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Domestic Relations--Legitimacy Saving Statutes--Children of Common Law Marriages

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(2) The judge should be made criminally liable in cases of gross negligence in determining the adequacy of security.[55]

(3) Since it is evident that the security for bail is often extremely inadequate, an *initial*, separate deposit, which would be available if the security failed to satisfy all claims against it, should be required of the professional bondsman when he applies for a license.[56]

(4) *All* forfeited bonds should be carefully collected.[57]

(5) A lien should be placed on the property which is pledged for security.[58]

(6) Amounts of bail should be less when given by a friend or relative than if offered by a professional bondsman.

These suggested reforms are not intended to be all-inclusive but adoption of them would greatly aid the proper administration of bail. Until such reforms as these are adopted, the bail system as a process of the criminal courts will continue to be inadequate.

LUTHER HOUSE

DOMESTIC RELATIONS—LEGITIMACY SAVING STATUTES—CHILDREN OF COMMON LAW MARRIAGES

The question arises whether the children of an attempted common law marriage,[1] which is void in Kentucky, have been made legitimate by the statutes. This question, uncomplicated by other issues, has never been decided in Kentucky since the abolition of common law marriages in 1852.[2]

Three statutes are applicable. First, Section 391.100 of the Kentucky Revised Statutes seemingly legitimates the issue of common law marriages, together with most other void marriages, by the following language:

[55] *Supra* note 7 at 119; A.L.I. CODE OF CRIM. P. sec. 112 (1930). This would also be analogous to the liability of the common law. *See*, 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 584 (2d Ed. 1905).

[56] 102 PENN. L.R. 1031, 1063 (1954).

[57] See U.S. v. Field, 190 F. 2d 554 (1951), where the court jailed a surety for refusing to give aid to the court in obtaining custody of an accused who had absconded.

[58] *Supra* note 56.

[1] As used in this note, a common law marriage is defined as a marriage based upon mutual consent of the parties to become husband and wife, *per verba de presenti*, then and there, without any formal ceremony. An attempted common law marriage refers to a factual situation which would raise a valid common law marriage in a state recognizing common law marriage.

[2] Ky. Acts 1850, c. 617, p. 212, secs. 2 and 8, effective July 1, 1852.

> (1) The issue of a marriage found to be incestuous by the conviction of the party or by the judgment of a court during the lifetime of the parties, or of a marriage between a white person and a negro or mulatto is not legitimate.
> (2) The issue of all other illegal or void marriages is legitimate.

Further, Section 402.020 seems to include common law marriages among the "void" marriages contemplated by the Legislature, by the following:

> Marriage is prohibited and void: (1) With an idiot or lunatic; (2) Between a white person and a Negro or mulatto; (3) Where there is a husband or wife living from whom the person marrying has not been divorced; (4) When not solemnized or contracted in the presence of an authorized person or society; (5) When at the time of marriage, the male is under sixteen or the female is under fourteen years of age.

However, Section 406.010, on its face might be thought to make illegitimate the issue of a common law marriage when it provides:

> Any child shall be considered a bastard if: (1) It is begotten and born out of lawful wedlock and not made legitimate thereafter by recognition and marriage of its parents as provided by KRS 391.090.[3]

An "illegal or void" marriage is not "lawful wedlock." Thus, taken alone, Section 406.010 would indicate that the issue of "illegal or void" marriages could be made legitimate only by a subsequent valid marriage of the parents. Such a result, however, would render Section 391.100(2) meaningless.

This apparent conflict between Sections 406.010 and 391.100(2) is resolved by interpreting them to supplement rather than conflict with each other. Thus Section 406.010 applies to the situation where there has been no marriage of any kind prior to the birth of issue. In order to legitimate under this section, by subsequent "recognition and marriage," there must be a subsequent ceremonial marriage[4] or a common law marriage contracted in a state where such are recognized.[5] On the other hand, Section 391.100(2) has within its purview the situation when before the birth of issue there has been a marriage which is "illegal and void," but the children of which are nevertheless legitimate.[6]

[3] KY. REV. STAT. sec. 391.090(3) (1953) provides: "If a man who has a child by a woman afterward marries her, the child or its descendants, if recognized by him before or after marriage, shall be deemed legitimate."

[4] Helm v. Goin, 227 Ky. 773, 14 S.W. 2d 183 (1929); Bates v. Meade, 174 Ky. 545, 192 S.W. 666 (1917).

[5] Copenhaver v. Hemphill, 314 Ky. 356, 235 S.W. 2d 778 (1952).

[6] Bates v. Meade, *supra* note 4; Harris v. Harris, 85 Ky. 49, 2 S.W. 549 (1887); Sneed v. Ewing, 5 J. J. Marsh. (28 Ky.)

It is submitted that Section 402.020(4) must necessarily include common law marriages when it speaks of marriages "not solemnized or contracted", since Section 402.070 specifically validates marriages performed by unauthorized persons or societies if entered into in good faith by one or both parties.

We must therefore determine whether an attempted common law marriage is an "illegal or void marriage," the issue of which is legitimated under Section 391.100(2), or whether it is no marriage at all, which would result in illegitimacy under Section 406.010. A further part of this problem is whether the "illegal or void marriages," the issue of which are legitimated by Section 391.100(2), are limited to the "prohibited and void" marriages enumerated in Section 402.020.

As these questions have never been resolved by the Kentucky Court of Appeals, it would seem appropriate, therefore, to examine the cases decided under related sections of the statutes and the interpretation of similar statutes in other jurisdictions in order to determine the state of the law.

Due to the paucity of decisions under Section 391.100, it is necessary to look to decisions under Section 391.090, the most closely related section, to find some indication of the attitude of the court toward the problem and the probable state of the law regarding it. The decisions under Section 391.090 are consistent in holding that a *ceremonial* marriage is required where legitimacy is sought from recognition and subsequent marriage. The writer has been unable to locate a single case since the abolition of common law marriage in Kentucky wherein the court has given any effect to or recognition of an attempted common law marriage contracted in Kentucky. There is a strong possibility that the same reasoning that is used in cases under Section 391.090 would be used by the court to deny legitimacy sought under Section 391.100 to issue of an attempted common law marriage.[7]

[7] There are a number of examples of language used by the Court, which indicates its view that only a ceremonial marriage can have a legitimating effect. In *Bates* v. *Meade, supra* note 4, the Court said:

> . . . [U]nder our statutes the marriage may be void but the children, born after the marriage, will be legitimate, if a marriage was consumated under the forms and ceremonies of the law of the state . . . subject to the exception . . . (incest and miscegenation)

In the same opinion, the Court quotes and adopts the language of *Harris* v. *Harris, supra* note 6, saying:

> The Court then after a reference to section 2098, (now KRS 391.100–Ed. note) providing, in part, that "the issue of void marriages shall be legitimate," said "Where a marriage actually takes place, that is, when it is solemnized according to the forms of law . . ." Turning now to sections 1398 [now KRS 391.090–Ed. note] and 2098, [now KRS 391.100–Ed. note] it will be seen that they provide for two different states of case–one when the child is born before the

Strong arguments to the contrary may be made, however. In the first place, the problem under Section 391.100 is quite distinguishable from that under Section 391.090. Since the latter involves legitimatizing children of prior meretricious relationships it is natural that more scrupulous attention to the legal formalities should be required and that the subsequent marriage necessary for legitimacy should be held to contemplate only valid marriages which must be ceremonial. On the other hand, Section 391.100 states as its purpose the saving of the legitimacy of issue of void marriages. It is arguable that a child of an attempted common law marriage should be included among the legitimated issue of void marriages.

While it must be recognized that the courts have placed heavy emphasis on ceremonial marriage and have consistently refused to permit an attempted common law marriage to legitimate issue under the

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marriage takes place; the other when it is the offspring of a void marriage, but in both sections the legislative intent was the same—to save the children from illigitimacy if a marriage was solemnized between the parties.

Bates v. *Meade, supra* note 4, is an extremely interesting case illustrating the interplay between sections 391.090 and 391.100. There, several children were born to a man and woman outside of lawful wedlock prior to a subsequent ceremonial marriage which was bigamous because of a living undivorced spouse of one of the parties. Several other children were born to this man and woman after their bigamous ceremonial marriage. The children born before the marriage were legitimated by the subsequent marriage and recognition by the father under Section 391.090. Those children born after the marriage, though beyond help under Section 391.090, which contemplates a marriage subsequent to the birth of children, were nevertheless held to have been legitimated as children of a void marriage under the legitimacy saving statute, Section 391.100.

In *Helm* v. *Goin, supra* note 4, at 777 Ky., 14 S.W. 2d at 185, an attempted common law marriage was relied upon to establish legitimacy. If valid, this marriage would have also been bigamous. In holding the attempted common law marriage insufficient to legitimate, the Court said:

> It being admitted that she was not born in lawful wedlock, the burden was on her to show a subsequent lawful marriage to bring her within the statute. This under all the evidence, she failed to do. A mere common-law marriage is not sufficient.

In *Todd* v. *Bowman*, 285 Ky. 117, 122, 147 S.W. 2d 75, 78 (1941) an attempt was made to raise a common law marriage with no impediment. But here the Court said:

> It (the evidence) was, as we view it, of sufficient weight and quality to overcome the presumption of ceremonial marriage . . . (and) to indicate no more than a common law marriage.

Apparently the Court questioned whether a common law marriage was actually established under the circumstances, saying: "In this case it may be doubted whether proof was sufficient to establish a marriage by reputation. . . ."

The only exception to the Court's refusal to give any effect to a common law marriage attempted in Kentucky is found in decisions under the Workmen's Compensation Act, KY. REV. STAT. sec. 342.080 (1953), which specifies that "Compensation to any dependent shall cease at the death or legal or common-law marriage of such dependent. . . ." See *Gilbert* v. *Gilbert*, 275 Ky. 559, 122 S.W. 2d 137 (1938); *Edgewater Coal Co.* v. *Yates*, 261 Ky. 335, 87 S.W. 2d 596 (1935); *Nolan* v. *Giacomini*, 250 Ky. 25, 61 S.W. 2d 1055 (1933); *Elkhorn Coal Corp.* v. *Tackett*, 243 Ky. 694, 49 S.W. 2d 571 (1932).

statute providing for legitimation by subsequent marriage and recognition (Section 391.090), this is not to say, however, that an attempted common law marriage might not be permitted to legitimate under the different provisions of Section 391.100 if uncomplicated by other factors.

There are strong reasons why such a marriage should legitimate. An indication that such might be the result is found in *Copenhaver* v. *Hemphill*, where the court said:

> We can see no distinction between a void ceremonial marriage and a void common-law marriage. The intention of the statute was to protect the innocent victims of these illegal relationships, and with two exceptions . . . [incest and miscegnation], the legislature has declared that the issue of void marriage shall be legitimate.
>
> If appellee's mother and . . . [father] had gone through a civil ceremony of marriage . . . we think there would be no question of appellee's right to inherit from her father. Instead of doing this, her parents so conducted themselves as to create the relationship of common-law marriage. While in either case the marriage would be void, the legislature has declared the issue shall be legitimate. The decision of the Chancellor to this effect was correct.[8]

It should be pointed out, however, that the common law marriage in that case was contracted in Ohio, where such were recognized as legal, and was void because bigamous. It is believed that the decision should be the same had the common law marriage been contracted in Kentucky. Such a result would be in accord with the spirit of the law and the trend of decisions in other jurisdictions.

Furthermore, the legitimation statute is in derogation of the common law, and Kentucky, contrary to many states, requires by statute a *liberal* construction of such acts.[9] In addition, the statute is remedial in nature and the usual rule, applicable in Kentucky, is that such statutes are to be liberally construed.

Kentucky has been true to these rules of construction in cases where bigamy has been involved.[10] At worst, an attempted common law marriage is a misdemeanor penalized by a fine of from $20 to $50,[11] while bigamy is a felony carrying a penalty of three to nine year's imprisonment.[12] For the court to legitimate the offspring of the felonious relationship while bastardizing the issue of the attempted common law marriage, a mere misdemeanor, would seem an exaggerated premium to place on ceremonial marriage.

[8] *Supra* note 5 at 358, 235 S.W. 2d 779.
[9] KY. REV. STAT. sec. 446.080(1) (1953).
[10] *Supra* note 4.
[11] KY. REV. STAT. sec. 436.070 (1953).
[12] KY. REV. STAT. sec. 436.080 (1953).

The children of an attempted common law marriage are surely no less innocent than those of a bigamous ceremonial union. When even the issue of a *bigamous*, common law marriage in a state recognizing common law marriage is legitimated,[13] by the Kentucky statute, the same statute should certainly be construed to include the issue of a simple common law marriage attempted in Kentucky.

The Court of Appeals, in a slightly different but analogous connection, said in *Bates* v. *Meade:*[14]

> The full extent to which the legislature has gone in the effort to save the innocent and punish the guilty may be well illustrated by a comparison of sections 1216[15] . . . with section 2098[16] of the statutes. So that if a man who has a wife living from whom he has not been divorced should marry another woman, he will be guilty of the crime of bigamy and the marriage be void, yet the children born of such a marriage will be legitimate.

In addition to the Kentucky cases, which, it is submitted, lay a fair groundwork for legitimacy in the situation here discussed, there is yet another source to which we may turn for light. Since the Kentucky statute is derived directly from an early Virginia statute (the prototype of most American legitimation acts) the interpretation by Virginia courts of the Virginia statute should be of great aid in construction of the Kentucky act. The Virginia act passed in 1785,[17] of course, applied at that time to Kentucky. It said, in part: "The issue in marriage deemed null in law, shall, nevertheless, be legitimate." This statute became part of the common law of Kentucky in 1792 with the adoption of the first Constitution.[18] Then in 1796 the Kentucky legislature passed a statute reenacting verbatim the Virginia act of 1785,[19] and the Court of Appeals has said:

> . . . From that time to this the idea expressed in the Act of 1796 has been the statute law of the State, although some verbal changes have been made in the form of the statute, as may be seen by a comparison. . . . The changes, however, did not affect the substantial thing intended to be accomplished by the original section. . . .[20]

[13] *Supra* note 5.
[14] *Supra* note 4 at 556, 192 S.W. at 666.
[15] KY. REV. STAT. sec. 436.080 (1953).
[16] KY. REV. STAT. sec. 391.100 (1953).
[17] 12 LAWS OF VIRGINIA (Henning 1823) 139-140.
[18] KY. CONST. ART. 8, sec. 6 (First Constitution): "All laws now in force in the State of Virginia, not consistent (sic.) with this Constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State until they shall be altered or repealed by the Legislature."
KY. CONST. SEC. 233: "All laws which, on the first day of June 1792, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly."
[19] THE STATUTE LAW OF KENTUCKY 557 (Littell 1810).
[20] Bates v. Meade, *supra* note 4 at 550, 192 S.W. at 668.

The leading case under the Virginia act of 1785 is *Stones* v. *Keeling*.[21] This case, decided before the Kentucky act had been judicially construed, has been followed consistently in Virginia and other States having similar acts. The immediate question before the court was legitimation of issue of a bigamous marriage. The opinions by two eminent jurists took occasion, however, to declare the general spirit in which this and similar acts have ever since been interpreted.

Judge Tucker,[22] in his opinion, says:

> [T]he law ought to receive the most liberal construction; it being evidently the design of the legislature, to establish the most liberal and extensive rules of succession to estates, in favour of all, in whose favour the intestate himself, had he made a will, might have been supposed to be influenced.[23]

Judge Roane said, in part:

> . . . [I]f the legislature should ever be supposed to consider every second marriage, living a first husband or wife, as criminal, wherefore should they visit the sin of the parents on the innocent and unoffending offspring? But this was not the temper of the legislature. . . . [T]he children of a man and woman, who afterward intermarry, if recognized by him, shall be thereby legitimated (New Code, 170 sec. 19.) . . . If the legislature has legalized children begotten in open fornication, where there is no marriage or semblance of a marriage, it is reasonable presumption that they at the same moment, and by the same clause ment also to include the offspring of marriages, which, though void in law, and unfortunate, may be nevertheless excusable, and even innocent.
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> It was said . . . that the construction . . . is inadmissable, as tending to encourage bigamy. It was well said in answer . . . that considerations of this kind, in relation to the offspring, form no part of the inducements to marriage: but this is not all. The legislature itself has given the answer.[24]

That this liberal spirit has continued in the Virginia courts up to the present is evidenced by *McClaugherty* v. *McClaugherty*,[25] where, in determining the legitimacy of issue of an attempted common law marriage, the court said:

> . . . [D]ecisions of the Supreme Court of Appeals of West Virginia, and dicta of the distinguished judges of our own Supreme Court of Appeals, concurred in by the entire court, are each entitled to much respect. They concur . . . to legitimitze the issue of common

[21] 5 Call. 143 (Va. 1804).

[22] St. George Tucker was successor to the illustrious George Wythe as professor of law at the College of William and Mary when Wythe became Chancellor of Virginia. Judge Tucker published the first American textbook of law—an edition of Blackstone's Commentaries, and was for many years prominent among the leaders of the American bar.

[23] *Supra* note 21 at 144.

[24] *Supra* note 21 at 146-148.

[25] 180 Va. 51, 21 S.E. 2d 761 (1942).

> law marriages. This construction is supported by sound reasoning from the Virginia decision. There is no Virginia authority to the contrary.
>
> To deny the protection of this section to the innocent and unoffending offspring of common law marriages requires the most narrow and technical construction of the phrase "marriage deemed null in law," defeats the intention of the Legislature as determined by our Virginia court, and violates the principle of liberal construction laid down by them.[26]

Since the Kentucky legitimacy saving statute was originally lifted bodily from the Virginia act it may be assumed that the Kentucky Legislature intended it to have the same meaning and effect in Kentucky as in Virginia.

Of all Virginia's many children, probably none is so near the parent in its jurisprudence as West Virginia, the youngest. As the preceding quotation indicates, the Virginia courts attach great weight to the decisions of West Virginia courts construing matters of first impression in Virginia based on common statutes. The legitimation acts of both West Virginia and Kentucky closely resemble the Virginia statute and arose from it. Therefore, the interpretation given this statute, common to these three states, by the West Virginia court should be a powerful beacon to the Kentucky court in a like situation.

In 1929 the West Virginia Supreme Court of Appeals decided the case of *Kester* v. *Kester*,[27] which is almost exactly in point with the hypothetical situation to which this note is directed. The legitimacy of a number of children depended on the sufficiency of an attempted common law marriage, void in West Virginia, to legitimate by operation of the legitimacy statute. In construing the West Virginia statute, blood brother of the Kentucky act, the court said:

> The case was tried on the theory that the right of these children to inherit depended upon whether there was a legal marriage of their father and mother according to the statutes of the state. . . . But that theory is not controlling of the rights of these infants in this case.
>
> It is quite evident that, even if the marriage was not according to the statutes of this state, it was a common-law marriage. But it is urgently argued that common-law marriages are not recognized as such in this state. That is quite true, but nevertheless it is a marriage. It is a marriage which is deemed in law as null and void and of no effect, so far as the husband and wife are concerned. But the children, the issue of such marriage, are not bastards. Our statute, section 7, chapter 78 of the Code, provides: "The issue of marriages deemed null in law or dissolved by a court, shall nevertheless be legitimate."

[26] *Id.* at 766.
[27] 106 W. Va. 615, 146 S.E. 625 (1929).

> Stones v. Keeling, supra, has been consistently followed by the courts of Virginia. . . . In other jurisdictions, where similar statutes have been passed, the rule of construction given by the Virginia court has been uniformly followed.[28]

Kester v. *Kester*[29] was approved and reaffirmed in 1933 in *Fout* v. *Hanlin*.[30] The opinion in that case is of particular interest to this discussion for the light it throws on the problem of whether the effect of Section 391.100(2) should be limited to the enumeration found in Section 402.020. The court said:

> The defendants questioned the soundness of the principle of legitimization laid down in said syllabus and request our reconsideration thereof. It is urged that an attempted common law marriage in this jurisdiction is in reality "no marriage at all" and is not within the category "deemed null in law" specified in the statute above quoted. To emphasize this proposition, reference is made to Code 1931, 48-2-1, wherein there are set forth the various marital relationships which "shall be void from the time they are so declared by a decree of nullity." Common law marriages are not included in the enumeration.
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> We are of the opinion, however, that in construing the legitimating statute . . . it should not be limited in its application to null and void marriages enumerated by the statute. . . . The legitimating statute, founded in benevolence and charity, has for its design the protection of innocent offspring. Humanitarian principles require that the statute be liberally construed to effectuate its benign purpose. Many of the States of the American Union recognize the validity of common-law marriage contracted within their borders. And, a State which does not permit common-law marriages therein will give full recognition to such marriages when deemed legal in the State where contracted. In the light of this situation, we cannot hold, as insisted by defendants, that it is the legislative intent in this jurisdiction that a common law marriage attempted to be consummated in this State should be "no marriage at all." We think it is a marriage "deemed null in law" within the purview of the legitimizing statute, supra.[31]

[28] *Id.* at 626, 627. See also: Re Henry Shipp's Estate, 168 Cal. 640, 144 P. 143 (1914): "The appellant seeks to give this clause (identical to the Virginia and West Virginia statutes) a very limited interpretation; his contention being that the term 'marriages null in law,' as here used, includes only the marriages which are subject to an action for annulment on one of the grounds specified . . . We think the provision should not be construed so narrowly. The statute was passed with the generous and kindly purpose of relieving children, to some extent, from the harsh consequences of illegitimacy—a status for which the children affected are in no degree morally responsible. The section should be liberally construed." See also Darling v. Dent, 82 Ark. 76, 100 S.W. 747 (1907).

[29] *Supra* note 27.

[30] 113 W. Va. 752, 169 S.E. 743 (1933).

[31] Id. at 169 S.E. 744. W. VA. CODE Chap. 78 sec. 7 (1931), now Section 4701(1). This section is roughly comparable to KY. REV. STAT. sec. 402.020 and lists a number of conditions existing which make marriages void. It should be pointed out, however, that the Kentucky Statute purports to make a number of "marriages" void without a decree of annulment whereas under West Virginia procedure a judicial determination of invalidity is necessary and a plea of a void marriage must be based on a decree of nullity. See W. VA. CODE ANN. secs. 4701, 4702, and 4086 (1955).

The Supreme Court of Maryland, in *Milton* v. *Escue*,[32] very recently made these interesting and apropos comments on Kentucky and Virginia decisions and statutes:

> . . . We think the law of Virginia to be that . . . [facts raising a common law marriage] that [such] marriage, equally with a void ceremonial marriage, is one "deemed null in law" by the Virginia statute and its courts, and therefore one which makes the issue of the couple legitimate, whether *ante-nati* or *post-nati*. See also Campbell v. Allen, 208 Ga. 274, 66 S.E. 2nd 226 and Copenhaver v. Hemphill, 314 Ky. 356, 235 S.W. 2nd 778, 779, in which the Georgia and Kentucky courts in construing legitimation statutes similar to the Virginia statutes, found that common law marriages, equally with ceremonial marriages, were sufficient to satisfy the statutes. In each case, the court said, "We can see no distinction between a void ceremonial marriage and a void common law marriage."[33]

In conclusion, in no Kentucky case has the hypothesized situation been squarely before the court. With all the strong emphasis on the necessity of a ceremonial marriage to legitimate children previously born, there is nothing as yet in the Kentucky decisions that would necessarily obviate a result like that attained by West Virginia in *Kester* v. *Kester*, or by Virginia in *McClaugherty* v. *McClaugherty* under virtually identical statutes. The door to legitimation of children of an attempted common law marriage, though not open wide, is not closed. The language in cases already decided is such that, should a case arise, the court would be at a crossroad. Either result, legitimacy or bastardy, could logically be reached.

It is submitted that Section 402.020(4) contemplates attempted common law marriages, possibly with other situations, in the list of "prohibited and void" marriages. Therefore, the attempted common law marriage clearly does not fall in the category of meretricious relationships which are no marriage at all and the issue are legitimate by virtue of Section 391.100(2). If, however, it were to be held that an attempted common law marriage is not included in the enumeration of "prohibited and void" marriages found in Section 402.020, it is further submitted that the legitimating effect of Section 391.100(2) is not limited to those situations found in that enumeration but applies to the issue of any attempted but void marriage not specifically excluded by Section 391.100(1). Such a result is in accord with the spirit of the legitimacy saving statute, the decisions in other States, and the general trend and avowed policy of the Kentucky courts "to declare children legitimate when it can be fairly done."[34]

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[32] 261 Md. 190, 93 A. 2d 258 (1952).
[33] *Id.* at 93 A. 2d 262.
[34] Stein's Admr. v. Stein, 42 Ky. Law Rep. 664, 106 S.W. 860 (1908).