional requirement. The case adds uncertainty to the validity of the Alabama "quickie," both there and elsewhere. To be compared with the Alabama case is a previous Kentucky case which recognized the power of a lower court to vacate its own divorce decree but pointed out that this power should be limited to clear lack of jurisdiction.[19]

Lack of jurisdiction of the divorcing court can be raised not only where the divorce was granted but also in another state in which recognition of the divorce decree is sought.

An interesting Kentucky case[20] recently held that a Georgia divorce decree is not entitled to full faith and credit where the defendant was fraudulently decoyed into the state of Georgia for the purpose of service of process. The collateral attack in Kentucky must be treated as if it had been made in the original jurisdiction. Although there was no Georgia case in point, the Kentucky Court of Appeals thought that it was reasonable to assume that a Georgia court of equity would not allow a fraud to be perpetrated upon it by means of fraudulent enticement into the state in order that service might be had.

Most lawyers are familiar with the basic pattern which the Supreme Court has fixed in interpreting the full faith and credit

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[18] Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961), 47 Cornell L.Q. 459-69 (1962), 46 Minn. L. Rev. 982-90 (1962).

[19] Kenmont Coal Co. v. Fisher, 259 S.W.2d 480 (Ky. 1953)—"without clear and convincing proof of utter lack of jurisdiction." This is true except in cases of statutory annulment of divorce decrees upon application of both parties. Whether or not collusion by both parties to the action undiscovered by the court at the time constitutes utter lack of jurisdiction has not been answered by the Kentucky Court of Appeals.

[20] Hanshew v. Mullins, 385 S.W.2d 186 (Ky. 1964).

clause as applied to extra-state divorce decrees. Since the *Williams* cases[21] it is settled that if the complainant was domiciled within the granting state, the divorce is valid and sister states must give full faith and credit to the divorce decree even though the judgment was taken by default against the non-domiciliary spouse constructively served, subject to the right to later challenge the bona fide domicile within the granting state of the procuring spouse. However, if both parties appear in the granting court and there is an affirmative finding that jurisdictional domicile existed, such a finding is res judicata. Consequently, the judgment is not subject thereafter to collateral attack and must be accorded full faith and credit everywhere.[22]

*Venue*—Not to be confused with jurisdiction is the matter of venue for divorce actions. The Kentucky statute requires that the action for divorce or alimony be brought in the county where the wife usually resides or the county of the husband's residence if the wife has no actual residence in the state.[23] Choice of the wrong county under this statute is properly a matter of incorrect venue rther than lack of jurisdiction, provided plaintiff resided in the state for one year to satisfy the jurisdiction requirement, although occasionally a court may loosely refer to the question as one of jurisdiction.[24]

There are important differences between questions under the venue statute and the one year residence requirement. When it is merely a matter of the correct county in which to sue, a writ of prohibition may be more sparingly exercised.[25] Furthermore, wrong venue between counties under the statute may be waived by allowing the case to proceed to trial; whereas, failure of the Kentucky court to acquire jurisdiction because of insufficient

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[21] Williams v. North Carolina II, 325 U.S. 226 (1945); Williams v. North Carolina I, 317 U.S. 287 (1942).

[22] Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948).

[23] KRS 452.470.

[24] Whitaker v. Bradley, 349 S.W.2d 831 (Ky. 1961).

[25] Burke v. Tartar, 350 S.W.2d 146 (Ky. 1962). For a case allowing a writ of prohibition see, Gross v. Ward, 386 S.W.2d 456 (Ky. 1965). There the husband attended the University of Kentucky, and the wife had been residing in Fayette County for three years. They had spent one summer in Perry County. After the wife had gone to Missouri, the husband instituted a divorce action in Perry County. The Court of Appeals of Kentucky issued a writ of prohibition against the circuit judge of Perry County on the theory there was no proof that when the wife left for Missouri she intended to change her residence.

residence in the state for one year could not thus be waived.[26] An interesting question which is yet to be answered is whether the residence required for proper venue is satisfied when a spouse moves from one county to another within the state.[27]

*Grounds*—No important changes in the statutory grounds for an absolute divorce in Kentucky have come from the proposal by the Legislature in 1954 for a thorough study of the divorce laws.

*Fault*—By the 1956 amendment the words "if she is not in like fault" were deleted as a prerequisite to the wife's cause for divorce for the husband's cruelty to her,[28] a change which had already been made in favor of the husband's cause for divorce against the wife on similar grounds in 1950.[29] The Court of Appeals recently commented upon the elimination of the "without like fault" language in favor of the wife. The court stated that her fault did not bar her cause where the evidence was sufficient to prove his cruelty to her.[30] Similarly, the courts continue to note the statutory elimination of fault as a bar to the husband's cause based upon his wife's cruelty.[31]

*Cruelty*—In Kentucky, cruelty continues to be the most popular ground, taking the statutory form of "habitually behaving toward her (or him), for not less than six months in such a cruel and inhuman manner as to indicate a settled aversion to her (him) or to destroy permanently her (his) peace or happiness."[32] This is

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[26] Jones v. Jones, 350 S.W.2d 124 (Ky. 1959).

[27] In Burke v. Tartar, 350 S.W.2d 146 (Ky. 1962), the wife left Somerset in Pulaski County prior to 9:00 a.m. with her children and belongings, drove directly to Fayette County, about seventy miles from Somerset, and rented an apartment in Lexington. There later that day she filed suit for divorce. However at 9:30 a.m. the same day the husband filed suit for divorce in Pulaski County. The court denied her an order of prohibition, as she had made no showing she was a resident of Fayette County at 9:30 a.m. that day. The court refused to follow the rule that the law takes no account of fractions of a day because, as all fictions, it is used only when it will promote right and justice. In Sebastian v. Turner, 320 S.W.2d 794 (Ky. 1959), the wife left Fayette County and went to Wolfe County with the intention of remaining and living there indefinitely. She left her children and a substantial amount of her belongings in Fayette County. She filed suit for divorce in Wolfe County but left shortly thereafter. The court entered a permanent order of prohibition precluding her from bringing the action in Wolfe County holding that she had not completely abandoned her home in Fayette County and had not established a new residence in good faith in Wolfe County.

[28] Ky. Acts 1956, ch. 72, at 113. KRS 403.020(3)(b)-(c).

[29] Ky. Acts 1950, ch. 162, at 640. KRS 403.020(4)(d)-(e).

[30] Pedigo v. Pedigo, 324 S.W.2d 820 (Ky. 1959); Minnis v. Minnis, 312 S.W.2d 903 (Ky. 1958).

[31] Lewis v. Lewis, 354 S.W.2d 287 (Ky. 1962).

[32] KRS 403.020(3) (b), (4) (d).

understandable since the cruelty allegation ordinarily involves less moral turpitude and is more readily susceptible of proof than most other grounds. This is also true in other states permitting divorce for cruelty in the broad sense, whether the statutory form is cast in terms of "extreme cruelty", "cruel and inhuman treatment" or the milder "indignities" of "incompatibility."[33] The recent improvement in machinery for gathering of statistical information on marriage and divorce provided by the 1958 legislation should make possible a more accurate tabulation of the number of divorces granted and denied as well as the grounds asserted,[34] but it is safe to say that cruelty is a ground for a majority of Kentucky divorces, and that the divorce is granted far more often than denied. Hence, there continue to be quite a few cases[35] holding that the divorce was correctly granted by the lower court for the purpose of determining which party is the more deserving with regard to the alimony and property determination. Of course, the appellate court is denied the power to do other than affirm the granting of a divorce by the lower court.[36]

Further, when the record warrants the Court of Appeals will reverse the lower court's denial of a divorce and direct that it be granted on the evidence.[37] Denial of a divorce by the lower court for want of evidence has been sustained in several cases.[38] One case upheld the discretion of the trial judge in refusing to grant a divorce in the face of an argument by the appellant husband that a letter written by the wife to the judge saying that she did not want a divorce created a prejudice with the judge. The appeals court noted that the judge had rebuked the wife for writing the letter and stated that he was denying the divorce in spite of the letter and not because of it. Furthermore, the judge was apprised by the wife's deposition that she did not want a divorce.[39]

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[33] Pa. Stat. Ann. tit. 25, § 10; Ann. Mo. Stat. 452.010.

[34] Ky. Acts 1958, ch. 34, at 110. KRS 213.320.

[35] Conlan v. Conlan, 293 S.W.2d 710 (Ky. 1956); Hundley v. Hundley, 291 S.W.2d 544 (Ky. 1956); Shephard v. Shephard, 295 S.W.2d 557 (1956).

[36] KRS 21.060.

[37] West v. West, 309 S.W.2d 341 (Ky. 1958); Minnis v. Minnis, 312 S.W.2d 903 (Ky. 1958).

[38] Gartin v. Gartin, 384 S.W.2d 298 (Ky. 1964); Krampe v. Krampe, 339 S.W.2d 446 (Ky. 1960); Walker v. Walker, 324 S.W.2d 804 (Ky. 1959); Dixon v. Dixon, 306 S.W.2d 879 (Ky. 1957); Witt v. Witt, 307 S.W.2d 1 (Ky. 1957).

[39] Gartin v. Gartin, *supra* note 38.

The varied forms which cruelty may take is illustrated by the recent case of *Krampe v. Krampe*,[40] where the wife charged that the husband behaved "in such a cruel and inhuman manner as to indicate a settled aversion to her" by wanting to engage in sexual intercourse to the extent of harming her health on account of her allergy. In affirming denial of her petition the Court of Appeals stated: "We have concluded that, if her peace and happiness have been destroyed, it has resulted from her state of mind. We are unable to say from the record that her husband's conduct contributed to that state of mind."[41]

This case is in line with previous decisions from Kentucky and other jurisdictions holding that *unreasonable* insistence on intercourse may constitute cruelty.[42]

A spouse's association with members of the opposite sex falling short of adultery may sometimes nevertheless constitute cruelty. The Court of Appeals reaffirmed this principle where such association took the form of courtship with a "slobbering love letter" in evidence.[43]

*Adultery*—For the statutory ground of adultery we find again that the statutory language is unchanged. The old discrimination in favor of the husband still remains. While a divorce may be granted to the husband for the wife's adultery or such lewd and lascivious conduct "as proves her to be unchaste, without actual proof of an act of adultery,"[44] the wife's only cause for similar grounds must be found in the provision allowing a divorce to the party not in fault for his living in adultery.[45] This time honored differentiation seems to have no justification in current opinion. As previously noted, however, discrimination as to grounds against the wife has been in part softened by judicial interpretation.[46] For example, there are holdings to the effect that the lewd and lascivious conduct the statute refers to must be of such character as to prove her unchaste and not merely to create

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[40] *Ibid.*

[41] *Id.* at 447.

[42] Obennoskey v. Obennoskey, 215 Ark. 358, 220 S.W.2d 610 (1949); Hockman v. Hockman, 184 Md. 473, 41 A.2d 510 (1945); On what constitutes unreasonableness, see Mudd v. Mudd, 206 La. 1055, 20 So. 2d 311 (1944).

[43] Taylor v. Taylor, 331 S.W.2d 895 (Ky. 1960).

[44] KRS 403.020(4)(c).

[45] KRS 403.020(2)(b).

[46] See Whiteside, *Domestic Relations—Recent Kentucky Developments* 1950-1955, 44 Ky. L.J. 60, 66 (1955).

a suspicion.[47] Changing attitudes toward social behavior have also been pointed to by courts to show that the wife's mere opportunity to commit adultery from her dating a man were insufficient.[48] To fall within the statutory act the husband need not live with another woman as long as might seem to be necessary from a casual reading of the statutes.[49] Further, even if the husband's conduct is insufficient to constitute adultery it may nevertheless amount to cruelty under certain circumstances.[50]

No trends are discernible in the few recent cases which reached the highest state court. As one would expect, the Court of Appeals refrains from repeating unnecessarily an elaborate review of the evidence in these cases. One case held that the chancellor correctly granted the husband a divorce with custody of the three children based upon the wife's lewd and lascivious conduct where the statutory requirement of proof by credible witnesses had been met.[51]

Although Kentucky's statute expressly states that the offense of adultery is condoned by subsequent marital relations,[52] this condonation, as is the case with other offenses, should be conditional upon the offending spouse thereafter treating the condoning spouse with conjugal kindness and refraining from repetition of the offense.[53]

*Abandonment*—Several cases involved divorces on the statutory ground of abandonment for one year's duration. Two cases of the wife's abandonment of her husband involve also the choice of domicile by the traditional breadwinner sex. In *Dixon v. Dixon*[54] the Court of Appeals, while admitting that the lower court was not clearly erroneous in denying relief to either spouse upon weak evidence of cruelty, reversed the denial and held that the husband should have been granted a divorce upon the basis of the wife's abandonment. The evidence showed that the wife was very hard to please as to her abode and finally left a new house that husband had bought especially for her and stayed away the full

[47] Blackburn v. Blackburn, 294 Ky. 312, 171 S.W.2d 457 (1943).
[48] Fister v. Fister, 131 So. 2d 103 (La. App. 1961). *Cf.* Brumley v. Brumley, 247 S.W.2d 987 (Ky. 1952).
[49] Combs v. Combs, 294 Ky. 414, 171 S.W.2d 1001 (1943).
[50] Bobbitt v. Bobbitt, 297 Ky. 288, 178 S.W.2d 977 (1944).
[51] McQueen v. McQueen, 294 S.W.2d 75 (Ky. 1956).
[52] KRS 403.030.
[53] Tootle v. Tootle, 329 S.W.2d 218 (Mo. 1959).
[54] 306 S.W.2d 879 (Ky. 1957).

one year period. And in another case the court directed that a bed and board divorce be set aside and an absolute divorce be granted to the husband because of the wife's refusal and failure to live at the domicile chosen by the husband for more than one year.[55] The technical requirement that the abandonment be without consent of the abandoned spouse was held to have been satisfied despite the fact that the husband had sent his wife money during the period of her separation from him. Under the circumstances his sending money was merely recognition of his obligation to support her and not consent such as to bar him from setting up her abandonment. Another interesting case is a ruling by an Arkansas court in regard to the effect which the Arkansas court gave to a determination by the sister state of Mississippi. The Arkansas court held that a previous award of separate maintenance money to a wife by the Mississippi court, which was not appealed, was res judicata and that there had been no abandonment by the wife because Mississippi did not give maintenance to a deserting wife. Therefore, the absence of abandonment was necessarily determined by the Mississippi court.[56]

*Insanity*—Another ground for divorce in Kentucky, added to the statutes in 1946, is based upon insanity.[57] The court had occasion to interpret the requirement of confinement in an asylum for mental illness for "not less than five consecutive" years prior to filing the petition (for other than insanity shown by medical testimony to be incurable). Interruption of the confinement for a period of a year outside the mental institution broke the continuity and prevented a divorce on that ground.[58] Prior to the enactment of the statute making incurable insanity *or* confinement for five years in a mental institution a separate ground for divorce, the Kentucky courts held that the five year period required to allow a divorce for living apart could not include any such time spent in an institution.[59] While this is still true under the five year separation, the new statute making commitment to an institution a separate ground is an improvement over previous law because it provides the same relief

[55] Dunning v. Dunning, 325 S.W.2d 315 (Ky. 1959).
[56] Lambert v. Lambert, 316 S.W.2d 822 (Ark. 1958).
[57] KRS 403.020(5).
[58] Witherspoon v. Witherspoon, 289 S.W.2d 502 (Ky. 1955).
[59] Begley v. Jones, 246 Ky. 135, 54 S.W.2d 639 (1933); Messick v. Messick, 177 Ky. 337, 197 S.W. 792 (1917); Pile v. Pile, 94 Ky. 308, 22 S.W. 215 (1893).

whether the living apart is because of committal or simply because the spouses have remained apart by voluntary action. The statutes taken together, however, still leave much to be desired since temporary insanity before running of the five year separation period would break the continuity required by the statutory ground of living apart for five consecutive years unless the insanity is incurable.

*Drunkenness*—With respect to habitual drunkenness as a ground for divorce, it should be noted that the legislature has chosen to continue the requirement that the petitioning spouse be without like fault whether the petition is brought by the husband or the wife,[60] thus continuing Kentucky law comparable at least in result with the decisional law in some jurisdictions that leading the offending spouse to drink sometimes constitutes connivance.[61] Here, however, the impartiality between spouses stops when it comes to drunkenness. For when the husband is the offender there must be not only habitual drunkenness for the required one year's duration (sufficient as a ground against the wife), but there must also be such continuance *"accompanied* by a wasting of the husband's estate and without any suitable provision for the maintenance of the wife or children."[62] [Emphasis Added]

*Out-of-State Grounds*—In addition to the foregoing problems which have arisen under the major grounds for divorce—cruelty, adultery, desertion under the one year's abandonment provision, and separation for five consecutive years—a few interesting developments have occurred under the more uncommon grounds provided for in Kentucky's statute.

One such uncommon ground, it may be recalled, is found in the provision specifying the locale for the acts constituting the cause for divorce. It provides that acts occurring out of state, if made a ground for divorce by the laws of the other state as well as under the Kentucky divorce statute,[63] constitute valid grounds though the action took place in the other state and might have been insufficient as grounds if committed locally. To illustrate, the Kentucky court with jurisdiction over divorce may be called

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[60] KRS 403.020(3) (a), (4) (b).
[61] Muir v. Muir, 86 A.2d 857 (Del. 1952); Rosengren v. Rosengren, 115 N.J. Eq. 283, 170 Atl. 660 (1934).
[62] KRS 403.020(3)(a).
[63] KRS 403.035(2).

upon to adjudicate the sufficiency of other grounds for divorce such as "indignities" or "incompatibility" when those grounds are recognized in the state where the parties are when the acts or events take place. In a fascinating case the Court of Appeals was recently called upon to interpret ambiguous language in this provision. The court made clear that the legislature did not intend by its language to require that plaintiff have been a Kentucky resident at the time of the conduct alleged to constitute grounds, for such an interpretation would have made the statute meaningless as to the conduct occurring in the other state. The only residence required by Kentucky of the plaintiff is the jurisdictional requirement of his residence for one year preceding the bringing of the action. Hence the court had jurisdiction, the plaintiff-wife having resided within Kentucky for one year prior to the action. The Court of appeals refused its writ of prohibition based upon asserted lack of jurisdiction based merely upon plaintiff's nonresidence at the time the out-of-state acts of defendant were committed.[64]

*Defenses*—Whatever the virility of current moves for thorough reform of divorce legislation, the legislature has continued the requirement of definite grounds, and the courts have at least formally carried out the legislative will by insisting upon proof by complainant of the existence of one of the prescribed grounds. Nor has the court changed its approach as to the defensive matter which the defendant in a divorce action can plead in answer to the cause for divorce.

*Condonation*—On condonation of cruelty the court continues its view that only in the rarest of circumstances does a spouse condone the continuing offense of cruelty by subsequent marital relations.[65] To hold otherwise would discourage efforts at reconciliation. For desertion under the one year abandonment statute the husband's recognition of his support obligation by sending the wife money during the period of separation is not a condonation of her abandonment.[66]

*Connivance and Collusion*—There have been no recent cases

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[64] Rowley v. Lampe, 331 S.W.2d 887 (Ky. 1960).

[65] Cox v. Cox, 343 S.W.2d 395 (Ky. 1961). *Cf* York v. York, 280 S.W.2d 553 (Ky. 1955), 44 Ky. L.J. 241 (1956); Stephens v. Stephens, 280 S.W.2d 557 (Ky. 1955).

[66] Dunning v. Dunning, 325 S.W.2d 315 (Ky. 1959).

involving an assertion that plaintiff's connivance designed to facilitate defendant's commission of the offense should bar plaintiff's action. Neither have there been any recent cases involving collusion.

*Recrimination*—Despite much recent opinion that recrimination as a defense is or should be on the way out,[67] the court repeatedly recognizes the possibility that recriminatory conduct by the plaintiff committed by him at any time[68] during the entire course of the marriage and sufficiently serious in nature to have entitled the other spouse to an absolute divorce[69] may bar his cause for divorce.[70]

Of course, where mutual incompatibility is made a ground for divorce by statute, the legislature has effectively eliminated recrimination as a defense. The question has arisen whether Kentucky's legislative elimination of "without like fault" on the part of either a husband or a wife seeking the divorce as a bar to the action could be cited as indicative of a dilution of the force of the doctrine, but the Court of Appeals has made it clear that the change in the statutory language indicates no such thing.[71] The elimination of the "without fault" language merely recognizes the fact that both parties are likely to be somewhat at fault and that it is rare that one is completely without fault. The complaining spouse, however, must not himself have been guilty of such fault or such cruelty as to entitle the other spouse to a divorce against him, or else recrimination will bar him from a divorce. It is only when the complainant's fault is less serious in nature, for example, serious enough for the court to have awarded the other party a bed and board divorce, that his fault is no bar.

Nor does the fact that a divorce was granted to both the plaintiff on his petition and the defendant on his cross-claim militate against the doctrine of recrimination. The Court of Appeals has

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[67] See Note, 41 Ky. L.J. 330 (1954), pointing out that despite occasional dictum in cases to the contrary the defense of recrimination is extinct in Kentucky.

[68] Despite the fact that ordinarily action constituting a cause for divorce must have happened within five years preceding the bringing of the action. KRS 403.035.

[69] Cox v. Cox, 343 S.W.2d 395 (Ky. 1961). Conduct merely justifying a bed and board separation is not sufficient to constitute recriminatory conduct to bar a divorce. Haskins v. Haskins, 188 Va. 525, 50 S.E.2d 437 (1948).

[70] Cox v. Cox, *supra* note 69; Minnis v. Minnis, 312 S.W.2d 903 (Ky. 1958); Witt v. Witt, 307 S.W.2d 1 (Ky. 1957).

[71] Lewis v. Lewis, 354 S.W.2d 287 (Ky. 1962); Cox v. Cox, *supra* note 69; Pedigo v. Pedigo, 324 S.W.2d 820 (Ky. 1959); Minnis v. Minnis, *supra* note 70; *But cf.* Carlton v. Carlton, 265 S.W.2d 477 (Ky. 1954).

commented on the anomaly, under orthodox doctrine, of these so-called "double divorces". It must be remembered that the court is nevertheless bound by the statute preventing reversal of a decree granting a divorce.[72] Hence neither of the divorces to the two spouses would be reversible.

It is true, however, that under Kentucky's statute permitting a divorce to be granted either party when they have lived apart for five consecutive years that the defense of recrimination has no place.[73] When the condition of this statute is satisfied no inquiry is made into what caused the parties to have lived apart without any cohabitation.

*Bed and Board Divorces*—The above grounds and defenses are of course irrelevant in case a limited divorce only is sought. Such limited divorces can be granted under the Kentucky "bed and board" statute[74] any time the court of equity thinks fit, as well as when grounds for absolute divorce are deemed insufficient.

The inadequacy of the bed and board divorce as a catch-all solution where the court is at a loss for what to do has already been well noted in the *Law Journal.*[75] A few of the more recent cases indicate an awareness by the Court of Appeals of the possible over-use of the bed and board divorce.[76] However, a substantial number of cases granting bed and board divorces show its proper function.[77] In one of these[78] the court cited approvingly a previous case[79] on the shortcomings of a bed and board divorce, but

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[72] Hundley v. Hundley, 291 S.W.2d 544 (Ky. 1956).

[73] KRS 402.020(1)(b).

[74] KRS 403.050.

[75] A previous writer emphasizes the following objections: the bed and board divorce easily leads to temptations of adultery but is no defense to adultery between the parties or with any other person; if children are born they may be considered illegitimate; neither party may remarry; and in cases where there appears no chance of a reconciliation, the parties are prevented from seeking happiness with another. See Note, 43 Ky. L.J. 322 (1954).

[76] Judgment for bed and board divorce reversed in favor of absolute divorce. Dunning v. Dunning, 325 S.W.2d 315 (Ky. 1959); Coleman v. Coleman, 269 S.W.2d 730 (Ky. 1954); Eckhoff v. Eckhoff, 247 S.W.2d 374 (Ky. 1951). See Witt v. Witt, 307 S.W.2d 1 (Ky. 1957).

[77] Brown v. Brown, 347 S.W.2d 524 (Ky. 1961) (affirmed action of lower court granting only a bed and board divorce where party seeking absolute divorce not entitled to it); Hadd v. Hadd, 325 S.W.2d 213 (Ky. 1959) (lower court should have granted wife's prayer for bed and board divorce where her proof sustained right to absolute had she asked for it); Alford v. Alford, 317 S.W.2d 887 (Ky. 1958) (bed and board to wife on her counterclaim where proof of husband was insufficient ground for absolute divorce).

[78] Brown v. Brown, *supra* note 77.

[79] Coleman v. Coleman, 269 S.W.2d 730 (Ky. 1954).

observed that the bed and board divorce is nevertheless appropriate where the party seeking an absolute divorce without grounds and the more deserving party prays for a bed and board solution. Granting the limitations of the bed and board divorce, it may be the best solution available in the following situations: (1) There is still hope of affecting a reconciliation, (2) Absolute divorce from bonds of matrimony with freedom of spouses to remarry is contrary to the religions of the parties, or (3) Neither spouse seeks remarriage, or (4) A spouse who is dissatisfied with property settlement proposed by the other refuses absolute divorce in favor of bed and board divorce in order to force more favorable terms. One case had occasion to describe carefully the effects upon properties held by the parties to a bed and board divorce.[80] While the bed and board divorce does not ordinarily affect the rights of parties to property owned at the time of the decree, it does operate to permit the parties to acquire separate property prospectively. Maintenance should be awarded to take the place of the husband's personal responsibility for the wife's bills. Of course, the parties remain married, although living apart by judicial order, and either would inherit a spouse's share upon death of the other in the absence of a separation agreement to the contrary.

## ALIMONY

An increasing amount of divorce litigation demonstrates that adjustment of the property rights of the parties to a broken marriage will continue to be of greatest concern to the lawyer. There is usually little question as to the divorce itself in the cases brought to the highest court on the amount and kind of alimony to be awarded. Most of the recent cases involve the application of familiar principles to infinitely diverse factual situations. Some interesting trends are nevertheless discernible.

The lower court's discretion in denying[81] the wife's alimony or in detremining the appropriate amount of alimony in most cases is affirmed in routine fashion.[82] Quite frequently, however, a re-

[80] Gentry v. Gentry, 318 S.W.2d 870 (Ky. 1958).

[81] Anderson v. Anderson, 392 S.W.2d 45 (Ky. 1965); Sears v. Sears, 339 S.W.2d 453 (Ky. 1960).

[82] Ingram v. Ingram, 385 S.W.2d 69 (Ky. 1964); Jones v. Jones, 382 S.W.2d 842 (Ky. 1964); Crowe v. Crowe, 352 S.W.2d 68 (Ky. 1961); Gann v. Gann, 347 S.W.2d 540 (Ky. 1961); Peavy v. Peavy, 351 S.W.2d 869 (Ky. 1961); Boyd v.

(Continued on next page)

view of the evidence dictates reversal because of inadequacy of the provisions made for the wife.[83] A great number of the appealed cases seem to review the correctness of divorces granted below,[84] but in reality are appealed for the purposes of deciding the fairness of the alimony award and property rights of the parties.[85] These cases at first blush might indicate that fault of the parties in causing the breaking up of the marriage is a major factor in determination of alimony, but a closer examination shows that such fault of itself is not determinative.

*Fault*—Although the Kentucky statutory language is phrased to entitle a needy wife to alimony when "on a divorce obtained by her,"[86] it is well established by judicial interpretation that a needy wife may receive alimony on a divorce granted to the husband where she is not entirely to blame for breaking up the marriage and is free from moral delinquency.[87] But if the court finds the wife *entirely* at fault it has stated that she is not entitled to any alimony.[88] Sometimes, however, the wife's lack of fault is

(Footnotes continued from preceding page)
Boyd, 335 S.W.2d 898 (Ky. 1960); Davis v. Davis, 347 S.W.2d 534 (Ky. 1960); Jackson v. Jackson, 320 S.W.2d 302 (Ky. 1959); Patterson v. Patterson 232 S.W.2d 862 (Ky. 1959); Combs v. Combs, 314 S.W.2d 689 (Ky. 1958); Centers v. Centers, 294 S.W.2d 525 (Ky. 1956); Wells v. Wells, 293 S.W.2d 718 (Ky. 1956); Willoughby v. Willoughby, 294 S.W.2d 550 (Ky. 1956).

[83] Combs v. Combs, 350 S.W.2d 502 (Ky. 1961) (Court held inadequate a 200 dollar lump sum settlement to wife against whom the divorce was granted); Heustis v. Heustis, 346 S.W.2d 778 (Ky. 1961) (Court reversed a 125 dollar a month alimony as inadequate and directed lump sum alimony out of the considerable estate); Turner v. Turner, 336 S.W.2d 586 (Ky. 1960) (Although the husband got the divorce and custody of the children from drinking wife, the court held the situation called for at least 350 dollars a month alimony); Alexander v. Alexander, 317 S.W.2d 494 (Ky. 1958) (1,000 dollars lump sum alimony out of estate of 17,000 dollars inadequate); Witt v. Witt, 307 S.W.2d 1 (Ky. 1957) (Reversed 2,000 dollars lump sum, increased monthly payments from 35 dollars to 50 dollars); Snider v. Snider, 302 S.W.2d 621 (Ky. 1957) (Although husband was given divorce and custody of the child, the mentally ill wife should receive 1,000 dollars lump sum alimony out of an estate worth around 11,000 dollars).

[84] KRS 21.060(1)(b) provides that a final order granting a divorce may not be appealed. Appeal from an order denying a divorce is not affected by this statute.

[85] Witt v. Witt, 307 S.W.2d 1 (Ky. 1957); Lampkin v. Lampkin, 258 S.W.2d 720 (Ky. 1952).

[86] KRS 403.060(1).

[87] The earlier Kentucky cases are collected in 34 ALR2d 313, 344-45 (1954). More recent cases are: Baker v. Baker, 344 S.W.2d 391 (Ky. 1961); Combs v. Combs, 350 S.W.2d 502 (Ky. 1961); Pearson v. Pearson, 350 S.W.2d 141 (Ky. 1961); Terrell v. Terrell, 352 S.W.2d 195 (Ky. 1961); Turner v. Turner, 336 S.W.2d 586 (Ky. 1960); Boggs v. Boggs, 330 S.W.2d 118 (Ky. 1959); Scalf v. Scalf, 312 S.W.2d 467 (Ky. 1958); Snider v. Snider, 302 S.W.2d 621 (Ky. 1957); Bailey v. Bailey, 294 S.W.2d 942 (Ky. 1956); Howard v. Howard, 291 S.W.2d 828 (Ky. 1956).

[88] Rutledge v. Rutledge, 310 S.W.2d 276 (Ky. 1958). And see Rogers v. Rogers, 295 S.W.2d 302 (Ky. 1956).

mentioned in her favor,[89] and one opinion states that it is error to refuse alimony to a wife granted a divorce without finding of fault on her part.[90] Where it is the *husband's* serious fault which leads to divorce, the court takes note of the fact that fault is not ordinarily an element in alimony awards.[91] The amount and character of the award, rather, is based upon the husband's financial means and the wife's needs, there being a definite trend in the most recent cases to emphasize these two variables as the primary factors.[92]

*Lump Sum*—An alimony award may take the form of an outright settlemnet (including a lump sum payable in installments),[93] periodic installments, or both.[94] The recent cases supporting an award of a lump sum are very numerous.[95] They show a recognition of the policy to favor lump sum over periodic payments where this is possible.[96] Sometimes, of course, there is no accumulated estate, and the existence of earning capacity renders periodic payments the only possible type provision.[97] Furthermore, if capital assets are going to have to be liquidated in order to pay alimony, the income tax consequences are to be considered in determining the time of payment.[98]

Though merely a rough rule-of-thumb, variable according to the circumstances, the Court of Appeals has continually stated

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[89] Boggs v. Boggs, 330 S.W.2d 118 (Ky. 1959).

[90] Henderson v. Henderson, 336 S.W.2d 581 (Ky. 1960).

[91] Francisco v. Francisco, 331 S.W.2d 279 (Ky. 1960).

[92] Combs v. Combs, 350 S.W.2d 141 (Ky. 1961); Francisco v. Francisco, 331 S.W.2d 279 (Ky. 1960). See also, Carter v. Carter, 382 S.W.2d 400 (Ky. 1964) (Where there is no estate accumulated by the husband during the marriage, the wife is not entitled to alimony as a matter of right).

[93] Rogers v. Rogers, 295 S.W.2d 302 (Ky. 1956).

[94] Davis v. Davis, 347 S.W.2d 534 (Ky. 1961) (both lump sum and periodic alimony); Holcomb v. Holcomb, 337 S.W.2d 32 (Ky. 1960) (periodic alimony); Snider v. Snider, 302 S.W.2d 621 (Ky. 1957) (lump sum alimony).

[95] Lindsey v. Lindsey, 358 S.W.2d 484 (Ky. 1962); Davis v. Davis, 347 S.W.2d 534 (Ky. 1961); Day v. Day, 347 S.W.2d 549 (Ky. 1961); Heustis v. Heustis, 346 S.W.2d 778 (Ky. 1961); Pearson v. Pearson, 350 S.W.2d 141 (Ky. 1961); Patterson v. Patterson, 323 S.W.2d 862 (Ky. 1959); Yonts v. Yonts, 329 S.W.2d 209 (Ky. 1959).

[96] Heustis v. Heustis, 346 S.W.2d 778 (Ky. 1961) (reversed as inadequate an award of 125 dollars periodic alimony and ordered lump sum alimony at not less than one-third total net estate); Yonts v. Yonts, 329 S.W.2d 209 (Ky. 1959). This policy favoring the lump sum award is supported in an article relating to the psychology of alimony. See Peele, *Social and Psychological Effect of Alimony*, 6 L. & C.P. 283 (1939).

[97] Holcomb v. Holcomb, 337 S.W.2d 32 (Ky. 1960); Witt v. Witt, 307 S.W.2d 1 (Ky. 1957).

[98] Broida v. Broida, 388 S.W.2d 617, 621 (Ky. 1965), where the court said, "there is no need for, and every reason to avoid, making the taxing authorities beneficiaries of the litigation."

that one-third the total amount of all properties accumulated during marriage is a ready guide to the fair amount of a lump sum settlement.[99] A major limitation upon lump sum, as well as periodic, alimony awards in Kentucky is that "no such allowance shall divest the husband of the fee simple title to real estate." Although this statutory injunction has been respected, there is nothing to prevent real property from standing as security for alimony[100] nor to prevent the taking of real property after the personal property is exhausted in satisfaction of a writ of execution to collect a judgement for accrued alimony.[101]

Speaking of enforcement of alimony decrees, contempt remains the most frequently and easily used method.[102]

*Restoration of Property*—Closely related to the allowance to the wife of a lump sum settlement by way of alimony is the other means by which the wife may receive a distribution of family assets upon family dissolution. After providing for alimony the statute provides that "each party shall be restored all the property . . . that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."[103] Of course this provision refers to the return to each spouse of his or her property owned independently of the marriage; whereas, a lump sum alimony award is made from property accumulated during marriage or belonging to the spouse required to pay alimony. An interesting case in which these two theories were intermingled was recently noted in the *Law Journal.*[104] Even though the wife has been quilty of too much fault in connection with the dissolution of the marriage to be entitled to alimony, she

[99] Ollish v. Ollish, 382 S.W.2d 876 (Ky. 1964) (wife entitled to at least one-third of estate accumulated from the husband where she was not at fault in dissolution of the marriage and performed her wifely duties during a substantial part of the marriage relation); Combs v. Combs, 350 S.W.2d 502 (Ky. 1961) (reversing for determination of husband's finances and estate in order to determine fair share to wife against whom divorce ordered); Heustis v. Heustis, 346 S.W.2d 778 (Ky. 1961); Boggs v. Boggs, 330 S.W.2d 118 (Ky. 1959) (one-third total estate properly exceeded in chancellor's discretion); Alexander v. Alexander, 317 S.W.2d 494 (Ky. 1958) (Court points out that the fraction of one-third of the estate is apparently based upon dower).

[100] Gentry v. Gentry, 318 S.W.2d 870 (Ky. 1958); Noll v. Noll, 282 S.W.2d 620 (Ky. 1955). See Murphy, *Enforcement of Alimony Decrees in Kentucky,* 41 Ky. L.J. 335 (1953).

[101] Murphy, *supra* note 100.

[102] *Id.* at 336.

[103] KRS 403.060.

[104] Kivett v. Kivett, 312 S.W.2d 884 (Ky. 1958), 47 Ky. L.J. 573 (1959).

is still entitled to restoration of the property she contributed.[105] One surprising aspect of the recent cases interpreting this statute requiring an equitable restitution to each spouse of his own property is the number of cases in which the lower court has been reversed for failure to do so.[106] Restoration of property is based upon the acutal value of the property at the time of contribution without interest rather than its enhanced value.[107]

In *Rogers v. Rogers,* [108] the court made its determination, adverse to an unusual contention by the husband, that his support of wife and child beyond the call of duty (*i.e.,* beyond the mere "necessaries" measured by their economic station in life) during the early stages of the marriage did not entitle him to reimbursement upon termination of the marriage either in the form of reduction of property restored to his wife or reduction of his support or alimony obligation. Furthermore, a wife is not entitled to restoration of property for her contribution to family living expenses.[109]

If property rights are not determined by the divorce decree, an action for restoration may be instituted.[110] Since there may be an independent action subsequent to the divorce and since this is not a strictly personal right, the personal representative is under a duty to assert the right for the estate.[111]

Where a party seeking restoration fails to comply with the alimony and maintenance order, fails to personally appear in circuit court when a contempt rule is issued against him, and fails to take any steps to prevent the court's sale of property or its subsequent confirmation, the trial court is not required to restore the property.[112]

*Modification*—In line with the statutory[113] and judicial pro-

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[105] Taylor v. Taylor, 331 S.W.2d 895 (Ky. 1960) (Wife entitled to restitution of her own property despite her sole fault leading to divorce).

[106] Pearson v. Pearson, 350 S.W.2d 141 (Ky. 1961); Taylor v. Taylor, 331 S.W.2d 895 (Ky. 1960); Stubblefield v. Stubblefield, 327 S.W.2d 24 (Ky. 1959); Willoughby v. Willoughby, 294 S.W.2d 550 (Ky. 1956).

[107] Triplett v. Triplett, 328 S.W.2d 545 (Ky. 1959); Kivett v. Kivett, 312 S.W.2d 884 (Ky. 1958).

[108] 295 S.W.2d 302 (Ky. 1956).

[109] Legel v. Legel, 382 S.W.2d 870 (Ky. 1964).

[110] Fyffe v. Fyffe, 375 S.W.2d 407 (Ky. 1964).

[111] Henderson v. Baker, 362 S.W.2d 730 (Ky. 1962).

[112] Hughes v. Hughes, 384 S.W.2d 83 (Ky. 1964).

[113] 403.020(5)(d).

nouncements[114] relating to judicial authority to modify, there is discernible in the case an increasing tendency to anticipate in advance some expected future time or change in circumstances when such modification is to be made or applied for.[115]

*Termination*—It is still the general rule that the obligation terminates upon the husband's death, absent a contrary agreement incorporated in the decree. In *Desjardins v. Desjardins,*[116] the federal court in the eastern district of Kentucky so held. The obligation ended with the husband's death. Express language in the decree "so long as the *wife* shall live or until she remarries"[117] [emphasis added] was considered by the court not to be inconsistent with the general principle that the obligation ceases when the husband dies.[118]

It still seems to be the general rule that the subsequent remarriage of the wife terminates the obligation of periodic alimony payments but not the obligation to pay lump sum alimony whether in installments or not.[119]

*Alimony After Divorce*—The Kentucky statute contemplates that incidental to divorce actions the court shall straighten out the interests of the parties in their property and affairs and grant alimony for the wife.[120] Sometimes, however, the divorce decree is silent on these matters. It may well be that expectation of an accord by the parties on these matters is the reason for failing to prosecute the matter to an adjudication by the court. Such a case was *Reynierson v. Reynierson,*[121] where the wife was properly permitted to maintain her separate action in equity for alimony some months after termination of the divorce action. However, where there are no unusual circumstances the general rule seems

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114 Gaun v. Gaun, 347 S.W.2d 540, 542 (Ky. 1961) (The Court, in stressing its power to modify alimony allowances, seems to overlook KRS 403.020 (5) (d)).

115 Gaun v. Gaun, 347 S.W.2d 540 (Ky. 1961) (material or substantial change in conditions of the parties such as a change in the financial circumstances or needs of the parties); Barrickman v. Barrickman, 296 S.W.2d 475 (Ky. 1956) (inadequacy of husband's income or improvement of wife's financial condition).

116 193 F. Supp. 210 (E.D. Ky. 1961).

117 *Ibid.*

118 Contrast the holding in a North Dakota case, Stoutland v. Stoutland, 103 N.W.2d 286 (N.D. 1960), in which the court held similar language in the decree meant that the obligation continued as an obligation against the husband's estate after his death until the wife should die or remarry.

119 Piersall v. Piersall, 302 Ky. 486, 194 S.W.2d 627 (1946).

120 KRS 403.060(1).

121 303 S.W.2d 252 (Ky. 1957).

to be that in the absence of a determination of alimony in the decree awarding the divorce the question of alimony is res judicata.[122]

*Alimony Pendente Lite*—It is now the established rule in Kentucky that the crediting of temporary alimony payments against the total award of alimony is discretionary with the chancellor.[123] Of course, on a question of reasonableness of the total award this may be considered.[124] The theory behind such a rule is that the alimony pendente lite has already been considered along with all the other factors by the chancellor in arriving at the amount of the total award.

Prior to the three 1964 cases there were two lines of authority on this question. The earlier cases,[125] which have now been overruled,[126] held that a credit should be allowed toward the total award for that paid not only after judgment pending appeal but also for that paid before judgment was entered. On the other hand, *Hicks v. Hicks*[127] held that the allowance or non-allowance of pendente lite alimony payments as a credit toward the ultimate award is a matter to be taken into consideration by the chancellor in fixing the amount of the permanent award. A credit toward the total award of the amount paid after judgment and pending appeal apparently still remains in the law.

*Property Settlements*—When there is a parting of the ways by a formal divorce or otherwise, property settlement agreements continue to be looked upon with favor by the courts.[128] These separation agreements must be "fair and reasonable in view of the circumstances of the parties at the time and with full knowledge of the rights and consequences of the agreement."[129] If a party has been defrauded or overreached in executing the agreement, the court should not incorporate it in the decree.[130] When

[122] Reynierson v. Reynierson, 303 S.W.2d 252 (Ky. 1957). See also, *In re* Potts, 142 F.2d 883 (6th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945).

[123] Broida v. Broida, 288 S.W.2d 617 (Ky. 1964); Heustis v. Heustis, 381 S.W.2d 533 (Ky. 1964); Hickey v. Hickey, 383 S.W.2d 114 (Ky. 1964).

[124] Broida v. Broida, *supra* note 123; *Heustis v. Heustis, Supra* note 123.

[125] Oldham v. Oldham, 259 S.W.2d 42 (Ky. 1953); Wheeler v. Wheeler, 238 S.W.2d 1001 (Ky. 1951).

[126] Hickey v. Hickey, 383 S.W.2d 114 (Ky. 1964).

[127] 290 S.W.2d 483 (Ky. 1956).

[128] Childress v. Childress, 335 S.W.2d 351 (Ky. 1960).

[129] *Id.*, at 353.

[130] *Ibid.* In this case an illiterate husband relinquished his right to considerable property acquired during marriage for a nominal sum. The court set

(Continued on next page)

a wife is not entitled to alimony, it is not error to incorporate into the divorce decree a property settlement agreement which makes no mention of alimony.[131] And when a property settlement agreement is executed by the parties and not incorporated into the decree which makes no mention of alimony, although the husband will be required to pay the wife the sum agreed upon, any claim to alimony will be considered waived.[132]

After an agreed judgment has been entered awarding alimony or child maintenance[133] the parties may subsequently modify the award by agreement.

The Court of Appeals has made it clear that when a father wrongfully destroys the source of payments for child support provided for in an agreement not incorporated in the divorce decree, the court will require him to continue the agreed payments. The duty to support is not destroyed if he has the present ability to pay.[134] Nor will the Court of Appeals "rewrite the contract" to conform with the allegations and proof of the petitioner.[135]

An intriguing problem is presented concerning the effect on separation agreements when the parties subsequently become reconciled and resume cohabitation. The recent cases point out that separation agreements will usually be annulled, at least as to the unexecuted portions, when this occurs.[136] However, if the agreement is fully executed before the reconciliation, the court must then look to the intention of the parties to determine whether the agreement was intended to be annulled by the reconciliation.[137] This intention may be found in the express

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(Footnotes continued from preceding page)
aside a default judgment which incorporated the agreement. *Cf.* Hedgespeth v. Hedgespeth, 301 S.W.2d 589 (Ky. 1957). The court refused to set aside judgement incorporating a property settlement agreement on ground of misrepresentation when evidence showed plaintiff was an astute businesswoman.

[131] Rutledge v. Rutledge, 310 S.W.2d 276 (Ky. 1958) (wife almost entirely at fault).

[132] Commonwealth, Dep't of Highways v. Hobson, 384 S.W.2d (Ky. 1964); Commonwealth, Dep't of Highways v. West, 383 S.W.2d 116 (Ky., 1964).

[133] Montgomery v. Montgomery, 309 S.W.2d 188 (Ky. 1958) (award of alimony reduced by agreement allowed); Reid v. Reid, 300 S.W.2d 225 (Ky. 1957) (award of child maintenance reduced by agreement allowed).

[134] Henderson v. Henderson, 350 S.W.2d 477 (Ky. 1961) (Father forced the corporation of which he was a member, and from which the support money was to come, out of business by opening a competing business).

[135] O'Nan v. O'Nan, 345 S.W.2d 377 (Ky. 1961).

[136] Gordon v. Gordon, 335 S.W.2d 561 (Ky. 1960); Hall v. Hall, 328 S.W.2d 541 (Ky. 1959); Goodalser v. Littell, 314 S.W.2d 539 (Ky. 1958).

[137] *Ibid.*

terms of the original contract or in a subsequent agreement. In the absence of such an agreement the intention may be shown by the acts and conduct of the parties and from the circumstances.[138] The Court of Appeals generally affirms the lower court's determination of this intention.[139]

Another interesting recent case involved a separation agreement which provided for child support. The agreement was incorporated into a divorce decree and was to be effective subject to further orders of the court. The Court of Appeals held that the agreement was terminated by the death of the father.[140] In reaching this result the court distinguished *Arnold v. Arnold's Ex'r*[141] pointing out that that case is in accord with other jurisdictions "that a contract of the father assuming support payments for his child through a given or definite period of time is not terminated by his death."[142]

These days an awareness of federal tax consequences is most important for counsel in negotiating separation agreements.[143] Some of the most important recent developments here are the holdings in *United States v. Davis*[144] and *Commissioner v. Lester*.[145] The *Lester* case held that where the provisions of the decree, instrument, or agreement do not make definite the amount of the periodic payments that are for the benefit either of the wife or of the children, then all such payments are deductible by the husband and taxable to the wife. The *Davis* case held that the transfer of appreciated property by the husband to the wife in return for her relinguishment of marital rights in a marriage settlement is a taxable event resulting in a gain to the husband. A recent Kentucky case held that if capital assets are going to have to be liquidated in order to pay alimony, the income tax con-

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138 Gordon v. Gordon, 335 S.W.2d 561 (Ky. 1960).

139 *Ibid.* (Judgment holding no intent to nullify because husband broke promise which induced reconciliation affirmed); Hall v. Hall, 328 S.W.2d 541 (Ky. 1959) (Judgment holding intention was to nullify as property was used jointly as before separation affirmed); Goodalser v. Littell, 314 S.W2d 539 (Ky. 1958) (Judgment affirmed holding no intent to nullify as land was not deeded back after reconciliation and written agreement was not destroyed).

140 Bowling v. Robinson, 332 S.W.2d 285 (Ky. 1960).

141 237 S.W.2d 58 (Ky. 1951).

142 Bowling v. Robinson, 332 S.W.2d 285, 287 (Ky. 1960).

143 See, 2 Banks-Baldwin, *Kentucky Legal Forms* 903(1); (2) (1964), for a very valuable checklist on tax consequences and separation agreements.

144 366 U.S. 299 (1961).

145 370 U.S. 65 (1962).

sequences are to be considered in determining the time of payments.[146]

### CHILD SUPPORT

Although the Kentucky statute[147] authorizes the court incidental to a divorce action to provide for the "care, custody and maintenance" of minor children of the marriage, failure of the court to do so does not bar a later action by the divorced wife to secure payments for future support of the child in her custody.[148] The mother's custody does not affect father's support duty. Of course any judgment for support of children is, like alimony, subject to the possibility of subsequent modification by the court as to future payments.[149] This rule is applicable even though the case may be on appeal,[150] or the parties have contracted otherwise.[151] The lower court's exercise of discretion in determining the amount of monthly payment, whether on petition to modify or in determining the amount in the first instance, is usually affirmed.[152] One recent case, however, held that the monthly payments for two children should have been 400 dollars, not just 200 dollars per month while the mother had custody, when the father was on a 24,000 dollar annual salary.[153] One noteworthy case[154] establishes the right of a father ordered to make maintenance payments in a definite amount to a hearing on his petition for a reduction even though his increasing financial disability causes him to default prior to hearing and reverses the lower

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146 Broida v. Broida, 388 S.W.2d 617 (Ky. 1965).

147 KRS 403.070.

148 Waters v. Waters, 251 S.W.2d 580 (Ky. 1952).

149 "At any time afterward, upon the petition of either parent, the court may revise any of its orders as to the children, having principally in view in all such cases the interest and welfare of the children." KRS 403.070. Gamblin v. Gamblin, 354 S.W.2d 504 (Ky. 1962); Honaker v. Honaker, 332 S.W.2d 550 (Ky. 1960) (Payments reduced, change in father's health and earnings); Nugent v. Nugent, 328 S.W.2d 425 (Ky. 1959) (Increase beyond forty dollars a month refused where wife with custody worked and was provided free board on parent's farm); Spencer v. Spencer, 312 S.W.2d 360 (Ky. 1958); Benson v. Benson, 291 S.W.2d 27 (Ky. 1956) (Increased monthly amount); Bloodworth v. Bloodworth, 296 S.W.2d 232 (Ky. 1956) (Reduction refused).

150 De Simone v. De Simone, 392 S.W.2d 68 (Ky. 1965).

151 Elkins v. Elkins, 359 S.W.2d 620 (Ky. 1962).

152 In all the cases cited in note 149 *supra*, the lower court's discretion was upheld.

153 Conlan v. Conlan, 293 S.W.2d 710 (Ky. 1956) (Also involved an appeal from a difficult custody problem following a broken marriage. in which the chancellor's discretion in making a divided custody determination for the time being was affirmed).

154 Knight v. Knight, 341 S.W.2d 59 (Ky. 1960), 50 Ky. L.J. 411 (1962).

court determination to the effect that his default as to past due payments deprives him of his right to a hearing on his need for a reduction. Language by the court would support a similar holding even though the husband were in default prior to his filing of the petition. There is no question as to the authority of the court to enforce by the contempt procedure its order for support.[155] Nor is it an excuse for disobedience by the father, ex-husband, of a court order for support that the mother had removed the child from Kentucky in violation of the court decree provision for his visitation rights,[156] or had violated the terms of the judgment relating to custody of the children.[157] Other ruses to escape payment have not worked either. Thus a father of five children ordered to pay 350 dollars per month for their support and to put up stock in his business to secure such payment did not escape by establishing a competitive business causing the original business to collapse.[158] Another case held constiutional a criminal statute making it a felony for a father to fail to comply with court orders relative to maintenance of a child under sixteen and without independent means of support.[159]

There is a definite trend toward holding that the continued duty to support children may include responsibility to provide for higher education. A recent Kentucky case pointed out that the age for termination of the father's obligation is normally twenty-one and that education away from home may be involved before that time.[160]

In light of this trend it is doubtful if the new statute in Kentucky discussed at the beginning of this article has lowered the age up until which the father remains responsible for the care, custody, and education of his minor child.

The amount to be allowed for child support is the minimum amount necessary for the support of the children. There are several factors that are not to be given consideration by the chancellor in setting the amount a divorced husband should con-

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155 Mulkey v. Martin, 335 S.W.2d 565 (Ky. 1960).
156 Spencer v. Spencer, 312 S.W.2d 360 (Ky. 1958).
158 Henderson v. Henderson, 350 S.W.2d 477 (Ky. 1961).
157 Dalton v. Dalton, 367 S.W.2d 840 (Ky. 1963).
159 Commonwealth v. Mason, 317 S.W.2d 166 (Ky. 1958), upholding KRS 435.240(3)(a).
160 Pass v. Pass, 238 Miss. 449, 118 so.2d 769 (1960), 109 U. Pa. L. Rev. 130 (1960); Clark v. Graves, 282 S.W.2d 146 (Ky. 1955) (Private preparatory school. See KRS 405.020(2).

tribute to the maintenance of the children. One of these is the financial condition of the divorced wife;[161] another is the earnings of the father.[162] It is submitted, though, that the chancellor cannot absolutely put these factors out of his mind and more often than not the amount of child support awarded will be somewhat altered by the financial circumstances of the ex-wife and the ex-husband.

If maintenance for the children is allowed pending an action for divorce under KRS 403.060, the order so allowing is interlocutory and is not an appealable order under Kentucky Rules of Civil Procedure 54.01 [here in-after cited as CR]. 54.01.[163] The allowance of maintenance pending an action for divorce does not ultimately adjudicate the rights of the parties.

It is important to note that a husband does not have to pay maintenance support to his wife for a child that she has by a former marriage and which the husband has not adopted.[164]

There is presently a development on the reverse side of the coin. The court has now had occasion to construe the statutory provision requiring an adult child to provide for a needy parent the "necessary shelter, food, care and clothing."[165] In that case,[166] the court narrowly construed the statutory provision by refusing to impose financial responsibility upon a daughter for a hospital bill which the mother was unable to pay. It was pointed out by the court that this statute was aimed at needs of a personal nature rather than a professional one and that the inability to pay hospital bills does not mean that one is destitute and indigent.

## CHILD CUSTODY

A tragic incident of many divorce actions is the necessity of making some compromise or determination with respect to custody of children of the marriage.[167] The note [168] by Prof.

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[161] De Simone v. De Simone, 392 S.W.2d 68 (Ky. 1965).

[162] Robinson v Robinson, 363 S.W.2d 111 (Ky. 1962). Sufficient relief will be provided to such a person when mitigating circumstances are addressed to the court in defense of contempt proceedings.

[163] Lebus v. Lebus, 382 S.W.2d 873 (Ky. 1964).

[164] McDowell v. McDowell, 378 S.W.2d 814 (Ky. 1964).

[165] KRS 405.080.

[166] Woods v. Ashland Hospital Corp., 340 S.W.2d 594 (Ky. 1960).

[167] KRS 403.070 provides in part that "pending an application for divorce, or on final judgement, the court may make orders for the care, custody and maintenance of the minor children of the parties and any of their children of unsound mind."

[168] 41 Ky. L. J. 324 (1953).

Charles N. Carnes analyzing the factors weighed by the Kentucky courts from 1940 to 1952 in the determination of child custody is still the most definitive treatment of the Kentucky cases, and only those recent cases which add to or explain significantly the factors as outlined in that article will be discussed. Almost all the cases continue to announce the generality that the child's welfare is paramount, but resolution of this issue is not susceptible of any ready formula. Hence the Court of Appeals most frequently affirms the decision of the chancellor "who has lived with the case,"[169] but sometimes reverses for reasons stated.[170] Similarly, on petitions to modify previous custody determinations, the Court of Appeals has ordinarily affirmed the lower court in its granting[171] or its denial[172] of an order changing the custody. Should the lower court, however, direct a change of custody in the absence of an actual change of conditions, a reversal of such an order is to be predicted.[173] Then too, the Court of Appeals might reverse where it considers the lower court's finding to be based upon insufficient taking of proof.[174]

It is usually stated that a divorce judgment procured by fraud and perjury as to residence may by a direct attack be set aside as

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[169] Hinton v. Hinton, 377 S.W.2d 888 (Ky. 1964); Day v. Day, 347 S.W.2d 549 (Ky. 1961); Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961); Harper v. Harper, 344 S.W.2d 616 (Ky. 1961); Morris v. Morris, 336 S.W.2d 548 (Ky. 1960); Somerville v. Somerville, 339 S.W.2d 940 (Ky. 1960); Wilkerson v. Wilkerson, 335 S.W.2d 552 (Ky. 1960); Williams v. Williams, 338 S.W.2d 689 (Ky. 1960); Hall v. Hall, 329 S.W.2d 375 (Ky. 1959); McCormack v. Lewis, 328 S.W.2d 415 (Ky. 1959); Nugent v. Nugent, 328 S.W.2d 425 (Ky. 1959); Meek v. Meek, 318 S.W.2d 851 (Ky. 1958); Riggle v. Rhoten, 319 S.W2d 472 (Ky. 1958); Roberts v. Roberts, 307 S.W.2d 757 (Ky. 1957); Somerville v. Somerville, 306 S.W.2d 301 (Ky. 1957).

[170] Hatfield v. Decossett, 325 S.W.2d 84 (Ky. 1959) (Custody award of children to father reversed and remanded for failure of lower court to set out findings of fact according to CR 52.01); Hatfield v. Decossett, 339 S.W.2d 631 (Ky. 1960) (Custody award to father reversed as mother was a fit person to raise children of tender years); Goff v. Goff, 323 S.W.2d 209 (Ky. 1959) (Custody award to mother reversed as mother was an unfit person to have custody). *Cf* Pickett v. Farrow, 340 S.W.2d 462 (Ky. 1960) where custody award to maternal grandmother of child reversed and custody granted to father, the mother having died.

[171] Hall v. Hall, 386 S.W.2d 448 (Ky. 1964). Vincent v. Vincent, 316 S.W.2d 853 (Ky. 1958); Estes v. Estes, 299 S.W.2d 785 (Ky. 1957). *Cf.*, Merriman v. Selvey, 296 S.W.2d 716 (Ky. 1956). *But see, Goff v. Goff, supra* note 170.

[172] Gholson v. Gholson, 383 S.W.2d 909 (Ky. 1964). Wyatt v. Webb, 317 S.W.2d 883 (Ky. 1958). *Cf.* Shaw v. Graham, 310 S.W.2d 522 (Ky. 1958).

[173] Hatfield v. Derossett, 339 S.W.2d 631 (Ky. 1960).

[174] See Cupp v. Cupp, 302 S.W.2d 371 (Ky. 1957) where the mother, who had been awarded custody by the divorce decree, died, it was error for circuit court to refuse restoration of custody to the father solely on confidential recommendation of a welfare worker without giving father a chance to present proof.

void even though the party obtaining the divorce has remarried and innocent parties may be affected,[175] but the welfare of a child is controlling over this rule.[176]

Where a child is determined to be a qualified witness, his testimony must be given in the presence of the parties or their counsel if it is to be made a basis of the court's decision.[177]

In spite of the common law preference for the father,[178] the child's welfare frequently requires that a very young child be placed in the care of its mother.[179] The character of the party with custody is considered of highest importance, although mere fault of a party may not be important unless the fault seriously reflects upon that party's character. Examples are the cases of divorce on the grounds of adultery or desertion.[180]

Two recent cases provide excellent illustrations of the interrelationship of character and fault contributing to the marriage break-up. In *Donoko v. Donoko,* [181] the lower court's judgment granting custody to the father was affirmed, the overriding reason appearing to be the indifference of the mother to the husband and children, although there was some proof of infidelity on the part of the mother. In *Harper v. Harper*[182] the father was given custody because the mother was "running around."

To be compared with these cases are those which deny custody because of mental illness,[183] although, of course, fault plays no part.

*Third Parties against Natural Parents* — In line with an ap-

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[175] Kirk v. Kirk, 240 S.W.2d 598 (Ky. 1951); Crowe v. Crowe, 264 Ky. 603, 95 S.W.2d (1936); Logsdon v. Logsdon, 204 Ky. 104, 263 S.W. 728 (1924).

[176] McDaniel v. McDaniel, 383 S.W.2d 344 (Ky. 1964).

[177] Schwartz v. Schwartz, 382 S.W.2d 851 (Ky. 1964).

[178] Shehan v. Shehan, 152 Ky. 191, 153 S.W.243 (1913).

[179] Numerous cases continue to reiterate the point that a child of tender years is to be placed in the custody of the mother if she is morally fit; Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961); Hatfield v. Derossett, 339 S.W.2d 631 (Ky. 1961); McLemore v. McLemore, 346 S.W.2d 122 (Ky. 1961); Clay v. Clay, 334 S.W.2d 909 (Ky. 1960); Merriman v. Selvey, 296 S.W.2d 716 (Ky. 1960); Estes v. Estes, 299 S.W.2d 785 (Ky. 1957); Somerville v. Somerville, 306 S.W.2d 301 (Ky. 1957); Renfro v. Renfro, 290 S.W.2d 46 (Ky. 1956). The age beolw which a child is "of tender years" seems to be ten or twelve, and may vary according to the sex of the child. For a case holding that boys of ten or twelve are not children of tender years, see Nichol v. Conlon, 385 S.W.2d 779 (Ky. 1965).

[180] McQueen v. McQueen, 294 S.W.2d 75 (Ky. 1956) (refused custody to mother because of her lewd and lascivious conduct).

[181] 357 S.W.2d 665 (Ky. 1962).

[182] 344 S.W.2d 616 (Ky. 1961).

[183] Day v. Day, 347 S.W.2d 549 (Ky. 1961); Snider v. Snider, 302 S.W.2d 612 (Ky. 1957).

parent trend in other states, the Kentucky courts have adjudicated an increasing number of cases in which an award of custody to a third party other than the parents has been made over strong opposition of one of the parents seeking custody.[184]

Understandably there remains some preference shown to the natural parent, who is not apt to be deprived of custody unless clearly shown to be unfit.[185] In one case a great-aunt received custody against the wishes of a grandparent on special circumstances appearing that the child would be able to enjoy what amounted to the partial custody of its mother under the arrangement made.[186] Although divided custody continues to be frowned upon as not ordinarily in the child's best interest,[187] several recent cases have affirmed convenient arrangements for divided custody, say for the school year or for monthly periods prior to the child's reaching school age.[188]

*Jurisdiction in Custody Cases* — There have been several interesting cases on jurisdiction enabling courts to make custody awards. As pointed out in the previous article, the cases continue to base custody jurisdiction upon domicile or physical presence of the child within the state.[189] Even the divorcing court which originally asserted jurisdiction over custody of children in connection with its decree of divorce may decline to act further where

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[184] Roberson v. Wells, 355 S.W.2d 675 (Ky. 1962). Bonilla v. Bonilla, 335 S.W.2d 572 (Ky. 1960) (where maternal grandmother allowed to keep custody over father's petition); McCormack v. Lewis, 328 S.W.2d 415 (Ky. 1959) (where paternal grandmother allowed to keep custody over mother's petition); Riggle v. Rhaten, 319 S.W.2d 472 (Ky. 1959) (where mother's petition for writ of habeas corpus dismissed leaving custody of child with paternal grandparents); Shaw v. Graham, 310 S.W.2d 522 (Ky. 1958) (where judgment leaving custody with paternal grandmother over mother's petition affirmed); White v. England, 348 S.W.2d 936 (Ky. 1961) (dictum).

[185] Pickett v. Farrow, 340 S.W.2d 462 (Ky. 1960). See Berry v. Berry, 386 S.W.2d 951 (Ky. 1965) and Goff v. Goff, 323 S.W.2d 209 (Ky. 1959). In the latter case KRS 405.020, which provides in part that the surviving parent, if suited, shall have the custody of the minor children, was construed to give a parent a prima facie right to custody, and held that the parent does not have the burden of proving his suitability. This shows some preference to the natural parent in that the third party does not have in his favor this presumption of suitability in child custody cases.

[186] Guess v. Glenn, 294 S.W.2d 940 (Ky. 1956).

[187] McLemore v. McLemore, 346 S.W.2d 722 (Ky. 1961).

[188] Barrier v. Brewster, 349 S.W.2d 823 (Ky. 1961). Maxwell v. Maxwell, 351 S.W.2d 192 (Ky. 1961); Babb v. Babb. 293 S.W.2d 728 (Ky. 1956); Conlan v. Conlan, 293 S.W.2d 710 (Ky. 1956); Sharp v. Sharp, 283 S.W.2d 172 (Ky. 1955) (divided custody not unreasonable).

[189] 44 Ky. L. J. 60, 72 (1955). For a similar rule basing proper venue on physical presence of the child in the country, see Balentine v. Goodin, 338 S.W.2d 702 (Ky. 1960).

the child has subsequently been removed from the state. As the Kentucky courts have previously put it, the divorcing court which originally asserted jurisdiction over the custody of children of the marriage loses jurisdiction when the child is removed from the state, unless the removal is in violation of the court's decree or for the purpose of escaping its jurisdiction.[190] In a recent Kentucky case the court which had previously granted the original custody award invoked its discretionary lack of jurisdiction (forum non conveniens) to decline to enter an order affecting custody after the ex-wife had taken the child to Indiana.[191] Since the mother, father, and child had all become residents of Indiana, the case was distinguishable from those where one of the parties seeks to evade jurisdiction of the Kentucky court by removing the child to another state. Granting that the Kentucky court technically had jurisdiction, the appellate court considered that the chancellor in his discretion properly declined to act in view of the difficulty of enforcing his order and the availability of appropriate relief in the Indiana courts.

In *Dake v. Timmons*[192] the Court of Appeals held that it must give full faith and credit to a Georgia divorce decree which awarded the custody to the father during the school months and to the mother during the summer months (by agreement). Still later the court gave full faith and credit to a Texas decree awarding custody for nine months to the Texas grandparents and compelled its obedience by habeas corpus proceeding.[193] Habeas corpus continues to be held a proper remedy to determine the right to present possession of a child, say, under a presently extant court decree.[194] However, when the task before the court is instead the determination of the permanent location of responsibility for custody of the child, habeas corpus is not the proper

[190] *Id.* at 72; Beutel v. Beutel, 305 Ky. 683, 205 S.W.2d 489 (1947). Hence decisions continue to hold a custody award by state where the child is not present is not entitled to full faith and credit (whether or not connected with a divorce action there): Rice v. Rice, 316 S.W.2d 329 (Mo. 1958); *Cf.* Burden v. Burden, 313 S.W.2d 566 (Tenn. 1958) (Tennessee Court refused to follow Ohio Court decree awarding custody to father where child was with mother outside of Ohio).

[191] Carter v. Netherton, 302 S.W.2d 382 (Ky. 1957).

[192] 283 S.W.2d 378 (Ky. 1955).

[193] Burke v. Burke, 356 S.W.2d 40 (Ky. 1962).

[194] Burke v. Burke, *supra* note 193; Pickett v. Farrow, 340 S.W.2d 462 (Ky. 1958); Shaw v. Graham, 310 S.W.2d 522 (Ky. 1958); Merriman v. Selvey, 296 S.W.2d 716 (Ky. 1956); Dake v. Timmons, 283 S.W.2d 378 (Ky. 1955).

procedure. The matter should instead be brought to the consideration of the court by a petition in equity seeking to determine the issue upon the basis of the child's welfare.[195]

Perhaps the most interesting child custody case involved the jurisdiction of a Kentucky court to make a decree concerning a minor child visiting with her father on the Fort Knox Military Reservation.[196] The father sought to modify the previous award of custody to the mother by the divorcing court in Nevada on the ground of change of conditions, basing jurisdiction upon physical presence of the child within Kentucky's boundaries. The court declined jurisdiction because persons within a United States military reservation are not within the jurisdiction of Kentucky courts. The statute passed in 1952 providing the Kentucky circuit courts with jurisdiction over divorce actions brought by residents of United States reservations in counties adjacent to the reservation was held not applicable. The only possible remedy available to the mother in New Jersey was in the federal courts.

## ADOPTION

In 1962 the Kentucky legislature substantially altered the adoption procedure of this state. An exhaustive examination of the 1962 changes will not be conducted here since these have been dealt with previously in both this publication and the *Journal of Family Law*.[197] A brief summary of the statutory modifications and a few observations will be sufficient for the purposes of this article.

The recent statutory amendments were made to prevent unscrupulous persons from placing babies in homes without regard for the welfare of any interested parties and thereby eliminate "black market" operations. In this the law seems to have achieved a triumphant success.[198] The statutes which become effective in 1962 basically provide that before a petition can be filed the child must have been placed for adoption by a licensed child-placing

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[195] Merriman v. Selvey, *supra* note 194.

[196] Lathey v. Lathey, 305 S.W.2d 920 (Ky. 1957).

[197] Mitchell, *Kentucky Law Relating to the Placement of Children for Adoption*, 53 Ky. L. J. 223 (1965); Mitchell, *The 1962 Kentucky Adoption Law*, 3 J. Family Law 48 (1963).

[198] Mitchell, *Kentucky Law Relating to the Placement of Children for Adoption*, *supra* note 197.

institution or agency or by the Kentucky Department of Child Welfare. As an alternative the written approval of the Kentucky Commissioner of Child Welfare will suffice.[199] There are three instances in which neither of the above three methods of approval are necessary. These are as follows: (1) "A child sought to be adopted by a step-parent, grandparents, sister, brother, aunt or uncle";[200] (2) "A child received by the proposed adopting parent or parents from an agency without this state with the written consent of the Commissioner";[201] or (3) "those children placed for adoption prior to the effective date of the amendments."[202] Prior to 1962 there did not have to be any notification given to the Kentucky Department of Child Welfare until after the adoption petition had been filed.

Partially as a result of the statutory change there has been an increasingly higher percentage of agency adoptions (where the child is placed by a licensed child-placing agency or a state adoption agency) with a corresponding decrease in independent adoptions (where individuals place the child for adoption).[203]

Since adoption is a statutory creation, the announced policy has been one of strict compliance with the statute as a requirement,[204] even to the point of invalidating an adoption because of the failure to have the written consent of the natural parent notarized.[205]

The strict construction of statutory adoption is illustrated further by several recent cases interpreting the statutory exceptions to the requirement of consent by the natural parent or parents. The Court of Appeals in two cases reversed the granting of the adoption where the natural parent did not consent and was at most guilty of neglect falling short of facts dispensing with the necessity of consent.[206] The natural parents' consent must be obtained unless they have (a) "abandoned or deserted the child," (b) "substantially and continuously or repeatedly refused, or being able have neglected, to give the child parental care and

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[199] KRS 199.470(4).
[200] KRS 199.470(4)(a).
[201] KRS 199.470(4)(b).
[202] KRS 199.470(5).
[203] Mitchell, *supra note* 198
[204] Stanfield v. Willoughby, 286 S.W.2d 908 (Ky. 1956).
[205] Higgason v. Henry, 313 S.W.2d 275 (Ky. 1958).
[206] Jouett v. Rhorer, 339 S.W.2d 865 (Ky. 1960); Kantorwicz v. Reams, 332 S.W.2d 269 Ky. 1960).

protection," or (c) "been adjudged mentally incompetent to retain their parental right . . . for not less than one year" coupled with neglect of the child.[207] These are the grounds for an order terminating parental rights under the statute, and if such parental rights have not already been terminated, the termination must be placed and proved in the adoption proceeding itself as a condition for adoption. Proof of one of these facts in relation to the natural father of a child was held necessary in a petition by the stepfather to adopt the child even though a court in granting the mother (who had since married the stepfather) a divorce from the natural father had awarded the mother custody without express reservation of either a right of visitation or a duty of support in the father.[208] The court's holding seems justified by the statutory language dispensing with the necessity of consent as follows:
"(c) the living parents are divorced and the parental rights of one parent have been terminated under KRS 199.600 and consent has been given by the parent having custody and control of the child."[209]

Strict construction of adoption statutes seems all the more justified when one considers the complete and final effect of adoption. This finality is brought home in the *Jouett*[210] case by the court's calling attention to the error of the adopting court in permitting visitation by the natural parent after adoption. By way of contrast with court orders determining custody, adoption is purely statutory, whereas custody is of equitable cognizance; adoption is final while custody awards are subject to modification; and adoption is purely statutory and to be strictly construed, but jurisdiction over custody of minor children is of equitable cognizance.

There is a statutory pronouncement in Kentucky that adults can be adopted in the same manner as children.[211] Unless there is a contrary intent expressed in the will, adopted children will

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[207] KRS 199.600.

[208] Jouett v. Rhorer, 339 S.W.2d 865 (Ky. 1960); Matter of Anonymous, 23 Misc. 2d 577, 197 N.Y.S.2d 17 (1960); but contrast Matter of Adoption of Candell, 54 Wash.2d 276, 340 P.2d 179 (1959), holding natural father's consent to be unnecessary when divorce decree had awarded mother custody without express mention of custody or visitation rights. The Kentucky and New York position seems preferable.

[209] KRS 199.500(1)(c).

[210] Jouett v. Rhorer, 339 S.W.2d 865 (Ky. 1960).

[211] KRS 405.390.

inherit through as well as from the parent who adopted them.[212] The status of an adopted child for inheritance purposes then is the same as if he or she were the natural child.[213] This situation of the law left open the door for the peculiar case of *Bedinger v. Graybill's Ex'r & Trustee,*[214] a case which is the subject of an extensive note by Glenn L. Greene, Jr.[215] There it was held that a man could adopt his wife, and the adoption made her his "heir at law" under the terms of an earlier will of his mother. Since the court only considered the adoption for the purpose of inheritance, it did not have to face the problem of incest from a view of relationship. The question then becomes what will constitute a contrary intent where one spouse adopts another. If the testator uses words of legal import such as "heir," "heirs," or "heirs at law," then the adopted spouse will inherit through the other spouse.[216] But if the testator uses such terms as "child," or "children," which are not legal words, then the adopted spouse will not inherit through the other spouse.[217] The line is drawn between legal relationships and those that are merely social.

In the cases where there have been changes in the adoption statutes the problem of which one is to be deemed applicable has arisen. In determining whether an adopted child comes within the class of remaindermen who are to take upon termination of the life estate, it has been decided that the adoption statutes in effect at the time of the termination of the life estate control and not the statute in effect at the time of the testaor's death.[218]

To be compared with inheritance by an adopted child is inheritance by an illegitimate child. A bastard is defined as a child conceived and born out of wedlock.[219] Under this statute a child conceived before marriage but born after marriage is born in wedlock and therefore legitimate. If the child is conceived in wedlock but born after the death of the father or dissolution of the marriage by divorce, the child is legitimate. An illegitimate child

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[212] Major v. Kammer, 258 S.W.2d 506 (Ky. 1953).
[213] Bailey v. Wireman, 240 S.W.2d 600 (Ky. 1951).
[214] 302 S.W.2d 594 (Ky. 1957).
[215] Note, 47 Ky. L. J. 149 (1958).
[216] Bedinger v. Graybill's Ex'r & Trustee, 302 S.W.2d 594 (Ky. 1957).
[217] Pennington v. Citizen's Fid. Bank & Trust Co., 390 S.W.2d 671 (Ky. 1965).
[218] Breckinridge v. Skillman's Trustee, 330 S.W.2d 726 (Ky. 1960); Edmands v. Tice, 324 S.W.2d 491 (Ky. 1959).
[219] KRS 406.010.

inherits only from the mother.[220] The major consequence of illegitimacy, the incapacity to inherit from the father, is illustrated by a recent case[221] where the illegitimate daughter claimed a child's portion of her father's estate despite illegitimacy by virtue of a special agreement which the father was asserted to have made with the mother that she would be willed the property or entitled to inherit as a child. There is a very strong presumption that a child conceived during wedlock is the child of the husband.[222] In order to rebut the presumption complete non-access or complete impotency of the husband must be shown.

One of the more interesting problems in the adoption field is the extent to which religion should be considered in a determination upon a petition for adoption. The statutes that have made pronouncements upon this matter are usually couched in slippery words.[223] Consequently, the language has been interpreted in various ways. One way is to give effect to the religious difference when it does not interfere with the best interests of the child.[224] On the other hand it is possible to allow the religious differences to control.[225] Yet another court has established the view that the legislature intended to give preference to persons of the same religion who are otherwise qualified to promote the welfare of the child.[226] The statute in Kentucky, which has not yet been interpreted, provides "that no placement shall be disapproved on the basis of the religious, ethnic, or inter-faith background of the adoptive applicant, if such placement is made with the consent of the parent . . . ."[227]

## CONCLUSION

The past decade of domestic relations law in Kentucky is characterized by stability and moderation. Of course there have been judicial and legislative changes, but no radical departure from precedent.

There are some signs of change. The 1954 Kentucky General

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[220] KRS 391.090(2).
[221] Napier v. Hodge, 293 S.W.2d 571 (Ky. 1956).
[222] Bradshaw v. Bradshaw, 295 S.W.2d 571 (Ky. 1956).
[223] Ill. Rev. Stat. ch. 4, sec. 4-2 (1955) (whenever possible); Mass Ann. Laws ch. 210 sec. 5B (1955) (whenever practicable).
[224] *In re* Duren, 355 Mo. 1222, 200 S.W.2d 343 (1947).
[225] Petition of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954).
[226] Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957).
[227] KRS 199.470(6).

Assembly made a beginning by directing the Judicial Council to make a thorough investigation of existing divorce law and of family courts, to be coordinated with studies of the entire court structure, but no substantial legislation along these lines has yet resulted.[228] In 1956, Kentucky's legislation permitting the fiscal court of any county to appoint a friend of the court was broadened and strengthened.[229] The Constitution Review Commission is presently considering some revision of the Kentucky judicial system to achieve reform in the judicial agencies with responsibility in family matters. The current volume of the *Kentucky Law Journal* contains articles discussing the merits of various reforms in family law.[230]

Kentucky's divorce laws are not extreme compared with most states. In regard both to the grounds required for divorce and the residence requirements for out-of-state applicants, Kentucky takes a representative middle stand somewhere between New York, where divorce is extremely difficult, and certain other states where residents and non-residents alike can procure a divorce on minimal grounds. The unreality of resolving marital problems through the adversary system of grounds and defenses in divorce proceedings has been pointed out. The grounds alleged are more often symptoms which have arisen after the marriage has failed rather than the underlying cause of the conflict. Proposals have been made to substitute other procedures for settling marital conflicts by the courts with the aid of non-legal specialists in family relations.[231]

In some other states, family courts, with jurisdiction over all aspects of the family, have operated for years, with bench and bar cooperating successfully with other disciplines in such matters as marriage counselling and family clinics. Because of the significance of the family as an integrated social-political institution, socio-economic considerations are of utmost importance. Certainly closer cooperation between lawyers and social workers is to be anticipated.[232]

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[228] See, Ky. Acts 1954, ch. 281, at 702; Ky. Acts 1954, ch. 268, at 689. See also, Comment, 46 Ky. L. J. 114 (1957).

[229] KRS 409.090 (1956).

[230] 54 Ky. L. J. 209-66 (1965).

[231] Bradway, *Collusion and the Public Interest in the Law of Divorce*, 47 Cornell L. Q. 374 (1962).

[232] Foster, *The Law and Social Work*, 53 Ky. L. J. 229 (1965).