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RESTRICTION ON TESTATION IN KENTUCKY, COMMON-LAW AND STATUTORY—WITH A SUGGESTED PLAN OF LEGISLATION

I *Introduction*

The 1956 General Assembly altered substantially several key provisions of the Kentucky Revised Statutes relating to the marital property rights of a surviving spouse.¹ The effect of the specific amendments will be discussed in detail later; for the present, suffice it to say that, policywise, the overall effect of these amendments was to liberalize the statutory share of the survivor. In making these changes the Legislature focused attention broadly on Kentucky's statutory provisions restricting testation. It is generally the purpose of this paper to consider these statutes and the case law which has developed around them with an eye to finding or developing some basic policy concept, then to utilize this policy in the formation of a comprehensive scheme of legislation. The value to be derived from having a strong guiding principle like this is exemplified by the field of workmen's compensation. There the social nature of the legislation, as well as statutory directive,² indicate an intent that the law be construed to favor the claimant. Thus, compensation cases that are technically hard can be resolved by resort to this abiding policy. It is hoped that a similar happy situation might obtain in this area of the law of succession.

A survey of the law of various countries and jurisdictions shows a variety of concepts and policies. In the civil law countries, for instance, testation is quite limited. The French *reserve* or *legitime* protects both ascendants and descendants, widows and children,³ while the German *Pflichtteil* reserves rights in the testator's lands to descendants, parents, and surviving spouses.⁴ And both, in addition, restrict inter vivos conveyances so as to favor children or parents. The English law, on the other hand,⁵ developed by 1832 to the point where almost complete freedom of testation was the rule.⁶ This policy was completely reversed, however, by the passage in 1938 of the Inheritance (Family Provision) Act.⁷ That legislation made it possible for the

¹ Ky. Rev. Stat. (hereinafter referred to as KRS) 392.010, 392.020, 392.090. The bill was introduced by Mr. Edward T. Breathitt of Hopkinsville and was considered as House Bill #7. These amendments became law on July 1, 1956.

² KRS 342.004.

³ Simes, *Public Policy and The Dead Hand* (1955), at 6; Kocourek and Wigmore, *The Rational Basis of Legal Institutions* (1923), at 462; Cahn, *Restraints on Disinheritance*, 85 U. Pa. L.R. 139, 140 (1936).

⁴ Simes, *supra* note 3.

⁵ 85 U. Pa. L.R. 139, 140 (1936).

⁶ Simes, *supra* note 3 at 10. An excellent summary of the developments in English law may be found in 25 Cornell L.Q. 337 (1940).

⁷ 1 & 2 George 6, 401. For analyses of the act, see 1 Modern L.R. 296, 25 Cornell L.Q. 337 (1940).

courts, upon proper application, to "rewrite" the will of a testator who failed to make "reasonable provision" for spouse or dependent children. Only by leaving two-thirds of his or her estate to the surviving spouse can the testator defeat the courts' jurisdiction—a far cry, indeed, from the old policy of complete freedom.

II *Present Restrictive Statutes and Their Application*

Operating generally between the two extremes of the English law, American jurisdictions, while retaining dower, have adopted a variety of means for restricting testamentary freedom. Prominent among these are homestead exemptions, family allowances, community property laws, provisions for pretermitted children, and the elective share. Simes finds that dower exists today "in over a score of states," that community property laws are in effect in eight states, that two states restrict testation primarily through generous homestead statutes, and that the right to elect against a spouse's will exists, in varying forms, in thirty-eight states.⁸ Pretermitted child statutes are, if anything, more prevalent than most of these.⁹

Homestead

Kentucky, in one form or another, has adopted all but one (community property) of these basic testamentary restrictions. Probably the least effective of the lot, by virtue of the obsolescence of its valuation provisions, is the homestead statute. Basically, this statute is designed to protect (if a one thousand dollar maximum can be said to protect) the family home from the depredations of creditors.¹⁰ However, Kentucky extends this protection to the surviving husband or wife and/or infant children.¹¹ This has created no little difficulty, as an investigation of the problem from the viewpoint of the prospective testator will show. In the first place, the interest is derivative.¹² It will not arise in favor of the widow or children unless the deceased has previously qualified as a "bona fide housekeeper with a family resident in this state."¹³ And even though he has thus qualified,

⁸ Simes, *supra* note 3 at 19.

⁹ 57 Am. Jur. 391.

¹⁰ KRS 427.060.

¹¹ KRS 427.070, 427.100. And the protection has been broadened to exclude claims of the heirs as well as creditors during the occupancy of the surviving spouse and/or infant children. *Lancaster v. Redding*, 16 Ky. L. Rep. 147, 26 S.W. 1013 (1894); *Gasaway v. Woods*, 72 Ky. 72 (9 Bush 1872).

¹² *Higgins v. Higgins*, 117 Ky. 725, 25 Ky. L. Rep. 1824, 78 S.W. 1124 (1904); *Runyon v. Runyon's Adm'x.*, 264 Ky. 823, 95 S.W. 2d 802 (1936). The court, by virtue of a bit of judicial legislation, appears to have made an exception to this requirement in the case of homesteads worth less than a thousand dollars. *Howard v. Mitchell*, 268 Ky. 429, 105 S.W. 2d 128 (1936).

¹³ KRS 427.060.

the interest is defeated if he sells the property¹⁴ or mortgages it.¹⁵ In addition, a purchase money mortgage or debt "existing prior to the purchase of the land or the erection of the improvements thereon" will always have priority over the homestead right.¹⁶

But our primary concern here is the effect of this statutory provision on the prospective testator. What of his right to dispose of the old home place? Apparently, judging by the dearth of decisions, his right to devise it to one outside of the immediate family has never been seriously contested in Kentucky. However, with the law in its present state, this should provide no problem, since the widow must elect among homestead, dower, and the will.¹⁷ And with real estate values what they are, dower (or the statutory share) would in the great majority of cases undoubtedly prove more valuable than the homestead right. This, coupled with the fact that the homestead is a mere right of occupancy,¹⁸ while dower is an estate in land,¹⁹ together with the fact that homestead must be shared with any infant children, while dower is the widow's right alone, make it extremely unlikely that homestead would ever be elected over both the will and the dower right.²⁰ For this reason, it seems, the prospective testator need pay very little attention to the homestead interest in making his will. Only when the total value of the dower right (which will undoubtedly be elected where the homestead property is devised to a third party) or of the homestead itself (if the testator devises it to the widow

¹⁴ *Hanna's Assignees v. Gay*, 117 Ky. 695, 25 Ky. L. Rep. 1794, 78 S.W. 915 (1904); *Pugh v. Pugh*, 279 Ky. 170, 130 S.W. 2d 40 (1939).

¹⁵ KRS 427.060.

¹⁶ KRS 427.060.

¹⁷ That an election is necessary between homestead and a will, see *Hazelett v. Farthing*, 94 Ky. 421, 15 Ky. L. Rep. 197, 22 S.W. 646 (1893) (surviving wife); *Schnabel v. Schnabel's Ex'x*, 108 Ky. 536, 22 Ky. L. Rep. 234, 56 S.W. 983 (1900), and *Jarboe v. Hayden*, 133 Ky. 378, 117 S.W. 961 (1909) (surviving husband).

¹⁸ *Lear v. Lear*, 234 Ky. 369, 28 S.W. 2d 32 (1930); *Ferguson v. Board of Drainage Com'rs. of Graves County for Mayfield Creek Drainage Dist. No. 2*, 299 Ky. 538, 186 S.W. 2d 16 (1945).

¹⁹ KRS 392.020.

²⁰ Before we judge too hastily the widow who cuts out her infant children by choosing dower or the will, let me point out that there is good authority for the proposition that the children retain their homestead, either in property taken under the will, *Schnabel v. Schnabel's Ex'x*, 108 Ky. 536, 22 Ky. L. Rep. 234, 56 S.W. 983 (1900), *Kieswetter v. Kress*, 24 Ky. L. Rep. 1239, 70 S.W. 1065 (1902), or in the elected dower share. In *Re Gibson*, 33 Fed. Supp. 838 (1940). However, equally strong authority to the contrary exists. *Hazelett v. Farthing*, 94 Ky. 421, 15 Ky. L. Rep. 197, 22 S.W. 646 (1893); *Jarboe v. Hayden*, 133 Ky. 378, 117 S.W. 961 (1909). *Russell and Merritt*, in their *Kentucky Practice, Probate Practice and Procedure* (1955), offer two separate rationalizations for these conflicting cases, in one section (238) suggesting that the existence or nonexistence of creditors determines the infant's rights and later (section 245) stating that the determining factor is whether the widow comes into her interest by operation of law or by will.

and/or children) is less than one thousand dollars, either for the reason that the property is of little value or that the testator is deep in debt, will the homestead provision be chosen to defeat his intention as expressed by his will. In those cases alone will claiming the homestead pay off.²¹

Generally, however, a testator may avail himself of devices much more likely to carry out his purposes. If he desires that the widow take only after his creditors have been satisfied, he may will the property to her. Unless she renounces the will, her rights will be subject to those of the creditors.²² If, on the other hand, he seeks to establish in her a right paramount to creditors, he may create a joint tenancy in the property with right of survivorship.²³ If he intends to cut off the widow and/or children from their homestead rights altogether, he need merely, as we have seen, sell the property.²⁴ But in the great majority of cases the mere existence of the dower statute is sufficient assurance that the widow will not exercise her homestead right.

Quarantine

Closely related to the homestead right is the widow's right of quarantine, secured to her by KRS 392.050. This statute merely makes interim provision for the widow, allowing her to occupy the mansion house and grounds and receive the rents and profits from dowable realty, pending assignment of her dower. It constitutes a very limited sort of restriction on the testator; the property so occupied eventually passes by the will.

Pretermitted Children

On the other hand, two statutory provisions clearly constitute restrictions on the freedom to dispose of property by will. The first, K.R.S. 394.380, concerns the pretermitted child in two situations. First, where the will is made before the testator has children, the afterborn child can have the court conditionally set aside the will, the condition being that if he dies under twenty-one, unmarried, and without issue, the will takes effect as intended.²⁵ In the second situation, the testator has children at the time of making the will;²⁶ the afterborn child in this case takes an intestate share, to be furnished by the legatees and

²¹ Note that any revision upward in the homestead allowance—and one is sorely needed—could alter substantially the effect of this statute as outlined here.

²² *Schnabel v. Schnabel's Ex'x*, 108 Ky. 536, 22 Ky. L. Rep. 234, 56 S.W. 983 (1900).

²³ 14 Am. Jur. 80.

²⁴ *Supra* note 14.

²⁵ KRS 394.380(1).

²⁶ By a recent case, *Scott v. Scott*, 291, S.W. 2d 551 (Ky. 1956), this includes a child as yet unborn who is provided for in the will.

devises ratably, subject, however, to reimbursement if the child dies, unmarried and without issue, before reaching twenty-one.²⁷

This statute has several significant aspects. In the first place, the testator can prevent operation of either section of the statute in favor of the afterborn child by providing for him in the will, expressly excluding him from the will, or by a settlement.²⁸ In at least one case, *Leonard v. Enochs*,²⁹ intent to expressly exclude was inferred from the fact that all children of the testator living at the time of the will's execution were also excluded. It has been argued that the same result should follow where the wife is pregnant at the time the will is executed, since failure to provide in such a case also indicates an intent to disinherit.³⁰ If this logic were consistently followed, the effect of sub-section (2) of the statute would be altered markedly. Instead of providing for *all* afterborn children not expressly included or omitted, it would provide only for those whose brothers and/or sisters took under the will. This appears to be a very reasonable limitation, since it seems quite logical to assume that the testator would not intend to provide for afterborn children if the children living at the time of execution of the will were not similarly taken care of. Despite this sort of judicial legislation, the fact remains that the child living at the time of execution who takes nothing by the will is not provided for at all by the statute.³¹ This means that his sole interest in his parent's estate is a tenuous, insubstantial homestead right. When compared with the child's lot in the civil law countries or under England's Inheritance Act,³² this seems a niggardly portion indeed.

A third aspect of this statute which warrants comment stems from the old common law rule that birth of issue to one childless at the time of execution of his will so changed his circumstances as to revoke the will. Subsection (1) of this statute apparently was intended to codify this rule, the result of which is that the testator's entire will could be nullified by his failure to "mention" afterborn children in a will made when he was childless.³³ This is not true under subsection (2), where

²⁷ KRS 394.380(2).

²⁸ KRS 394.380; and see, *Logan v. Bean's Adm'r.*, 120 Ky. 712, 87 S.W. 1110 (1905) (expressed intent to exclude); *Porter v. Porter's Ex'r.*, 120 Ky. 302, 86 S.W. 546 (1905) (settlement).

²⁹ 92 Ky. 186, 17 S.W. 437 (1891).

³⁰ 42 Ky. L.J. 35.

³¹ In twenty-six states, he is provided for. *Russell and Merritt, Kentucky Practice, Probate Practice and Procedure*, 255.

³² *Supra* note 7.

³³ *Knut v. Knut*, 22 Ky. L. Rep. 972, 58 S.W. 583 (1900), where the court, at p. 584, said, ". . . the statute declares the construction to be given the will, i.e., the devises and bequests are limited to take effect in the event appellant shall die under the age of 21 years, unmarried and without issue." Although this

the words indicate an intent that the will should stand.³⁴ But the careful draftsman should guard against operation of the statute in any manner by *always* making provision for the afterborn child. What, though, is to be done with the homemade will? The intent of the lay testator can easily be completely frustrated by a failure to mention the afterborn child. Not only this, but the legatees, devisees, and the child himself, must wait twenty-one years to be sure of their rights. Surely this subsection could profitably be revised along the pattern of subsection (2) so that rights of the legatees or devisees would be disturbed only so far as is necessary to make up the afterborn child's portion.

The second statute involving children of the testator is KRS 394.390. This provides that the child or grandchild of a testator takes an intestate share "as provided in favor of a pretermitted child,"³⁵ if he is either:

- (1) a child or grandchild of the testator
 - (a) who was living at the testator's death,
 - (b) whom the testator believed to be dead, both at the time he made the will and at his death, and
 - (c) who is neither expressly excluded or provided for by the will, or
- (2) a grandchild of the testator
 - (a) who was living at the testator's death,
 - (b) whose parent (child of the testator) died outside of Kentucky, which fact is known to the testator,
 - (c) whose existence is unknown to the testator, and
 - (d) who is neither expressly excluded or provided for in the will.

is actually no more than a direct quote from the statute, it indicates no inclination to vary from the plain meaning of the words. And, so far as the writer can determine, no subsequent Kentucky case has done so either. In addition, both Virginia and West Virginia have construed identical statutes as revoking the will entirely. *Wood v. Tredway*, 111 Va. 526, 69 S.E. 445 (1910) (will declared "void when he [child] arrives at the age of 21 or marries."). *Cunningham v. Dunn*, 84 W. Va. 593, 100 S.E. 410 (1919) (following *Tredway* and containing an excellent discussion of the entire problem).

³⁴ *Mann v. Peoples-Liberty Bank and Trust Co.*, 265 S.W. 2d 489 (Ky. 1953).

³⁵ What the statute means by, "as provided in favor of a pretermitted child," is not clear. In *Farber's Ex'r. v. Farber*, 282 Ky. 373, 138 S.W. 2d 986 (1940), the court says, "It is obvious from the reading of section 4842 [KRS 394.390] that the contesting of a will is not a prerequisite to making claim under that statute. In fact, the will stands, but the one making the claim, if substantiated, takes as if the testator had left no will." On a subsequent appeal of the same case, 285 Ky. 597, 148 S.W. 2d 732 (1949), the court held that the entire estate went over to the child from the party holding under the will—quite an about-face.

The last sentence of this section makes it possible for the presumption upon which this section is based—that the child was omitted by mistake—to be rebutted, thus preventing operation of the statute. On the whole, there has been very little litigation under this statute, and except for the problem surrounding the words, “as provided in favor of a pretermitted child,” which has been noted,³⁶ there seems little to add.

Personal Property Exemption

As the homestead statute limits the testator by reserving rights to his family in his realty, so the personal property exemption statute limits him by protecting rights of the family in his personalty.³⁷ KRS 391.030 says:

- (1) Where any person dies intestate as to his personal estate . . .
 (c) Personal property or money on hand or in bank to the amount of \$1500 shall be exempt from distribution and sale and shall be set apart by appraisers of the estate of an intestate to his widow and infant children, or if there is no widow to his infant children surviving him. . . .

Subsection (3) of the same statute extends this right to the case where the deceased dies testate and the widow elects against the will under KRS 392.080. In either case the money or property is “set apart” and never becomes a part of the estate. It therefore takes precedence over claims of heirs,³⁸ debts of the deceased,³⁹ and funeral expenses,⁴⁰ but not over prior liens such as mortgages or labor liens.⁴¹ Although the statute plainly seems to limit the right to the widow *and* infant children, or the infant children alone, it has nevertheless been held to apply in favor of a widow without children.⁴² It therefore must

³⁶ *Ibid.*

³⁷ An exception has been made where the widow uses the money or personalty on hand to pay the debts of the deceased, leaving less than her exemption in the till. In such a case, the court has allowed a sale of realty to repay the widow. *Nesbit v. Wood*, 22 Ky. L. Rep. 127, 56 S.W. 714 (1900); *Kilburn v. Holliday*, 295 Ky. 843, 175 S.W. 2d 516 (1943). And the same is true where the property has been misappropriated by others. *Meyers' Adm'r. v. Meyers*, 244 Ky. 248, 50 S.W. 2d 81 (1932).

³⁸ *Commonwealth v. Bracken*, 17 Ky. L. Rep. 785, 32 S.W. 609 (1895).

³⁹ *Thompson v. Thompson*, 117 Ky. 526, 25 Ky. L. Rep. 1626, 78 S.W. 418 (1904).

⁴⁰ *Blades v. Blades' Adm'r.*, 289 Ky. 556, 159 S.W. 2d 407 (1942); *Kilburn v. Holliday*, 295 Ky. 843, 175 S.W. 2d 516 (1943).

⁴¹ *International Harvester Co. v. Dyer's Adm'r.*, 297 Ky. 55, 178 S.W. 2d 966 (1944).

⁴² *Meyers' Adm'r. v. Meyers*, 244 Ky. 248, 50 S.W. 2d 81 (1932). *Russell and Merritt*, sec. 212, points out that the present statute was changed in 1912 from a widow *or* infant children to the present reading, which would indicate even more strongly that the legislative intent was to cut out the widow without children. Decisions since the change, which like the *Meyers* case above, pay no attention to this wording indicate that the argument may never have been advanced.

be reckoned with in all cases involving a married testator,⁴³ especially in view of the fact that, unlike homestead, the widow's exemption is cumulative, that is, in addition to the dower right under KRS 392.020.⁴⁴ The right, however, can be barred; a judicial summary of the ways in which this is accomplished appears in *Eversole v. Eversole*,⁴⁵ where the court said:⁴⁶

In this state the property rights of a widow in the estate of her deceased husband are controlled entirely by statute. She is entitled to an absolute estate in one-half of his surplus personalty, and to an estate for her life in one-third of his real estate [KRS 392.020], unless the right thereto has been barred, forfeited, or relinquished. She and the infant children of the decedent are also entitled to have set apart to them, as exempt from distribution and sale, personal property or money of the value of \$750 [changed in 1946 to the present \$1500]. . . . A wife may forfeit her interest in her husband's estate by adultery or bigamy. Kentucky Statutes, sections 2133 and 1217. [KRS 392.090 (2) and 392.100] Her interest may be barred by jointure or by divorce. Kentucky Statutes, sections 2136 and 2144. [KRS 392.120 and 392.090 (1)] She may also relinquish her dower right by deed or mortgage. Kentucky Statutes, section 2135 [KRS 392.040]. . . .

The court went on to hold in the *Eversole* case that since no statute barred the widow's rights in the event that she killed her husband, the court was foreclosed from preventing her assertion of those rights. The same line of reasoning was followed in *Meyers' Adm'r. v. Meyers*,⁴⁷ but has since been negated by the passage, in 1940, of KRS 381.280, which expressly prevents the widow from receiving her share of the estate if she killed her husband.

Dower and Curtesy

Two statutes, which, taken together, undoubtedly constitute the greatest restriction on Kentucky testators are KRS 392.020, the modern equivalent of dower and curtesy, and KRS 392.080, which extends to the surviving spouse of a testator the right to renounce the will and take the statutory share allotted under 392.020. As noted at the beginning of this note, the 1956 legislature amended both of these statutes. The changes made were as follows:

- (1) 392.020—Surviving spouse's interest was changed from a *one-third life estate* in *all* real property of which "the other spouse

⁴³ Not, however, in those cases involving a testatrix! This right does not run to the husband. *Hamilton's Adm'r. v. Riney*, 140 Ky. 476, 131 S.W. 287 (1910).

⁴⁴ *Miller v. Keown*, 176 Ky. 117, 195 S.W. 430 (1917).

⁴⁵ 169 Ky. 793, 185 S.W. 487 (1916).

⁴⁶ *Id.* at 794-95.

⁴⁷ *Supra* note 42.

. . . was seized of an estate in fee simple *during coverture*.
 . . .” to,

- (a) an estate *in fee*
 - (1) in *one-half*
 - (2) of the *surplus* real estate
 - (3) of which the spouse was seized *at death*, plus
- (b) an estate for life
 - (1) in *one-third*
 - (2) of *any* real estate
 - (3) of which spouse was seized during coverture but not at death.

(2) 392.080—Wording was clarified substantially, and

- (a) the right to renounce a spouse’s will was extended to the husband;⁴⁸
- (b) but no change was made in the interest given to the renouncing spouse (despite the liberalization made in favor of the spouse of an intestate), it remaining a one-third life estate in any realty and an absolute estate in one-half of the surplus personalty.⁴⁹

It is immediately apparent that the major changes are in favor of the surviving spouse of an intestate under section 392.020. The provisions which constitute limitations on testation were, with one exception, left unchanged. The lone exception is the inclusion of the surviving *husband’s* right to renounce his spouse’s will. And this, instead of proving to be a greater restriction on the testatrix, may very well prove to be a relaxation—for this reason: At common law it was presumed that any provision for one’s spouse in a will was intended to be in addition to his or her rights of dower or curtesy. In Kentucky, this presumption was reversed by 392.080, and an election was necessary unless a contrary intent was expressed in the will or “necessarily inferable” from it. However, the husband had no rights under 392.080, only the widow; therefore, the court construed another section, KRS 394.320, as giving a surviving husband the right to disclaim his spouse’s will.⁵⁰ Since the husband’s rights were not dependent upon 392.080,

⁴⁸ To make this complete, KRS 392.010 was also amended, excluding 392.080 as an exception to its direction that a husband’s interest in his wife’s estate be the same as her interest in his estate.

⁴⁹ Mr. Edward T. Breathitt, who introduced the amendments, explained, in a letter to the writer, that the reason for not changing this section was the fear that it would require a wholesale review and revision of existing wills.

⁵⁰ *Brand’s Exec. v. Brand*, 109 Ky. 721, 22 Ky. L. Rep. 1366, 60 S.W. 704 (1901); *Bottom v. Fultz*, 124 Ky. 302, 30 Ky. L. Rep. 479, 98 S.W. 1037 (1907).

the common-law presumption that they were in addition to provisions for him in his spouse's will continued. As a result, it was held that the husband of a partially testate spouse might take both his curtesy rights under the statute and the property given him by the will.⁵¹ Obviously, such a ruling was a greater restriction on the testatrix than was the statutory rule on the testator, which forced the widow to an election. Therefore, the legislature, by including the surviving husband in KRS 392.080, has indicated an intent that the surviving husband's rights in his spouse's estate be curtailed. The net effect of this is to give to a testatrix *greater* freedom in the disposition of her estate than she formerly had.

If we say, then, that the amendments impose no *new* burden on testation, it remains for us to determine what limitations these statutes do place on the testator. It should be obvious. Since the surviving spouse is given the right to renounce the will and take, in its stead, his or her statutory share, it is reasonable to assume that in order to minimize the chances of renunciation the prospective testator must will the surviving spouse property that is roughly equivalent to the value of the statutory share⁵² plus (in the case of a widow) the \$1500 exemption.⁵³

In assaying the relative value of the will provision and the statutory share, two points are important. First, a careful classification of the testator's property as real or personal must be made. The statutory share in realty, though only a one-third life estate, is taken from all real property owned⁵⁴ by the testator during coverture and is not subject to the claims of creditors. The interest in personalty, on the other hand, is an absolute estate in one-half but applies only to property owned at death, and only to such of that as is "surplus." This classification, therefore, could conceivably make a substantial difference in the amount due the widow. Apparently however, despite the numerous

⁵¹ Voss v. Stortz, 177 Ky. 541, 197 S.W. 964 (1917).

⁵² This is obviously only a generalization, and this problem would have to be considered in each case in relation to the personalities involved, the particular property concerned, and all the thousand-and-one other factors which could easily cause balance sheet comparisons to be secondary. It should also be noted that the will provision needn't equate the personal property given with the statutory personalty or the realty with the realty, merely the overall value, since the will must be rejected in its entirety. Morguelan v. Morguelan's Ex'r., 307 Ky. 94, 209 S.W. 2d 824 (1948).

⁵³ The value of this might not be actually \$1500, if a forced division with infant children were likely. For a discussion of the cases involving division see, Russell and Merritt, Probate Practice and Procedure, 159-161 (1955).

⁵⁴ "Seized," as used in 392.020, has been construed by the Kentucky Court to mean "owned." Chalk v. Chalk, 291 Ky. 702, 165 S.W. 2d 534 (1942); Pursifull's Adm'x. v. Pursifull, 299 Ky. 245, 184 S.W. 2d 967 (1945).

borderline problems which might arise.⁵⁵ it has caused no serious problem in Kentucky, except, perhaps, in the case of oil or gas leases.⁵⁶

Having classified the property as real or personal, it remains to decide whether that property is subject to allocation as part of the statutory share. In most cases this will cause no great problem. However, in some of the borderline cases and even in some where the interest is concededly real in nature,⁵⁷ this question must be settled. The solution has been said by the court to depend on any one of several things. In some cases the decision has turned on the statutory requirement of fee simple ownership,⁵⁸ in others on a perpetuation of the common-law concept of seisin,⁵⁹ and in still others upon a determination of whether the deceased spouse did or did not have the beneficial ownership.⁶⁰ Finally, some of the problems have been settled by statute.⁶¹ Each of these factors should be considered by the draftsman in any attempt to determine the value of the statutory interest. An analysis of what is or should be the determinative factor in each case is beyond the scope of this article, but has been dealt with in detail both in a note in the *Kentucky Law Journal*⁶² and in Russell and Merritt's *Probate Practice and Procedure*.⁶³

Jointure and Agreements

The problems involved in considering the statutory share and the widow's exemption may be avoided by agreement—either antenuptial⁶⁴ or postnuptial⁶⁵—or by a conveyance or devise “by way of Jointure.”⁶⁶ Both types of agreements, as might be expected, are subject to attack

⁵⁵ See 16 Am. Jur. 793-794.

⁵⁶ Russell and Merritt, 1 *Probate Practice and Procedure* 80 (1955).

⁵⁷ *Van Camp v. Evans*, 306 Ky. 59, 206 S.W. 2d 38 (1947).

⁵⁸ *Bodkin v. Wright*, 266 Ky. 798, 100 S.W. 2d 824 (1937) (no dower in a life estate); *Van Camp v. Evans*, 306 Ky. 59, 206 S.W. 2d 38 (1947) (no dower in an oil and gas lease where lessee was obligated to develop the property); *Trimble v. Kentucky River Coal Corporation*, 235 Ky. 301, 31 S.W. 2d 367 (1930).

⁵⁹ *Landers v. Landers*, 151 Ky. 206, 151 S.W. 386 (1912) (Dower allowed, however, in a defeasible fee, even though the fee expires upon death without issue, since this is an “inheritable estate.”); *Goodrum's Guardian v. Kelsey*, 244 Ky. 349, 50 S.W. 2d 932 (1932) (no dower in a remainder, since the deceased spouse did not have “possession”).

⁶⁰ 39 Ky. L.J. 120 (1950) and specifically, the instances noted at pages 123 (land subject to equities and liens) and 127 (land held in trust and land under contract of sale).

⁶¹ KRS 392.040.

⁶² 39 Ky. L.J. 120 (1950).

⁶³ Vol. 1, Secs. 105-117 (1955).

⁶⁴ *Stephens v. Stephens*, 181 Ky. 480, 205 S.W. 573 (1918); 33 Ky. L.J. 197 (1945).

⁶⁵ *Coleman v. Coleman*, 142 Ky. 36, 133 S.W. 1003 (1911).

⁶⁶ KRS 392.120.

on the basis of fraud.⁶⁷ The antenuptial agreement, being in consideration of marriage generally, must comply with the statute of frauds,⁶⁸ but an agreement between husband and wife need not unless there is some other reason, such as the involvement of real estate.⁶⁹ Except for these problems, the agreement is a very effective instrument by which to bar the surviving spouse's statutory claim.

Jointure, preserved by statute in Kentucky,⁷⁰ is not actually a separate and distinct means by which to extinguish a spouse's statutory rights, despite its possible common-law interpretation. Today, it is a generic term, including the two types of agreements discussed above as well as any devise or conveyance made with the intent that it be in lieu of the statutory share. It is important to remember, however, that jointure, like the statutory share, may be permanently barred by divorce (KRS 392.090(1)), adultery (KRS 392.090(2)), bigamy (KRS 392.100), or voluntary release by deed (KRS 392.040).

It should be clear from this rather abbreviated discussion of the statutes that Kentucky has no clear statutory policy in this area. The statutory provisions are piecemeal and, as a result, complicated by a wealth of case law. They manifest neither a clear policy to restrict testation nor to provide uniformly for the natural objects of the testator's bounty. Therefore, instead of the sort of revision made by the 1956 legislature, these sections require wholesale repeal and replacement. To give this statement added emphasis one need only look to the problems raised by the failure of the statutes to prevent evasion by *inter vivos* conveyance.

III *Evasion of the Statutes by Inter Vivos Conveyance*

The statutes discussed thus far enunciate certain rules. They declare generally that certain of the natural objects of a person's bounty may not be effectively ignored by him in his will. Failure of a testator to abide by these rules makes it possible for the specified statutory objects to have his will set aside, in whole or in part, in order that provision be made for them. Not everyone, however, loves the natural objects of his bounty. As a result, it is almost inevitable that attempts will be made to circumvent the statutory directives. In this particular area the obvious method is to make an *inter vivos* gift,⁷¹

⁶⁷ *Coleman v. Coleman*, 142 Ky. 36, 133 S.W. 1003 (1911) (post-nuptial); *Harlin v. Harlin*, 261 Ky. 414, 87 S.W. 2d 937 (1935) (ante-nuptial).

⁶⁸ KRS 371.010(5).

⁶⁹ KRS 371.010(6).

⁷⁰ KRS 392.120.

⁷¹ Where the property is transferred for a valuable consideration there is no problem. Not only would it impose an intolerable burden on the free transfer-

since if the deceased has no property at death, there is no need to evolve a testamentary scheme complying with the statutory requirements. To prevent this, courts generally have been forced to a certain amount of judicial legislation in order to carry out the intent of the legislature and insure that the statutory objects are provided for.

In Kentucky the statutes provide, in various ways, for the surviving spouse, children and grandchildren—no one else. At least two of the statutes, one providing for pretermitted children and one providing for unknown grandchildren, expressly declare that their provisions may be foreclosed from operation by the testator; he need merely state an intent that the issues be excluded from sharing in his estate.⁷² Similarly, the homestead statute does not preclude, and has therefore been construed as allowing, the sale of the homestead property⁷³ by the head of the family. Under the homestead exemption statute, the question of evasion by inter vivos gift has not arisen, probably because any gift which would defeat this right of the wife would also defeat her statutory right under KRS 392.020. This latter being the more substantial interest, it would undoubtedly be asserted instead. The net result of all this is that we are concerned almost solely with the dower or curtesy right in cases of evasion. That statute alone, in Kentucky, creates a substantial right in a natural object of the testator's bounty, *unlimited by any reservation to the testator of a right to defeat it*. And this is true in most states. As a result, the problem of evasion by inter vivos gift is generally concerned with only the husband and wife and their statutory share.

The General Common-Law Rule

Before proceeding further, one proposition should be made clear. Although our discussion to this point might tend to indicate a general rule that marriage limits the power of a man to gratuitously dispose of his property during his lifetime because of the statutory restraints on testation, actually, the converse is true. As stated in a recent ALR annotation:⁷⁴

The fundamental rule is that a husband may make an absolute gift or other voluntary disposition of his property during his lifetime, without violating any marital rights of his wife.

ability of goods and property to allow a spouse to attack paid-for transfers, but it would fly in the face of the general rules protecting a bona fide purchaser. Where the transferee has notice of or is party to the fraud, of course, payment of valuable consideration will not be a defense to the action of the surviving spouse. See, generally, 26 Am. Jur. 813.

⁷² KRS 394.380, 394.390.

⁷³ Supra note 14 and 15.

⁷⁴ 49 A.L.R. 2d 521, at 528 (1956).

The writer then goes on to list three exceptions to the general rule: (1) cases where the statute itself gives the spouse an estate or interest in the property during the owning spouse's lifetime (for example, the Kentucky statute which creates an inchoate right in real property of either spouse), (2) instances where the courts have said the transfer made was merely "colorable" or "illusory" and (3) situations wherein the court has deemed the transfer to be a "fraud" on the marital rights of the surviving spouse. Any elaboration on the first type, the statutory exceptions, would be beyond the purview of our discussion here. We are concerned instead with the latter two judicial concepts and their operation outside of the letter of the statute.

A prime example of adherence to the basic concept, as stated above, is found in the Pennsylvania cases. Though prevented from applying the general rule across the board by a statute which reserves to the wife an interest in all *realty* owned during coverture,⁷⁵ the Pennsylvania courts have consistently allowed the husband to dispose of personalty by inter vivos conveyance, even though his intent was to "hinder his wife from sharing in his estate."⁷⁶ As one court put it:⁷⁷

It is the settled law of this state that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then only, do the rights of his wife attach to his personal estate.

The Pennsylvania courts have ostensibly placed a limitation on this sweeping disregard of the spouse's marital rights, by holding that a showing of *actual fraud* will defeat the husband's inter vivos conveyance.⁷⁸ This, of course, offers the wife no unique protection, because such an action is available to the least of the claimants against her husband's estate. Not only that, but it becomes available to her only in the most serious cases, as where there is collusion between the husband and the transferee,⁷⁹ or where there is an intent to defraud

⁷⁵ Purdon's Pa. Stat., Tit. 20, sec. 15 (1950).

⁷⁶ Potter Title and Trust Co. v. Braum, 294 Pa. 482, 144 A. 401 (1928).

⁷⁷ Lines v. Lines, 142 Pa. 149, 165 21 A. 809 (1891).

⁷⁸ Ibid.

⁷⁹ See the language in Potter Title and Trust Co. v. Braum, 294 Pa. 482, 144 A. 401, 402 (1928), where the court said,

". . . the husband may dispose of such property by voluntary gift inter vivos, without his wife's consent, and free from any claim on her part, *provided collusion to defraud the wife is not established; if such intention does appear, the gift will be set aside; . . .*"

Beirne v. Continental-Equitable Trust Co., 307 Pa. 570, 161 A. 721, 723 (1932), where the court said:

"In the cases first above, cited . . . the question of the husband's or wife's intent to commit an actual fraud . . . was not considered. . . . In the later authorities . . . however, it is treated as the

an erstwhile spouse of her alimony,⁸⁰ or where the transfer is a mere sham or pretense, not actually passing the property rights.⁸¹ It does not, on the other hand, prevent the husband from establishing a trust and retaining the right to receive income, to revoke, to amend, or (at least by the statement of one dissenting judge) to control and manage the property in the hands of the trustee.⁸² In short, it makes virtually no inroad on the general proposition that a spouse is free to make an inter vivos conveyance of any property in which the other spouse has no present interest.

The "Illusory Transfer" Exception

As noted at the outset, other jurisdictions have been more liberal than Pennsylvania in making exceptions to the general rule. These exceptions have developed along two general lines, one group of states, Kentucky included, placing emphasis on the transferor's intent, the other school looking only to whether the transfer is real or "illusory." At first blush this latter view seems only to be the Pennsylvania doctrine revisited, and, as a matter of fact, the leading case on the subject, *Newman v. Dore*,⁸³ cited several of the Pennsylvania decisions, even quoting from one as follows:⁸⁴

The 'good faith' required of the donor or settlor . . . does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property.

However, after determining that retention by the settlor of the income for life, the right to revoke, and the right to control the trustee's management of the fund rendered the transfer in question illusory, the Court went on to say:⁸⁵

We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory. Question of whether reservation of the income or of a power of revocation, or

vital factor, and if *actual fraud* upon the other spouse is shown to have been the real cause of the transfer . . . the conveyance is held void."
(All emphasis added)

But cf. cases cited in the dissenting opinion at 725.

⁸⁰ *Armstrong v. Connelly*, 299 Pa. 51, 149 A. 87 (1930).

⁸¹ See the Potter case, supra note 79, in which the court, at page 402, said, ". . . the 'good faith' required of the donor in making a valid disposition of his property during his lifetime does not refer to the purpose to affect his wife, but to the intent to divest himself of the ownership of the property." Virtually the same language was used in *Benkart v. Commonwealth Trust Co. of Pittsburgh*, 269 Pa. 257, 259, 112 A. 62, 63 (1920) and earlier cases cited there.

⁸² *Beirne v. Continental-Equitable Trust Co.*, 307 Pa. 570, 161 A. 721 (1932).

⁸³ 275 N.Y. 371, 9 N.E. 2d 966, 112 A.L.R. 643 (1937).

⁸⁴ 9 N.E. 2d at 969, quoting from *Benkart v. Commonwealth*, supra note 81.

⁸⁵ *Ibid.*

both, might even without reservation of the power of control be sufficient to show that the transfer was not intended in good faith to divest the settlor of his property must await decision until such question arises.

It seems clear that the court was of the opinion that it was possible to constitute a trust, which though valid in itself (although this one probably was not), would still be "illusory" as to the surviving spouse. Such an opinion is well removed from the Pennsylvania notion that the widow may set aside only transfers that in fact passed no property right.

Unfortunately, however, this idea received only passing acceptance in subsequent New York cases⁸⁶ before being almost completely repudiated in the case of *In Re Halpern's Estate*,⁸⁷ where the court sustained a Totten Trust against the surviving widow's attack, fully aware, I have no doubt, that such a trust represents the maximum in retention of control and benefit by the donor. The *Halpern* position is apparently the unquestioned rule in New York today;⁸⁸ and the *Newman* view of the illusory test now finds its chief exponent in the Supreme Court of Ohio. That court, in *Bolles v. Toledo Trust Co.*,⁸⁹ citing the *Newman* case, held that a trust instrument which reserved to the settlor the income for life and the right to amend or revoke, although a valid trust in itself, was invalid to the extent that it deprived the surviving wife of her statutory rights. This proposition has been followed in the only subsequent Ohio case on the point,⁹⁰ although it should be noted that the decision was 4-3 and accompanied by vigorous dissenting opinions. As a result, the illusory test, insofar as it attempts to provide the surviving spouse with a mode of attack unavailable to other claimants against the estate, appears to hang by a slim thread, even in the state where it is most strongly entrenched. Notwithstanding this, however, it is clear that the concept of *Newman v. Dore* remains as a possible weapon with which to curtail a spouse's

⁸⁶ For example, *Krause v. Krause*, 285 N.Y. 27, 32 N.E. 2d 779 (1941); *Steinier v. Bowery Savings Bank*, 86 N.Y.S. 2d 747 (S. Ct. 1949).

⁸⁷ 303 N.Y. 33, 100 N.E. 2d 120 (1951).

⁸⁸ *In re Freistadt's Will*, 279 App. Div. 603, 107 N.Y.S. 2d 466 (2d Dept. 1951); *In re Friesing's Estate*, 123 N.Y.S. 2d 207, 210 (1953), where the court said,

"The Court of Appeals has now weakened that concept [the *Newman v. Dore* view that a trust might be valid generally but invalid as to the surviving spouse] by its statement that if the creation of a savings bank account in trust for a designated beneficiary constitutes an illusory transfer, it is wholly bad, and not partially bad, so that the fund becomes an estate asset for all purposes, and not for the limited purpose of satisfying the surviving spouse's expectant interests therein."

⁸⁹ 144 Ohio St. 195, 58 N.E. 2d 381, 157 A.L.R. 1164 (1944).

⁹⁰ *Harris v. Harris*, 147 Ohio St. 437, 72 N.E. 2d 378 (1947).

attempts to evade these restrictive statutes. And although Kentucky has not as yet seen fit to adopt it—despite at least two good chances⁹¹—it should not be discounted as a possible means for accomplishing this purpose. It is quite conceivable that a fraud or intent test such as we have now, will not be adequate in a comprehensive piece of legislation.

The "Fraudulent Transfer" Exception—Kentucky

As we have already noted, the Kentucky treatment of the inter vivos conveyance as a means of evading the statute is based on what has been described as a "fraud" or "intent" test. This test, although it represents a minority view insofar as it constitutes an exception to the basic rule (absolute freedom of inter vivos transfer unless prevented by statute),⁹² has become firmly fixed in several jurisdictions as a means of thwarting inter vivos destruction of the spouse's statutory share.⁹³ It should not be confused with the Pennsylvania doctrine, which required actual fraud before the spouse has an action. Instead, the proposition here is that a conveyance made with intent to divest the wife of her statutory share in the property conveyed is a fraud on her marital rights. The problem involved, of course, is that of showing intent. Frequently, this is an impossible task. As an aid, the Kentucky Court has indulged in certain presumptions, which give the Kentucky courts considerable discretion in the disposition of this sort of problem.⁹⁴

An excellent summary of the Kentucky position was made by Chief Justice Pryor, in 1886, in the case of *Fennessey v. Fennessey*.⁹⁵ The case involved an antenuptial gift by the husband-to-be to his children by a former marriage. The facts were strongly against the second wife, but she sought to claim her statutory share in the property transferred, nevertheless. Judge Pryor, in upholding the conveyances, clearly identified Kentucky with the fraud or intent test when he said:⁹⁶

⁹¹ *Cochran's Adm'x. v. Cochran*, 273 Ky. 1, 115 S.W. 2d 376 (1938); *Martin v. Martin*, 282 Ky. 411, 138 S.W. 2d 509 (1940).

⁹² 42 Ky. L.J. 616, 628 (1953); 85 U. Pa. L.R. 139, 151 (1936).

⁹³ For instance, *Missouri, Wanstrath v. Kappel*, 356 Mo. 210, 201 S.W. 2d 327 (1947); *New Hampshire, Ibey v. Ibey*, 93 N.H. 434, 43 A. 2d 157 (1945).

⁹⁴ See the bouquet tossed our way in 85 U. Pa. L.R. 139, 151, in fn. 42, where several of the more important Kentucky cases are cited. On the other hand, at least one writer disagrees rather vigorously with this opinion of the Kentucky rules, at least so far as they are based on intent. For a thorough discussion of the merits of the illusory test and a summary dismissal of any test based on intent, see, *Inter Vivos Trusts and Election*, 42 Ky. L.J. 616.

⁹⁵ 84 Ky. 519, 8 Ky. L. Rep. 477, 2 S.W. 158 (1886).

⁹⁶ *Id.* at 479, 2 S.W. at 158.

[T]he reported cases canceling such conveyances make the *fraudulent intent* with which they are made the question to be determined by the jury or the court, and the parties holding under the deed may show that no fraud was intended or practiced on the party complaining. (Emphasis added)

He then went on to state what might be called the "Kentucky Presumption:"⁹⁷

In this State the substance of the decisions are, that for the husband before marriage to convey the whole or the greater portion of his estate away without the knowledge of the wife is a fraud on her rights . . . where any such voluntary conveyances are made without the knowledge of one of the contracting parties [husband or wife] it presents a *prima facie case* of fraud, subject to be explained by the parties interested, and the burden is on the grantees to establish the validity of the deed. (Emphasis added)

The court ultimately held that the conveyances in question were not made with intent to defraud the wife, and explained that:⁹⁸

Where the intention is to provide for the children, and not to defraud the wife, *and the advancement or gift is reasonable, when considered with reference to the property owned by the donor or grantor*, the chancellor will uphold the transaction . . . (Emphasis added)

This apparently is an attempt to equate the rights of the two parties who are most naturally the objects of the deceased spouse's bounty, his wife and his children.

What Judge Pryor said substantially summarizes the present Kentucky law. Basically, intent to defraud the wife's statutory rights must be shown.⁹⁹ It may be shown in any case where there is an attempt to avoid operation of the statute, either by an antenuptial conveyance of realty¹⁰⁰ or personalty,¹⁰¹ or by a transfer during coverture of personalty.¹⁰² The requisite intent may be shown from the evidence¹⁰³ or presumed from testimony showing that (1) the surviving spouse had no knowledge of the conveyance¹⁰⁴ and (2) that the property so

⁹⁷ Id. at 482, 2 S.W. at 160.

⁹⁸ Id. at 483, 2 S.W. at 160.

⁹⁹ See also, *Martin v. Martin*, 282 Ky. 411, 138 S.W. 2d 509 (1940).

¹⁰⁰ *Leach v. Duvall*, 71 Ky. 201 (8 Bush 1871); *Goff v. Goff's Ex'r.*, 175 Ky. 75, 193 S.W. 1009 (1917).

¹⁰¹ *Patterson v. Patterson's Ex'r.*, 15 Ky. L. Rep. 755, 24 S.W. 880 (1894); *Wilson v. Wilson*, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901).

¹⁰² *Manikee's Adm'r. v. Beard*, 8 Ky. L. Rep. 737, 2 S.W. 545 (1887); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. 2d 2 (1930).

¹⁰³ *Manikee's Adm'r. v. Beard*, 8 Ky. L. Rep. 737, 2 S.W. 545 (1887); *Redmond's Adm'r. v. Redmond*, 112 Ky. 760, 66 S.W. 745 (1902).

¹⁰⁴ *Murray v. Murray*, 90 Ky. 1, 13 S.W. 244 (1890) (where an antenuptial conveyance known to the wife was upheld but postnuptial transfers of which she knew nothing were deemed fraudulent as to her); *Smith v. Erwin*, 26 Ky. L. Rep. 760, 82 S.W. 411 (1904) (where knowledge of the transfer by the wife defeated

conveyed constituted the bulk of the decedent's estate.¹⁰⁵ The latter requirement has been modified by the rule, also set out by Judge Pryor, that it is not a fraud upon the wife to make reasonable provision for one's children.¹⁰⁶ As a result, it would probably be more accurate to say that the presumption will arise when there is an *unreasonable* gift or advancement—rather than a gift of all or the bulk—made without the wife's knowledge. Reasonableness here is determined by looking at (1) the value of the gift in relation to the value of the decedent's estate and (2) the relationship or dependency of the donee to the decedent and, as will be shown, (3) other facts and circumstances.

Applying these rules the Court in the past has found no difficulty in striking down, as unreasonable and as a fraud on the marital rights of the surviving spouse, gifts which constituted the entire estate of the decedent,¹⁰⁷ or the bulk or greater part of it,¹⁰⁸ whether the gifts were made to children of the decedent or to others. It has been equally consistent in *upholding* gifts where they consisted of a minor portion of the whole estate¹⁰⁹ or where the wife had knowledge of the transfer.¹¹⁰ Those cases falling in between these extremes present more difficult problems, but they come closer to helping determine what is reasonable and what is not. In each of them the decision seems to turn on one or another of the factors mentioned. In *Murray v. Murray*,¹¹¹ for example, the total estate concerned was \$46,000; of this \$34,000, or approximately seventy-four per cent, had been conveyed to the decedent's sons by means of inter vivos gifts. The remainder was bequeathed by a will which failed to name the wife and which we are left to assume was renounced. These facts, said the Court, established a prima facie case of fraud which was not rebutted by the evidence. As a result, the value of the property conveyed was included

her claim); *Goff v. Goff's Ex'rs.*, 175 Ky. 75, 193 S.W. 1009 (1917) (where evidence was held to sustain widow's contention that she did not know of the conveyance in question, allowing her to set aside deed to husband's sons).

¹⁰⁵ *Gibson v. Gibson*, 12 Ky. L. Rep. 636 (1890); *Wilson v. Wilson*, 23 Ky. L. Rep. 1229, 65 S.W. 981 (1901); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. 2d 2 (1930); *Cochran's Adm'x. v. Cochran*, 273 Ky. 1, 115 S.W. 2d 376 (1938).

¹⁰⁶ *Patterson v. Patterson*, supra note 101; *Goff v. Goff's Ex'rs.*, 175 Ky. 75, 193 S.W. 1009 (1917).

¹⁰⁷ *Leach v. Duvall*, 71 Ky. 201 (8 Bush 1871); *Gibson v. Gibson*, 12 Ky. L. Rep. 636 (1890); *Cochran's Adm'x. v. Cochran*, 273 Ky. 1, 115 S.W. 2d 376 (1938).

¹⁰⁸ *Wilson v. Wilson*, supra note 101; *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791 (1919); *Payne v. Tatem*, 236 Ky. 306, 33 S.W. 2d 2 (1930); supra note 99.

¹⁰⁹ *Patterson v. Patterson*, supra note 101, involving a gift of \$20,000 out of a total estate of \$100,000.

¹¹⁰ *Murray v. Murray*, supra note 104 at 4, 13 S.W. at 246. *Smith v. Erwin*, 26 Ky. L. Rep. 760, 82 S.W. 411 (1904).

¹¹¹ 90 Ky. 1, 13 S.W. 244 (1890).

in the total estate, and, after allowing a reasonable advancement for the sons, the widow was awarded \$10,000. Thus we see that a gift of seventy-four per cent of the decedent's total estate, even though made to his children, is unreasonable and will raise a presumption of fraud—especially where the wife is cut off by the will. No further figures are given, but we can deduce from this that a reasonable provision, depending upon whether the widow's provision is satisfied wholly from the gifts or ratably from the gifts and legacies, would be somewhere between \$24,000 (fifty-two per cent) and \$27,000 (sixty per cent). This would indicate that under the Kentucky rules, a quite substantial gift to *children* may be considered reasonable as to the surviving wife. It also points up the discretionary power that is exercised by the Court in such cases, a sort of dispensing authority to determine who is entitled and to what extent they are entitled.

A similar exercise of discretion is demonstrated by *Goff v. Goff's Ex'r.*,¹¹² where shortly before his marriage to the plaintiff, the decedent, without the knowledge or consent of the plaintiff, conveyed realty to his two sons and his daughter, all children by a former wife. In upholding the conveyance to the daughter but not those to the sons, the Court looked to several factors. Strong in favor of validity in the court's eyes were the facts that (1) the donees were children of the decedent for whom he had a right to make reasonable provision; (2) the wealth of the decedent was bottomed on an original seven or eight hundred dollars furnished by his former wife and due in large part to her "economy," "thrift," and "untiring energy;" and (3) the decedent had repeatedly promised his former wife that he would make provisions for the daughter. In favor of the widow's contentions, said the court, was the fact that the decedent had previously provided for the sons by a substantial conveyance of realty. It was this latter factor which led the court to the conclusion that the gift to the daughter was a reasonable provision for her while those to the sons were unreasonable and a fraud on the widow's rights. This is the same sort of over-all appraisal found in the *Murray* case. Based on the consideration of the relationship of the parties, the size of the gifts, the source of the husband's wealth, and the existence or non-existence of previous gifts to the children, the court decided just what each of the litigants deserved to receive from the deceased's estate. In effect, the court, in its determination of what was reasonable, drew a will for the deceased spouse and father.

This concept reached a peak in 1949 in the case of *Benge v. Bar-*

¹¹² 175 Ky. 75, 193 S.W. 1009 (1917).

nett.¹¹³ There the court decided that a gift to brothers and sisters, unknown to the wife, of 45% of the personal property of the decedent was unreasonable and, hence, a fraud on the widow's rights. The court made it clear that "bulk" of the estate, as used in the Kentucky cases, meant anything over one-half of the total estate. But even this watering-down of the general test failed to fully sustain their holding, since they had presumed fraud from a gift of only 45% of the personal estate. To explain this, they stated:¹¹⁴

In this case, since the gifts by the deceased to the brother and sisters amounted to about 45% of the personalty owned at the time of making them without the knowledge or consent of his surviving widow, *we must look to other facts and circumstances disclosed by the record in order to determine whether or not they raised a presumption of fraudulent intent. . . .*

The facts to which they looked were two, (1) that the gift made, though not the bulk of the decedent's personal estate, was a substantial portion thereof, and (2) that by decedent's will the widow was given exactly what she would have taken as her statutory share of the remaining estate. This, they said, was tantamount to saying, "I do not want my wife to receive any portion of the personal property that I own at my death." What should have been said was that in any case where the answer is doubtful, the court will determine whether, upon a consideration of all the facts and circumstances, the widow is deserving and to what extent she is deserving.

Undoubtedly, reading this philosophy into the court's treatment of a few close cases could warrant the criticism that we are making mountains out of molehills. A close scrutiny, however, of just the bare rules, as set out in the *Fennessey* case, will show that this sort of discretion is at least *available* to the court. On the one hand, they are allowed to presume fraud where one spouse has given away the "bulk" of his or her estate. On the other, they are allowed to determine what constitutes the "bulk" in view of a rule that the spouse may make reasonable provision for his children. And the cases demonstrate that the test of reasonableness as a limitation on "bulk" is available beyond those cases involving children-donees alone; *Benge v. Barnett* clearly demonstrates this. Not only that, but the court has continually broadened its scope with regard to the factors that it may consider in determining whether to presume fraud or not. Bearing on the question, it has said, are such factors as failure to provide for the spouse by will,¹¹⁵ source of original capital,¹¹⁶ role of earlier spouse in

¹¹³ 309 Ky. 354, 217 S.W. 2d 782 (1949).

¹¹⁴ *Benge v. Barnett*, supra note 113 at 358.

¹¹⁵ *Murray v. Murray*, supra note 104; *Benge v. Barnett*, supra note 113.

¹¹⁶ *Goff v. Goff's Ex'r.*, supra note 100.

assisting to amass the wealth,¹¹⁷ dependency or non-dependency of the donee,¹¹⁸ existence or non-existence of earlier gifts,¹¹⁹ representations of security by the donor to his wife-to-be,¹²⁰ regard of donor for donee,¹²¹ and generally suspicious circumstances.¹²² Surely, if the court may in its discretion look to such a variety of factors as these, not to determine actual fraud, but *merely to presume fraud*, it has for all practical purposes a very effective tool with which to impose its notions of an equitable distribution of the deceased spouse's estate. And if such a climate as this exists in the present Kentucky law, is it not time to give the courts jurisdiction to compel fair distribution of estates? This jurisdiction coupled with a statutory provision by which the testator, through a reasonable will, could deprive the courts of their jurisdiction, could solve many of the problems and answer many of the complaints to which our present system is subject. To develop this sort of plan, however, requires considerable cleaning up.

IV *The Proposed Remedy*

The problems presented by Kentucky's present patchwork provisions for dependents of a testator should be apparent. The homestead provisions, for example, are in most cases worthless; and although this objection might be removed by raising the maximum allowable value, the problems of the testator in developing his testamentary plan would thereby be multiplied. On the other hand, to erase the homestead statute from the books completely would eliminate one of only two statutory provisions for non-pretermitted children of the testator.¹²³ And so we have an impasse; but it is by no means the only inadequacy in our system. The provisions for children generally make no sense. Children of whom the testator has either lost track completely or who were born after the will's execution come in for their full intestate share, while children in existence when the will was made are cut out completely unless the will provides for them.¹²⁴ Admittedly the presumption that the testator would want to provide

¹¹⁷ *Fennessey v. Fennessey*, supra note 95; *Goff v. Goff's Ex'r.*, supra note 100.

¹¹⁸ *Anderson v. Anderson*, 194 Ky. 763, 240 S.W. 1061 (1922); *Payne v. Tatem*, supra note 102; *Benge v. Barnett*, supra note 113.

¹¹⁹ *Goff v. Goff's Ex'r.*, supra note 100.

¹²⁰ *Wilson v. Wilson*, supra note 100.

¹²¹ *Payne v. Tatem*, supra note 102.

¹²² *Anderson v. Anderson*, supra note 113.

¹²³ The other is the widow's exemption which goes to either the widow or the infant children. KRS 391.030.

¹²⁴ For authority to the effect that frequently a pretermitted child will take a larger share by intestacy than even a child named in the will, see Mathews, *Pretermitted Heirs: An Analysis of the Statutes*, 29 Col. L.R. 748, 768.

for afterborn or lost children has its roots in reason. But reduced to a statutory rule it soon loses its rationality. For instance, it would be hard to rationalize the case where the testator leaves everything to his wife on the assumption that she will adequately provide for the family, only to have a prodigal son or afterborn child come in and demand his intestate share. The result in such a case is not only inequitable but indicative of the damage that can be wrought on an otherwise carefully planned testamentary scheme by a statute that gives an absolute right as opposed to judicial discretion.

Many of these complaints cannot be honestly directed at the statutes providing for the surviving spouse. Not only are these sections generous but the survivor's interest is mathematically calculable, making it possible for the testator to minimize the chances of an election against the will by making a will provision for the spouse that will match the elective share under the statute. In addition, the rights are real and well protected. As soon as any piece of real property is acquired by one spouse, an inchoate interest—equivalent to a one-third life estate—arises in the other. And it remains, even though the property is conveyed away, unless both of them join in the deed. The personal property exemption is likewise a valuable right; \$1500 is set apart immediately following the death of the husband and is thus never even included in the estate. And finally, the statutory share in real and personal property, although a mere expectancy until one spouse's death, is protected from inter vivos nullification by the judge-made rules discussed in the last section. However, the picture does have its darker side. The same provision is made in all cases, whether the widow involved is a faithful wife and loving mother of forty years standing or a young fortune-hunter who has contributed nothing and expects everything. Perhaps it is too much to expect the legislature to protect a man from his follies, but would it be too much to ask them to help? Would it be unreasonable, for instance, to have them lower the absolute amount of the elective share and permit the court, on application of the surviving spouse, to determine what a reasonable provision for him or her would be? As pointed out earlier, a result similar to this is already being reached in Kentucky in cases involving inter vivos conveyances used to avoid the statutes. It could be, however, that this solution as to the surviving spouse would be inequitable or unworkable as to children or other heirs. The matter requires a broader look.

Taking this broad look, certain conclusions seem undeniable. First—and foremost—it should be obvious that any legislation in this area is or will be a compromise between two conflicting interests.

On one hand a testator has an interest in being able to dispose by will of his accumulated wealth. On the other hand, his dependents have an interest in being reasonably provided for after his death. In Kentucky today the statutes attempt to reconcile these conflicting interests by rule, with a different point of balance established for each of several classes of people. This creates a confused situation in which neither interest receives full consideration in every case. It is this very situation which makes apparent my second point, that Kentucky has developed no *general* policy which requires consideration in any proposed legislation. The legislature has, however, made clear a *specific* policy in the case of a surviving spouse, a policy that husband and wife be treated alike and that this treatment be generous. This attitude was emphasized by the action of the 1956 assembly. A third point is demonstrated by the cases of fraud on marital rights; they make it clear that in a given case the Kentucky Court, considering all the facts and circumstances, is willing to make its own determination of what constitutes a reasonable disposition of a testator's property. With these conclusions in mind, the author makes the following recommendations:

(1) Institution of any comprehensive system of legislation requires repeal of all present statutes restricting testation. In the case of the homestead statute this would include only that section which preserves the right to the widow and/or infant children; its operation to prevent the sale of the homestead property by creditors during the life of the owner would be unaffected. All of the other sections, the pretermitted and unknown child statutes, the quarantine provision, the widow's exemption, and the section permitting the surviving spouse to elect a statutory share in lieu of the will would be eliminated completely. This would, however, have no effect on intestate succession or on the surviving spouse's intestate rights.

(2) Once the board is clean, legislation meeting two basic requirements should be enacted. One requirement is certainty. So long as a testator is to be restricted in the disposition of his property he deserves to know—and this will be of especial concern where a very large estate is involved—that by meeting his legal obligations he can prevent disruption of his testamentary scheme. The other requirement is flexibility. Any legislation in this area should, unlike our present statutes, enable the courts to take into account the multitudinous factors which bear on an individual case. It must avoid the inequities inherent in any system which makes the same provision in all cases, a system which allows the widow proportionately the same interest in a thousand dollar estate as is awarded a widow whose husband leaves a million.

Concededly, these characteristics make contrary demands. The writer firmly believes, however, that these demands can be reconciled in a system of legislation having the following characteristics:

(a) *Fundamentally, it must be discretionary.* An excellent prototype would be the English Inheritance Act.¹²⁵ This legislation, enacted in 1938 and based on the New Zealand Family Protection Act of 1908,¹²⁶ gives certain dependents¹²⁷ of the testator the right to come into court and contest the will if that dependent is "of the opinion that the will does not make reasonable provision" for his or her maintenance. The court then hears the evidence and, subject to certain limitation,¹²⁸ makes such provision for the applicant's maintenance as it deems "reasonable." Certain factors are set out as guides for the court in determining what is a reasonable provision, but these could hardly be considered serious limitations on the court's discretion, since the Act further allows a court to look to "any other matter or thing which in the circumstances of the case the court may consider relevant or material to that dependent, to the beneficiaries under the will or otherwise."¹²⁹ Nevertheless, at least one writer has felt that more equitable results have been reached under the New Zealand Act where no limitations at all are placed on the court's discretion, either as to amount or factors involved.¹³⁰ His argument is persuasive—at least as a suggestion to prospective legislators, since the temptation to limit the courts in their discretion can, once yielded to, become a runaway and eventually destroy the whole character of the legislation. Whichever of these views is taken, however, the fact remains that the power given the court by the legislation must be primarily discretionary.

This discretionary character, by itself, meets our requirement for flexibility. The court can look to all of the facts and circumstances that it has been accustomed to consider in the marital fraud cases, thus actually deciding each case on its merits. Desirable as this is, however, it is certainly going to meet with one objection. And that is that the courts will be flooded with litigation. The argument seems

¹²⁵ *Supra* note 7.

¹²⁶ 8 Edw. VII (1908).

¹²⁷ The term dependents (spelled dependants there) is used in the Act as a generic term covering the spouse and children of the decedent alone.

¹²⁸ They are limited in the case of a surviving spouse with dependents to an allowance of two-thirds of the net annual income from the estate, and in the case of a surviving spouse alone or children alone to one-half of the net annual income. However, in the case of an estate worth less than two thousand pounds, the court may give not only all income but may invade the principal.

¹²⁹ *Supra* note 125 at 403.

¹³⁰ 53 Harv. L.R. 465, 469 (1940).

tenable, but as a matter of fact, under neither the British nor New Zealand legislation has this been the result. Under the New Zealand Act, after thirty years of operation, only seventy-seven of a total of 4,396 wills had been contested—a mere 1.75%.¹³¹ The experience in Great Britain has been substantially the same; after five years only eleven cases had been reported.¹³² At least one English reviewer attributes much of this success to family solidarity, and substantiates his position by a review of the cases, almost all of which arose from unhappy or abnormal unions. In view of the prevalence of divorce, separation, and second marriages in this country it might be arguable that our success could not be so complete. It seems doubtful, however, that the American family has disintegrated to the point where this sort of legislation would be absolutely unworkable.

(b) *A second requirement is that the courts be given a workable standard.* In New Zealand, where none was set out in the legislation, the courts have spent a half century developing one; they have come to the position that they should look at a case from the viewpoint of a just and reasonable, but not a loving, testator under the circumstances.¹³³ It would seem foolish not to profit by this experience by adopting a similar standard.

(c) *The statute should not create an absolute right in any of the decedent's property.* It has already been noted that the English Act only authorizes the court to give a decree for maintenance and support. I see no reason for a Kentucky statute to differ. Although heretofore our only experience has been with statutes creating absolute rights—for example the homestead right or the widow's exemption—the underlying purpose of those statutes has been to provide for support and maintenance. As pointed out previously, however, it has been impossible for them to accomplish this because of their inability to adjust to individual cases. For instance, the widow whose husband wills away all of his \$4,000 can claim only a statutory one-third life estate; in reality, she needs and should probably have the whole amount, although in view of her generally limited business experience, it is probably best that it not be given her in a lump sum. The proposed statute, which can take into account such factors as the standard of living to which the spouse has been accustomed, the length of her marriage (disposing of the fortune hunter), and her actual needs, can remedy these inequities.

¹³¹ 1 Mod. L.R. 296, 304.

¹³² 6 Mod. L.R. 215, 226.

¹³³ *Supra* note 30 at 468.

(d) *Relief should be available to surviving spouses and children of the testator.* Persons outside of this group have no legal claim for support during the life of the decedent and there appears to be no reason for changing this at his or her death. If they *are* being supported by the testator it must be voluntary and, therefore, will probably be continued by terms of the will. In addition, the present Kentucky statutes, as well as the statutes of most other states, go no further than the immediate family.

The English Act limits the right of action in the case of surviving spouses to widows and widowers; remarriage terminates not only this right but any support payments being made under the Act. This seems eminently sound and should be incorporated in any Kentucky legislation. So should the English provision which keeps a physically or mentally incapable child eligible during his incapacity. Not so, however, other sections concerning the children. These state that no son over twenty-one who is physically and mentally capable of maintaining himself is eligible under the Act. The same is true of a married daughter who is physically and mentally capable of maintaining herself. This has several failings. In the first place, it results in a preference for the unmarried daughter which is unwarranted under modern conditions. In view of the availability of temporary or career employment for women it would seem that most daughters today should be as well able to support themselves as sons. On the other hand, however, both son and daughter should be eligible for support until they have completed their education, even beyond majority. This sort of thing would have to be limited in order to prevent scholastic "bums", but it is a real necessity.

In an attempt to incorporate the desirable features of the English law and to correct its failings, the author suggests the following:

- (1) That a child of either sex be eligible for support so long as he or she is physically or mentally incapable of supporting himself or herself.
- (2) That a physically capable daughter be eligible for support until such time as she marries or, if she does not marry, until such time as she reaches twenty-one or completes her education, whichever last occurs.
- (3) That a physically capable son should be eligible under the Act until such time as he reaches twenty-one or completes his education, whichever last occurs.
- (4) That a surviving spouse be eligible under the Act until remarriage.

It should be kept in mind with regard to each of these that eligibility in no sense means right to *support*; it means only right to *bring an action* contesting the will.

(e) *The statute should make it possible for a testator to avoid the jurisdiction of the courts by making a specified provision for spouse and/or children.* Undoubtedly, this should not be allowed in cases of small estates, since the entire estate might well be required to provide the necessary support. This principle has been recognized in New York where a statute precludes the surviving spouse, in the case of a large estate, from electing against the will if the testator sets up a testamentary trust providing income for life from property amounting to no less than one-third of his estate.¹³⁴ This is a good model but without modification would be too arbitrary for our purposes. A fairer system would be to provide a sliding scale, requiring the poor testator to make greater provision, percentage-wise, than the rich. Although at first blush this seems anything but fair, when it is remembered that our objective is to provide reasonable maintenance and support, it should be clear that a smaller portion of a \$500,000 estate is necessary to support a wife and/or children than is necessary in the case of a \$10,000 estate, even taking into consideration the different standards of living. Of course, any such scale would have to be the product of extensive investigation; an arbitrary set of standards or one which could be rendered obsolete by economic swings could make a mockery of the entire statute.

(f) *Broad discretion should be given the courts to strike down any inter vivos conveyance made in an attempt to evade the statute.* The present state of the Kentucky law, as analyzed earlier—and especially in view of the broad language used in *Benge v. Barnett*¹³⁵—would undoubtedly suffice in this regard. To give general legislative sanction to this practice, section thirty-three of the Model Probate Code might profitably be used as a model. It provides:

(a) *Election to treat as a devise.* Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) *When gift deemed fraudulent.* Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.¹³⁶

¹³⁴ N.Y. Dec. Est. Law, Sec. 18.

¹³⁵ Supra note 113.

¹³⁶ Simes, Problems in Probate Law, 72-73 (1946).

This section, though framed to complement the statutory share type of legislation found in the Model Code, has desirable basic characteristics which would fit into our plan. It uses the broad phrase "in fraud of the marital rights", which should indicate an intent to incorporate much of our present law. At the same time it puts the burden to disprove fraud on any donee of a gift made within two years of death. This latter provision goes the one extra step necessary to "put teeth" into the statute and should discourage attempts at evasion.

V *Conclusion*

The author feels that the foregoing suggestions, though undoubtedly subject to modification and refinement, form the nucleus of a workable and intelligent plan, which would, as much as possible, reconcile the conflicting interests that are brought to bear on any legislation of this nature. These proposals recognize the need for consideration of each case in light of all the attendant circumstances, avoiding, almost completely, arbitrary rules. At the same time, the prospective testator can intelligently predict whether or not his testamentary scheme will be disturbed—can even make a provision that will eliminate the possibility entirely. Finally, if his will is upset, the extent of damage done will assuredly be in direct proportion to the unreasonableness with which he acted in making his will.

J. Leland Brewster