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Family Law

BY LOUISE GRAHAM*

This Article addresses some of the family law developments occurring since the *Kentucky Law Journal* last published a Kentucky law survey.¹ Space limitations preclude discussion of every post-1985 change. Instead, this Article focuses on general trends, significant cases, and legislative developments.

Inquiry into family law developments in Kentucky is timely, not only because of the social importance of family relations, but also because of other contemporaneous efforts at family law reform. The American Law Institute ("ALI") is currently considering a final draft of principles governing family dissolution.² That draft, and the discussions that surround its ultimate acceptance or rejection by the ALI, undoubtedly will be the focus of national concern. Kentucky courts, the General Assembly, and Kentucky lawyers will need to determine to what extent the Restatement's positions should prompt changes in this state's law.

Emerging controversies have marked other areas of family law. Grandparent visitation and third-party custody rights may overlap as more child custody cases involve intergenerational disputes between parents and grandparents.³ Rights of unwed fathers also have figured prominently in custody-related decisions.⁴ Finally, Kentucky courts have addressed

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¹ See Louise Everett Graham, *Domestic Relations*, 73 KY. L.J. 379 (1984-85).

² See THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft Part I, Feb. 14, 1997). The draft version of the American Law Institute ("ALI") statement contains the warning that the draft, although tentatively approved by the ALI at 1995 and 1996 meetings, does not represent the ALI's final position on any issue dealt with in the draft. Nevertheless, the document does highlight those issues that are the subject of discussion, and also provides illustrations of the positions that may be taken on those issues. Part I of the final draft covers distribution of property at divorce and compensatory payments between spouses.

³ See *infra* text accompanying notes 165-82.

⁴ For example, unmarried fathers have been granted joint custody and have also claimed the right to have the minor child bear the paternal surname. See *Hazel v.*

international custody disputes, a new trend that involves interpretation of federal law.⁵

Child support enforcement continues to raise numerous issues. The Uniform Interstate Family Support Act⁶ became effective January 1, 1998.⁷ Interpretation of the Act will affect this state's ability to serve as a forum for child support disputes as well as this state's duty to enforce child support orders from other states.

Other developments involving the family center on the parent-child relationship rather than marriage dissolution. New concerns about the right of children to permanent, safe homes may alter state practice regarding termination of parental rights.⁸

I. DISTRIBUTION OF PROPERTY AT MARRIAGE DISSOLUTION

A. *Characterization and Distribution of Property at Divorce*

As family law practitioners know, Kentucky's version of the Uniform Marriage and Divorce Act requires characterization of property as marital or nonmarital before any equitable distribution of property at divorce.⁹

Wells, 918 S.W.2d 742 (Ky. Ct. App. 1996); *see also* Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995).

⁵ *See infra* text accompanying notes 134-44.

⁶ UNIF. INTERSTATE FAM. SUPPORT ACT (amended 1996), 9 U.L.A. 278 (Supp. 1997).

⁷ The Legislative Research Commission's notes to the Uniform Interstate Family Support Act as adopted in Kentucky provide that the statute becomes effective on the date required by Congress. *See* 1996 Ky. Acts, ch. 365, sec. 65. Congress mandated that states adopt the Act not later than January 1, 1998. *See* 42 U.S.C. § 666(f) (1996).

⁸ *See infra* text accompanying notes 276-80.

⁹ The General Assembly adopted the Uniform Marriage and Divorce Act in 1972. *See* KY. REV. STAT. ANN. [hereinafter K.R.S.] § 403.190 (Michie 1996). The Uniform Act's initial draft provided for both marital and nonmarital property. *See* LOUISE E. GRAHAM & HON. JAMES E. KELLER, 15 KENTUCKY PRACTICE: DOMESTIC RELATIONS LAW 502 (2d ed. 1997). Currently, the Uniform Act permits states to choose one of two alternative schemes for disposing of property at divorce. Alternative B permits division of marital, but not nonmarital, property. *See* UNIF. MARRIAGE AND DIVORCE ACT § 307, Alt. B, 9A U.L.A. 239-40 (1979). Kentucky's statute is similar to Alternative B, although section 403.190(2)(e) contains additional language not part of the Uniform Act. Models of property division that require characterization of property as marital or nonmarital are also

Section 403.190(2) governs the characterization of property.¹⁰ In its 1996 session, the General Assembly amended the portion of this statute dealing with property acquired by gift or inheritance.¹¹ Before the amendment, the statute directed courts to characterize as nonmarital property any property acquired by gift, bequest, devise, or descent, even though the property was acquired during the marriage.¹² The amendment now requires that courts also characterize as nonmarital property any income from donated or inherited property or the appreciated value of that property, unless one of the spouse's efforts substantially contributed either to the production of income or to the appreciation in value.¹³

Kentucky's historical rule for characterizing income from nonmarital property as marital property arose in a case grounded in statutory interpretation, but lacking discussion of policy choices. In *Brunson v. Brunson*,¹⁴ the Court of Appeals of Kentucky held that the legislature's failure to mention income in section 403.190(2)(e), and that statute's reference to "increase in value," indicated that the income from nonmarital property was to be treated as marital property.¹⁵ The court's rule rested on the common principle of statutory interpretation that the inclusion of one thing implies the exclusion of others. It also drew from the commentary to the Uniform Marriage and Divorce Act, which referred to the Spanish rule treating income from nonmarital property as marital.¹⁶

common in other states. *See infra* note 33.

¹⁰ The Kentucky Supreme Court has long held that characterization of property must precede equitable division. *See Hollon v. Hollon*, 623 S.W.2d 898 (Ky. 1981).

¹¹ *See* K.R.S. § 403.190(2)(a).

¹² For holdings that property received by gift or inheritance is the nonmarital property of the donee, see *Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974); *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App. 1978); *Culver v. Culver*, 572 S.W.2d 617 (Ky. Ct. App. 1978). A property transfer will not be treated as a gift if the transfer is not gratuitous. *See Underwood v. Underwood*, 836 S.W.2d 439 (Ky. Ct. App. 1992) (holding that father's agreement to forgive debt incurred through transfer of insurance agency to son in exchange for son's promise to give father future employment made the transfer one supported by consideration).

¹³ *See* K.R.S. § 403.190(2)(a).

¹⁴ *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978). Other cases holding that the income from nonmarital property is marital are *Dotson v. Dotson*, 864 S.W.2d 900 (Ky. 1993), *Mercer v. Mercer*, 836 S.W.2d 897 (Ky. 1992), and *Lampton v. Lampton*, 721 S.W.2d 736 (Ky. Ct. App. 1986).

¹⁵ *See Brunson*, 569 S.W.2d at 178.

¹⁶ *See* UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 239-40 (1979). One might argue that the Spanish rule has the advantage of treating earnings from

Kentucky courts treat passive appreciation as nonmarital,¹⁷ but usually treat income from nonmarital property as marital.¹⁸ Distinguishing income from appreciation was not always as simple as it might seem. In *Mercer v. Mercer*,¹⁹ the Supreme Court of Kentucky held that the increase in value of a certificate of deposit was income and therefore marital property. The certificate of deposit earned interest. That interest was added to the certificate's original face value. The court relied on the tax treatment of interest as income in making its decision.²⁰

The *Mercer* opinion caused concern. The interest was income in the technical sense, but neither party expended any effort to produce that income. Thus, some found it difficult to distinguish the *Mercer* certificate of deposit from a share of stock, for which for the increase in value would have been treated as nonmarital had the stock been held in the same manner as the *Mercer* certificate.²¹ Dissenters in *Mercer* argued that the type of investment should not control characterization at divorce. That argument carried the General Assembly.

The amendment nevertheless leaves some questions unanswered. Placing the amendment in section 403.190(2)(a) creates a property division

capital the same as earnings from labor. That is, if one of the spouses earned property through his or her labor during the marriage, the property would be treated as marital. Similarly, if one of the spouses had an asset that earned income during the marriage, the Spanish rule would treat that income as marital property.

¹⁷ See *Daniels v. Daniels*, 726 S.W.2d 705 (Ky. Ct. App. 1986).

¹⁸ Occasionally the results seemed to be the product of tortured rationales. In *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981), the Supreme Court of Kentucky held that the income produced when an entrepreneur husband sold a premarital business was marital income. The court might have reached the same result by finding that the husband's significant efforts probably were responsible for the gain in business value, whether that gain was labeled income or appreciation. Cf. *Vanover-May v. Marsh*, 793 S.W.2d 852 (Ky. Ct. App. 1990) (treating the income from the sale of a nonmarital home as nonmarital without mentioning the *Sousley* rule). The *Sousley* rule was sometimes applied over vigorous dissent. See *Walters v. Walters*, 782 S.W.2d 607 (Ky. 1989) (Leibson, J., dissenting) (arguing that a corporation's distribution of assets to the husband should not be treated as income to husband). One aspect of *Sousley* may survive for reexamination in the newly amended statute. If a spouse has special expertise that is causally related to the increased gain in value, he or she may have made the significant efforts needed to transform the gain, or some part of it, to marital property. See the cases cited *infra* note 32.

¹⁹ *Mercer v. Mercer*, 836 S.W.2d 897 (Ky. 1992).

²⁰ See *id.* at 899.

²¹ But see *infra* text accompanying notes 26-28.

statute that mentions increase in value of nonmarital property twice, once in section 403.190(2)(a), where the newly amended rule refers to an exclusion of donated or inherited property, and again in section 403.190(2)(e), which addresses the increased value of premarital property. In the latter subsection, (2)(e), there is no mention of income from property.²² Instead, the section refers only to the increase in value of property acquired before the marriage, treating that property as nonmarital if the increase in value does not result from the parties' efforts.²³ Future litigation may be necessary to determine whether Kentucky courts will apply a single rule that distinguishes only between active and passive increase or whether they will read the marital property statute to contain two different rules, one for gifted or inherited property and one for premarital property.

Courts must also reconcile other possible differences in the two statutory sections. Unlike section 403.190(2)(e), which implicates a "source of the funds" rule by providing that the increase in value is nonmarital to the extent that it is not the result of marital effort,²⁴ section 403.190(2)(a)

²² This fact was noted by the court in *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978).

²³ Although the statutory section specifically refers to property acquired before the marriage, Kentucky courts have applied the rule to apportion value increases when the property was acquired through inheritance during the marriage. See *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980).

²⁴ See *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981). The *Brandenburg* rule has been applied to require apportionment of the increase in value when property subject to a mortgage experiences equity gains during the marriage. See generally Louise Everett Graham, *Using Formulas to Separate Marital and Nonmarital Property: A Policy Oriented Approach to the Division of Appreciated Property Upon Divorce*, 73 KY.L.J. 41 (1984-85). For criticism of the rule, see John W. Potter & Ellen B. Ewing, *Apportioning Marital and Non-marital Interests in a Single Asset*, 9 KY.BENCH & B. 14 (Apr. 1983). When property is not subject to amortization formulas based on mortgage interest tables, no single formula for apportionment exists. California courts have used two approaches. In one line of cases, California courts have focused on the value of a spouse's efforts expended to improve nonmarital property. See *Van Camp v. Van Camp*, 199 P. 885 (Cal. Dist. Ct. App. 1921). If a spouse has not been compensated adequately for services rendered during the marriage, the marital partnership has a claim against the nonmarital property for the value of the services. Of course, if a spouse has been adequately compensated and the marital community has consumed that income, no claim against the nonmarital estate survives. See *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984); see also *In re Marriage of Werries*, 616 N.E.2d 1379 (Ill. App. Ct. 1993); *Huger v. Huger*, 433 S.E.2d 255 (Va. Ct. App. 1993). Another

states that increase in value remains nonmarital unless there are significant marital efforts. The latter section contains no command for a rule of proportionality and, indeed, no command for any recognition of nonmarital interests. Courts will have to decide whether to permit tracing of nonmarital contributions under the rule of section 403.190(2)(a), or whether the rule converts nonmarital property entirely into marital property.²⁵

Somewhat ironically, the amendment grants continuing importance to the distinction between active and passive assets.²⁶ Under the old version of section 403.190(2), the owner of a certificate of deposit or of a dividend-producing stock would find himself or herself with divisible marital property because the certificate's interest²⁷ and the stock dividends²⁸ were income. On the other hand, stock shares that appreciated in value would not produce divisible marital property.²⁹ The result in either case depended on the particular asset owned; for example, on whether a stock produced growth or dividends. If Kentucky courts follow one pattern adopted

approach stems from *Pereira v. Pereira*, 103 P. 488 (Cal. 1909). In that case, the California court held that the nonmarital property owner is entitled to a reasonable rate of return on his or her separate capital. *Pereira* itself treated the legal rate of interest as a reasonable return. *See id.* at 491.

²⁵ Even before the source-of-the-funds rule developed, Kentucky courts consistently permitted a spouse to recover nonmarital assets brought into the marriage. *See Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974); *Angel v. Angel*, 562 S.W.2d 661 (Ky. Ct. App. 1978); *Turley v. Turley*, 562 S.W.2d 665 (Ky. Ct. App. 1978). Missouri courts apply a rule of proportionality. The property becomes marital to the extent that marital labor or assets are used to increase value. *See Meservey v. Meservey*, 841 S.W.2d 240, 245 (Mo. Ct. App. 1992). Virginia courts have applied a rule treating the entire increase in value as marital if one spouse proves a significant contribution and the other spouse fails to demonstrate that other factors affected the increase in value. *See Martin v. Martin*, 489 S.E.2d 727 (Va. Ct. App. 1997).

²⁶ The irony stems from the argument made in *Mercer v. Mercer*, 836 S.W.2d 897 (Ky. 1992), that the type of asset held should not determine the outcome of the case. New York courts have distinguished between passive assets, such as unimproved real estate and mutual funds, and active assets. *See Greenwald v. Greenwald*, 565 N.Y.S.2d 494 (N.Y. App. Div. 1991) (treating stocks as active assets). *But see Kirshenbaum v. Kirshenbaum*, 611 N.Y.S.2d 228 (N.Y. App. Div. 1994) (treating the husband's Employee Stock Ownership Plan ("ESOP") as an active asset).

²⁷ *See Mercer*, 836 S.W.2d at 897.

²⁸ *See Lampton v. Lampton*, 721 S.W.2d 736 (Ky. Ct. App. 1986).

²⁹ *See Daniels v. Daniels*, 726 S.W.2d 705 (Ky. Ct. App. 1986).

elsewhere, they will treat some investments as presumptively passive, while others will be labeled as necessarily active.³⁰ Even if courts following this method draw careful conclusions, the nature of the asset will be important. For example, an estate beneficiary who inherited a business would be in a different position from an individual who inherited a stock portfolio, particularly if that portfolio were managed by others. Thus, the end result of any case would depend on the type of assets involved.

Owners of inherited businesses may lose the exclusion provided by section 403.190(2)(a) unless they put little or no effort into the business. Although section 403.190(2)(a) makes both the appreciation of and the income from the business nonmarital, that exclusion is lost if one of the marriage partners engages in significant activities that contribute to the increased value or income. Courts must first determine whether the particular spousal efforts at issue contributed significantly to the gain in value.³¹ The relationship among significant efforts, ownership, and control will be defined by future litigation. In other states, spouses who held corporate offices or management positions in inherited businesses have argued that their efforts were not sufficient to impress the business with a marital character.³²

³⁰ See *Greenwald*, 565 N.Y.S.2d at 494.

³¹ The formula for allocating the increase in value between the marital and nonmarital estates set out in *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981), does not take into account indirect contributions to the increase in value. New York courts have found that indirect contributions by homemaker spouses may result in increased value, although the rule is generally limited to cases involving assets that have appreciated through the significant activity of the property owner spouse. See *Feldman v. Feldman*, 605 N.Y.S.2d 777 (N.Y. App. Div. 1993) (stating that husband's periodic visits to inherited real property to check on tenant were not related to increase in value of property, and refusing to recognize wife's indirect contribution). Tennessee courts appear to require each spouse to make significant contributions. See *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996) (discussing indirect homemaker contributions, but factually demonstrating that each party had contributed directly to the reduction of the mortgage on nonmarital property).

³² See, e.g., *Oxley v. Oxley*, 695 So.2d 364 (Fla. Dist. Ct. App. 1997) (corporate president-husband argued that he delegated all management authority to others and made no substantial contribution to business appreciation); *Pagano v. Pagano*, 665 So.2d 370 (Fla. Dist. Ct. App. 1996) (husband claimed that his salary was solely due to his relationship to the business owner, his father, and not to his own efforts in business); *Robbie v. Robbie*, 654 So.2d 616 (Fla. Dist. Ct. App. 1995) (general manager of Miami Dolphins claimed that he held position in name only and made

Excluding donated or inherited property from the marital property definition and, therefore, from equitable distribution at divorce, is a common practice in other states that treat marriage as a partnership and provide for equitable distribution of marital property.³³ Theoretically, donated or gifted property's exclusion from distribution at divorce does not denigrate the marital partnership concept because the fruits of marital effort remain available for division between the parties.³⁴ The marital partnership

no significant contribution to team value); *Rowe v. Rowe*, 480 S.E.2d 760 (Va. Ct. App. 1997) (husband showed that part of increase in value of newspaper stock was due to increased circulation of the newspaper, stemming from population growth, and also to efforts of his brother, who also worked for the newspaper); *Spindler v. Spindler*, 558 N.W.2d 645 (Wis. Ct. App. 1996) (marital improvements to inherited lake cottage did not increase value where most of value was attributable to location). *Cf.* *Spencer v. Spencer*, 646 N.Y.S.2d 674 (N.Y. App. Div. 1996) (husband used expertise to increase value of investment account); *Wade v. Wade*, 897 S.W.2d 702 (Tenn. Ct. App. 1994) (wife's use of her experience gained at brokerage firm to manage stocks during marriage made appreciation marital); *Martin v. Martin*, 489 S.E.2d 727 (Va. Ct. App. 1997) (wife's acumen allowed the parties to purchase real property at below market value and created marital interest, although home was purchased with separate funds); *Smith v. Smith*, 475 S.E.2d 881 (W. Va. 1996) (treating some part of increased value of business as marital where husband played significant role in the business, although he argued that his withdrawals exceeded his contributions).

³³ See, e.g., ARK. CODE ANN. § 9-12-315(a)(1)(A) (Michie 1993); COLO. REV. STAT. § 14-10-113(1) (1997); FLA. STAT. ANN. § 61.075(1), (5)(a), (5)(b) (West 1997); ILL. COMP. STAT. ANN. § 503(a)(2) (West 1997); ME. REV. STAT. ANN. tit. 19-A, § 953(1), (2) (West 1997); MINN. STAT. ANN. § 518.58(1) (West 1998); MO. ANN. STAT. § 452.330(1) (West 1997); N.J. STAT. ANN. § 2A:34-23(10) (West 1997); N.C. GEN. STAT. § 50-20(a) (1995); TENN. CODE ANN. § 36-4-121 (1996). All but eleven states apparently limit equitable distribution to marital property. See generally Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 695 (1994). Some states, including Arkansas and Minnesota, permit distribution of nonmarital property under limited circumstances. See ARK. CODE ANN. § 9-12-315(2) (providing that court may allocate separate property but must state rationale on the record); MINN. STAT. ANN. § 518.58(2) (1998) (providing that if the court finds that property distribution and earning capacity are not sufficient to prevent unfair hardship to one spouse, it may distribute up to one-half of otherwise excluded property).

³⁴ Kentucky courts have generally made a distinction between "passive" increase in value attributable to market forces and "active" increase in value attributable to party efforts. Only the latter becomes divisible marital property if the underlying asset was nonmarital property. See *Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989); *Marcum v. Marcum*, 779 S.W.2d 209 (Ky. 1989).

shares in all of the assets acquired by either party's effort during the marriage.³⁵ Only assets not the product of spousal effort during the marriage remain solely the property of the individual owner. That vision of marital partnership emphasizes the marital relationship's enterprise nature,³⁶ in preference to treatment of marriage as a status with accompanying entitlements to property.³⁷ Windfall ownership, not the product of either spouse's effort, remains with the individual spouse.

Keeping inherited or donated property out of the divisible marital pot may seem fair for several reasons. First, widespread application of the rule indicates a general perception of fairness.³⁸ Second, recognition of the nonmarital nature of inherited or donated property might accord with both

³⁵ Section 403.190(2) defines marital property as "all property acquired by either spouse subsequent to the marriage." Further, although other statutory sections speak of "efforts of the parties during the marriage," Kentucky courts have treated the increase in value of premarital property as marital even when only one spouse contributed directly to the increase in value. *See Goderwis*, 780 S.W.2d at 39. The husband in *Goderwis* worked in the business, but the wife did not. The supreme court treated the increase as marital.

³⁶ *See McGinnis v. McGinnis*, 920 S.W.2d 68 (Ky. Ct. App. 1995) (recognizing that marital property might confer investment opportunities that would be lost by an immediate division of assets).

³⁷ Despite judicial statements to the contrary, *see, e.g., Turley v. Turley*, 562 S.W.2d 665 (Ky. Ct. App. 1978) (Vance, J., dissenting) (remarking that marriage is not a "business"), the treatment of marriage as an enterprise is evidenced by the focus on work or effort as the defining characteristic of marital property. Although the marital property statute's language refers to property "acquired" during the marriage and not solely to spouses' work or effort, the definition of marital property, when read as a whole, treats property attributable to work or effort during the marriage as marital. *See* K.R.S. § 403.190. This enterprise metaphor is further strengthened by statutory sections providing the basis for equitable distribution. Courts may consider other factors, but one important factor is each party's contribution to the acquisition of marital property. *See id.* § 403.190(1)(a). Work as a homemaker is treated as a "contribution" under the statute, but there is no requirement that it be counted as presumptively equal to efforts outside the home. For an argument that housework is consistently undervalued by divorce courts, *see Katherine Silbaugh, Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 59-63 (1996).

³⁸ *See supra* note 33. Some state statutes do not specifically except inherited property from division but have nonetheless been so interpreted by courts. *See* ALASKA STAT. § 25.24.160(4) (Michie 1996) (permitting a divorce court to divide all property acquired during the marriage). In *Lewis v. Lewis*, 785 P.2d 550 (Alaska 1990), the court interpreted the statute to bar the division of inherited property.

public and individual expectations.³⁹ Moreover, treating gifted and inherited property as the nonmarital property of an individual spouse accords status to the intention of the asset donor or testator.⁴⁰

The new statutory amendment applies not only to inherited or donated property, but also to any passive increase in value of that property as well as income derived from the property.⁴¹ Like Kentucky,⁴² many states treat a passive increase in the value of nonmarital property as nonmarital,⁴³ but there is no general consensus regarding the treatment of income from nonmarital property. Some community property states treat income from nonmarital property as nonmarital, while others treat income as marital.⁴⁴

One aspect of amended section 403.190(2)(a) requires courts to treat all gains on nonmarital property in the same way, whether those gains would otherwise be classified as income or appreciation. Unitary treatment of income and appreciation may make sense not only because courts have

³⁹ Commentators have differed over party expectations regarding property to be distributed at divorce. Some writers have noted that spouses' expectations with regard to inherited property are not the same as those for property earned during the marriage. *See, e.g.,* Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 151-56 (1989). Other commentators have apparently disagreed, emphasizing that marriage inherently involves sharing. *See, e.g.,* Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

⁴⁰ Donor intent often controls the identity of the donee and whether the asset is a gift. *See Calloway v. Calloway*, 832 S.W.2d 890 (Ky. Ct. App. 1992) (wife's mother gave the family a race car, which was treated as marital property because it was intended by the donor for family recreational use); *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980) (ring given to wife by husband was marital property in part because of the donor-husband's intent).

⁴¹ *See* K.R.S. § 403.190(2)(a).

⁴² *See Goderwis v. Goderwis*, 780 S.W.2d 39 (Ky. 1989); *Marcum v. Marcum*, 779 S.W.2d 209 (Ky. 1989).

⁴³ *See, e.g.,* *Oxley v. Oxley*, 695 So.2d 364 (Fla. Dist. Ct. App. 1997); *Meservey v. Meservey*, 841 S.W.2d 240 (Mo. Ct. App. 1992); *Rowe v. Rowe*, 480 S.E.2d 760 (Va. Ct. App. 1997); *Smith v. Smith*, 475 S.E.2d 881 (W. Va. 1996).

⁴⁴ Commentators have noted that most community property states follow the American rule, under which the income from nonmarital property remains nonmarital. However, Texas follows the Spanish rule, treating the income from nonmarital property as marital. *See generally* Thomas R. Andrews, *Income From Separate Property: Towards a Theoretical Foundation*, 56 LAW & CONTEMP. PROBS. 171 (1993).

difficulty telling the difference between the two, but because property owners could otherwise manipulate characterization.⁴⁵

The question will then remain whether the same rationale that permits the exclusion of inherited or donated property from the marital estate applies to gains from inherited or donated property, if those gains are not the result of significant spousal effort. A primary rationale for permitting both inherited and donated property to remain with the beneficiary or donee has been the preservation of family estates.⁴⁶ The value of preserving family property has strong roots in Kentucky, but there is reason to exercise caution before embracing preservation of private inheritance as the most significant value to be considered.

Preserving family property as the nonmarital property of an inheriting spouse necessarily has consequences for two families. One is the beneficiary's family of origin, the family into which he or she was born, but the other is the new family begun with the marriage. Preserving all of the gain from nonmarital property for the beneficiary or donee could, over a long period of time, impoverish the opportunities for the marriage-based family at the expense of keeping property in the family of birth.⁴⁷

Another rationale supporting the Kentucky statutory amendment might be found in arguments for court efficiency. Complex tracing,⁴⁸ use of expert witnesses for valuation, and hearings that take substantial court time

⁴⁵ See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 4.04, cmt. a.

⁴⁶ See William A. Reppy, Jr., *Acquisition With a Mix of Community and Separate Funds: Displacing California's Presumption of Gift By Recognizing Shared Ownership or a Right of Reimbursement*, 31 IDAHO L. REV. 965 (1995) (suggesting preservation as the historical rationale).

⁴⁷ The ALI proposes to balance the rule that all passive gain from nonmarital property remains nonmarital with rules that recharacterize nonmarital property as marital property if the marriage is of significant duration, *see* THE AMERICAN LAW INSTITUTE, *supra* note 2, § 4.18(1), and the asset is held for a significant period of time, *see id.* § 4.18(2). However, a spouse may avoid the application of the recharacterization rules by giving written notice to the other spouse of his or her intention to preserve the nonmarital nature of the property. *See id.* § 4.18(4). A will or gift deed that states that the bequest or gift is not subject to the recharacterization rule must be given effect. *See id.* § 4.18(5).

⁴⁸ The Kentucky Supreme Court's opinion in *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990), does not necessarily foreshadow the demise of tracing requirements imposed by section 403.190(3) and earlier cases such as *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978). The *Chenault* opinion held only that one spouse's testimony would satisfy tracing requirements if no other evidence implicated alternative sources for the property.

and involve considerable expense to the parties often attend the segregation of marital and nonmarital property. A rule that avoids such disputes and makes the outcome of any given case more predictable could have a significant impact on court efficiency.

Evaluating the impact of the statutory amendment on Kentucky families at this early stage is a difficult task. Parties with inherited wealth in the form of passive assets will be able to claim more nonmarital and, therefore, nondivisible property. Inherited wealth increased through active efforts of either spouse will be subject to equitable distribution. Viewed from this perspective, the rule appears to affect a relatively small group of litigants. In the future, the General Assembly must determine whether incremental increases in efficiency and the protection of inherited property justify a rule that decreases the assets available to the marital partnership, particularly in long-term marriages.

B. The Role of Private Agreement in Determining Divisibility of Property

During the last ten years, the Supreme Court of Kentucky has determined that otherwise valid antenuptial agreements may affect both property division at divorce and the availability of post-dissolution support.⁴⁹ Because both antenuptial agreements and separation agreements under section 403.180 may affect property distribution or post-dissolution support at divorce, the standard for determining the enforceability of those agreements is important.⁵⁰ In *Shraberg v. Shraberg*,⁵¹ the Supreme Court of Kentucky upheld a trial court's finding that a separation agreement was manifestly unfair and, consequently, not enforceable. The court held that unconscionability, as a defense to the enforcement of separation agreements, did not require that a trial court find fraud, duress, undue influence, or overreaching. Instead, unconscionability required only a finding that the agreement was manifestly unfair, after consideration of the parties' economic circumstances and other relevant evidence.⁵² The supreme court

⁴⁹ See *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990); *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990).

⁵⁰ Although antenuptial agreements are not covered under section 403.180, the unconscionability standard developed under that statute may also affect the definition of unconscionability applied to antenuptial agreements.

⁵¹ *Shraberg v. Shraberg*, 939 S.W.2d 330 (Ky. 1997).

⁵² See *id.* at 332-33. The supreme court opinion did not particularize the other relevant evidence. The *Shraberg* husband was not represented by counsel, but that omission has never before been the ground for determining that an agreement was

made clear that the most important factor in *Shraberg* was the relationship between the husband's gross income and his financial obligations under the agreement. The court noted that the husband had agreed to pay his former wife, to whom he had been married for some seventeen years, more than \$160,000 annually from his pre-tax income of approximately \$200,000. Some of the total amount was payable as maintenance; other portions provided child support for the five minor children of the marriage.⁵³ *Shraberg* could signal a departure from earlier appellate attitudes toward

unconscionable. *See Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990) (stating that there is no requirement for each party to be represented by counsel).

The court in *Shraberg* justified its review of the contract for unconscionability on the ground that a "strong and persistent spouse [could] overwhelm the other spouse," but it made no reference to Mrs. Shraberg as a person who exhibited those characteristics. *Shraberg*, 939 S.W.2d at 333. The court also spoke of spouses who labored under "great mental distress" and pointed out that protective rules, formerly applicable only to a wife, were applicable to either spouse. *Id.*; *see also McGowan v. McGowan*, 663 S.W.2d 219 (Ky. Ct. App. 1983) (setting aside an agreement requiring the husband to pay approximately one-third of his income on the ground that he was overwhelmed by his wife in the negotiations).

⁵³ *See Shraberg*, 939 S.W.2d at 331. The husband agreed to provide some \$8000 per month in child support, to be reduced by \$1000 per month per child as each child graduated from high school. However, the agreement permitted no reductions below \$5000 in child support. The husband also agreed to pay \$5500 to his former spouse as maintenance. The maintenance would have been reduced by \$1500 per month upon the sale of the marital residence. The wife was entitled to remain in the marital home while the husband paid the \$5200 mortgage and was also entitled to receive most of the household goods and a vehicle. *See id.* at 331. Although there were arguments at the trial court level over the tax ramifications of the award, the supreme court did not address those issues. The child support amounts agreed to by the husband were some \$5000 greater than the highest amount of support available for five children under the Kentucky child support guidelines, *see* K.R.S. § 403.212, but the husband's gross income was also greater than the highest amount specified in the guideline table, *see id.* Having found the agreement not enforceable, the trial court ordered the husband to pay \$3000 per month in child support and also to provide both health and dental insurance. However, the obligor avoided not only the payment of the higher child support amount, but the agreement's provision that the husband would pay for post-secondary education. *See Shraberg*, 939 S.W.2d at 331. The wife was awarded graduated maintenance in decreasing amounts totaling some \$132,000 payable over a period of thirteen years. The marital residence was sold and the proceeds divided. Apparently the husband retained his medical practice, which produced the \$200,000-per-year gross income.

agreements dividing property and providing for post-dissolution support.⁵⁴ Earlier appellate opinions had struck down separation agreements only when the agreement not only resulted in economic hardship, but also was tainted by some form of misrepresentation.⁵⁵ In *Rupley v. Rupley*,⁵⁶ the wife sought to set aside an agreement based on a determination that a corporation owned by the husband had no net asset value. The conclusion that the corporation had no value may not have amounted to intentional fraud, but it was clearly the product of the husband's failure to disclose relevant financial information, a failure that the court labeled as misrepresentation.⁵⁷ In *Burke v. Sexton*,⁵⁸ the appellate court set aside a separation agreement after the husband's actions deprived the wife of notice that the divorce, which he claimed to have dismissed, was being pursued. Although the agreement was also too one-sided, the primary fraud in *Burke* related to the husband's intentional activity in depriving the wife of the right to challenge the agreement.⁵⁹ *Shraberg* treats the substance of the agreement as unconscionable based on the amount the obligor agreed to provide. More importantly, it does so in the context of a high-income obligor with a long-term spouse and five minor children.⁶⁰

II. MAINTENANCE

Kentucky courts have not developed a consistent theory supporting the imposition of post-dissolution support obligations. Some courts have upheld awards to former spouses of highly compensated individuals as long as the awards met the current expenses of the former spouse, without

⁵⁴ Two factors limit the importance of the case. First, one reading of the case is that the supreme court has granted significant discretion to trial courts to determine unconscionability and will not overrule a trial court decision merely because other persons might draw from the facts inferences other than those drawn by the trial court. See *Shraberg*, 939 S.W.2d at 334 (Cooper, J., concurring). Second, two other justices joined in Justice Cooper's concurring opinion, while Justice Stumbo dissented from the opinion.

⁵⁵ Thus, hardship and misrepresentation or fraud may be separate requirements, but both were met in the earlier cases.

⁵⁶ *Rupley v. Rupley*, 776 S.W.2d 849 (Ky. Ct. App. 1989).

⁵⁷ See *id.* at 852. The court also mentioned the corporation's "curious" accounting practice, a clue that it viewed the valuation information as unreliable and perhaps unfair. See *id.* at 851.

⁵⁸ *Burke v. Sexton*, 814 S.W.2d 290 (Ky. Ct. App. 1991).

⁵⁹ See *id.* at 291-92.

⁶⁰ See *Shraberg v. Shraberg*, 939 S.W.2d 330, 332-33 (Ky. 1997).

regard to the disparity in the parties' economic circumstances.⁶¹ Other courts have emphasized disparity in the parties' post-dissolution economic circumstances.⁶² Appellate courts have imposed maintenance obligations as a remedy for one spouse's contribution to the other spouse's acquisition of a professional degree or license,⁶³ but recent opinions demonstrate that trial courts may work equity in such a situation without awarding maintenance.⁶⁴ Fault continues to play some role in the amount of maintenance awards, but only the proposed recipient's fault may concern the court.⁶⁵

The ALI's proposed final draft on the *Principles of the Law of Family Dissolution*⁶⁶ suggests a major shift in the theories underpinning mainte-

⁶¹ See *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992). It was agreed that the wife's net estate awarded in the divorce had a value over \$533,000. However, it also was agreed that the wife was unemployable at the end of a thirty-four year marriage, which had included the responsibility of raising four children. The husband paid no maintenance and continued his lucrative employment. The supreme court discounted arguments that meeting the wife's needs would require her to liquidate marital assets awarded to her. See *id.* at 827. The decision implies that the disparity between the parties' post-dissolution economic circumstances is not legally significant.

⁶² See *Beckner v. Beckner*, 903 S.W.2d 528 (Ky. Ct. App. 1995) (noting that although the parties had been married for less than ten years, the husband, an attorney, would enjoy a higher standard of living than the wife, who had not yet finished her education and could not maintain herself at the standard of living enjoyed during the marriage).

⁶³ See *Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985).

⁶⁴ See *Schmitz v. Schmitz*, 801 S.W.2d 333 (Ky. Ct. App. 1990).

⁶⁵ See *Tenner v. Tenner*, 906 S.W.2d 322 (Ky. 1995). The *Tenner* court applied the rule counting the proposed recipient's fault (in the case before the court, adultery) to a factual pattern involving a proposed recipient whose multiple-personality disorder did not render her legally irresponsible, but may have been connected to her behavior. The ALI proposed restatement would not permit courts to consider marital misconduct in determining maintenance awards. See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 5.02(2). However, the restatement does not foreclose one spouse from suing the other in tort. See *id.* § 29. Kentucky courts have not generally been receptive to suits between spouses based on the tort of outrage. See *Whittington v. Whittington*, 766 S.W.2d 73 (Ky. Ct. App. 1989) (holding that neither dissipation of assets nor adultery constitutes outrageous conduct). Also, Kentucky apparently bars suits for intentional infliction of emotional distress if the injured party could have sued for assault or battery. See *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. Ct. App. 1993).

⁶⁶ THE AMERICAN LAW INSTITUTE, *supra* note 2, §§ 5.02-5.06 (principles governing compensation).

nance awards. Section 5.02 of the proposed final draft states that its primary objective is the identification of appropriate compensable losses arising from marriage dissolution. The section abandons standards related to contract, contribution, and spousal need. The published draft states that need does not provide a coherent standard for requiring post-dissolution payments,⁶⁷ and also finds fault with theories of contribution and contract.⁶⁸ The proposed restatement replaces the need standard, as well as the labels “alimony” and “maintenance,” with the terminology “compensatory payments.”⁶⁹ Compensable losses under the proposed restatement are limited to financial losses arising from the dissolution of marriage.⁷⁰ Section 5.03(2) permits compensatory awards under three circumstances: (1) an award compensating for the loss of living standard experienced at dissolution by the spouse with less wealth or earning capacity when a marriage of significant duration is terminated;⁷¹ (2) an award compensating for the continuing loss of earning capacity arising during the marriage because of one spouse’s disproportionate share of child care;⁷² and (3) a similar award for lost earning capacity incurred during the marriage and continuing after its dissolution where the loss is traceable to care for a sick, elderly, or disabled third party for whom the other spouse or both spouses jointly are morally responsible.⁷³

Other financial losses are compensable under section 5.03(3). This section permits compensation for losses incurred by either spouse when the marriage is dissolved before that spouse realizes a fair return on his or her

⁶⁷ See *id.* § 5.02, cmt. a; see also *Russell v. Russell*, 878 S.W.2d 24 (Ky. Ct. App. 1994) (wife’s inability to support herself cited as a factor in the maintenance award); *Robbins v. Robbins*, 849 S.W.2d 571 (Ky. Ct. App. 1993) (similar rationale applied to wife who was a minimum-wage earner); *Garrett v. Garrett*, 766 S.W.2d 634 (Ky. Ct. App. 1989) (statute requires court to balance the needs of both spouses). Cf. K.R.S. § 403.200(1)(a).

⁶⁸ See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 5.05, cmt. b.

⁶⁹ *Id.* § 5.02, cmt. a. The drafters noted that recharacterizing the payments as compensatory amounts removes the stigma of a “plea for help” and grants the claimant an “entitlement.” *Id.*

⁷⁰ See *id.* § 5.02, cmt. b, c; see also *id.* § 5.03(1) (“Compensatory awards should allocate equitably between the spouses certain financial losses that either or both incur and which are realized at dissolution when the family is divided into separate economic units.”).

⁷¹ See *id.* § 5.03(2)(a); see also *id.* § 5.05 (describing the award’s calculation).

⁷² See *id.* § 5.03(2)(b); see also *id.* § 5.06. The child care may involve marital children or children of either spouse.

⁷³ See *id.* § 5.03(2)(c).

investment in the other spouse's earning capacity.⁷⁴ It also allows compensation if there is an unfairly disproportionate disparity between the spouses in their respective abilities to recover the premarital standard of living after the dissolution of a short marriage.⁷⁵ The draft restatement permits spouses to qualify for more than one kind of compensatory award, but places significant limits on aggregate awards. Under section 5.03(4)(b), no award pursuant to section 5.03(3) is available to an individual who receives a substantial award under section 5.03(2).⁷⁶ Moreover, section 5.03(4)(a) provides that no award under section 5.03(2) can exceed a maximum award available under a formula set out in section 5.05. Section 5.05 thus lies at the heart of the suggested rationale for compensatory awards because it establishes a formula for computing maintenance awards. The proposed method for setting maintenance awards involves the adoption of statewide rules for implementing the section's formula. A state must first adopt a rule governing the income disparity and the marriage duration needed to trigger the formula's application.⁷⁷ The proposed restatement leaves to the states the rules to be adopted;⁷⁸ however, the illustrations to the section employ an income disparity of twenty-five percent. The durational factor is more complex.⁷⁹ A state must determine the minimum number of years of marriage needed to qualify under statutes implementing the principles of section 5.05.⁸⁰ Presumptively, some marriages will not

⁷⁴ See *id.* § 5.03(3)(a). Cf. *Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990).

⁷⁵ See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 503(3)(b). Cf. *Carter v. Carter*, 656 S.W.2d 257 (Ky. Ct. App. 1983).

⁷⁶ See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 503(4)(b); see also *id.* §§ 5.15, 5.16.

⁷⁷ See *id.* § 5.05(2); see also *id.* § 5.05, cmt. d. Similar rules apply to awards compensating for a primary caretaker's residual loss of earning capacity under section 5.06. See *id.* § 5.05, cmt. e.

⁷⁸ See *id.* However, comment d notes that the policies underlying the adoption of the statewide formula would not permit a state to adopt rules that would allow a spouse to avoid a maintenance obligation in a marriage of ten years duration with an income disparity of twenty-five percent. The policies governing the section are explained in comment c. Comment c recognizes that dependent spouses in a long-term marriage experience an economic risk at marriage dissolution that is different from that of their marriage partners.

⁷⁹ See *id.* § 5.05(3).

⁸⁰ See *id.* § 5.05, cmt. d. Although the rule is left to the states, the comments suggest that a rule permitting application of the formula to a four-year marriage would be inappropriate, as would exclusion of a ten-year marriage.

qualify for the application of section 5.05 because they are too short. The formula, as illustrated by the restatement, then requires the court to multiply the number of years the parties have been married by the durational factor.⁸¹ The durational factor used in the illustration is .01, but in no case may it exceed .4.⁸² As a result, the maximum award level is achieved if the parties have been married forty years.

To implement the formula, which creates a presumptive award, the court measures the disparity between the spouses' income at the time the award is to become effective. For example, if Spouse A has an income of \$5000 per month and Spouse B has an income of \$2000 per month, the difference of \$3000 satisfies the twenty-five percent disparity rule. The court then multiplies the durational factor by the number of years that the spouses have been married. If the spouses were married for twenty years and the durational factors from the proposed draft illustration were used,⁸³ this would be $20 \times .01$, or .2. This durational factor is then multiplied by the income difference, in this case \$3000, which gives a presumptive award of \$600. A \$600-per-month award would leave the obligor with \$4400 and give the recipient \$2600 per month.⁸⁴

The section 5.05 formula creates a presumptive award unless the trial court makes written findings of fact establishing that the formula's use would create an unfair award.⁸⁵ In addition, a trial court could make an award under section 5.05, even though no award would usually be made in marriages of similar income levels and duration, if the court recited facts demonstrating that the absence of the award would work a substantial

⁸¹ See *id.* § 5.05, cmt. a, illus. 1.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ On the facts of *Shraberg v. Shraberg*, 939 S.W.2d 330, 331 (Ky. 1997), assuming Mrs. Shraberg had no income, she would have received approximately \$34,000 per year. The formula would have been the number of years of marriage (17) \times durational factor (.01) \times income difference (\$200,000) = \$34,000. She might also have been entitled to an award under section 5.06 based on her disproportionate responsibility for child care and loss of earning capacity, but that award could not exceed the maximum value allowed for a section 5.05 award alone. See THE AMERICAN LAW INSTITUTE, *supra* note 2, § 5.06, cmt. e, illus. 5. Thus the total award to Mrs. Shraberg under both sections 5.05 and 5.06 could not have been greater than \$80,000, since that would be the maximum section 5.05 award, assuming that the maximum durational factor was .4.

⁸⁵ See *id.* § 5.05(4). Cf. K.R.S. § 403.211(2) (providing that child support guidelines establish presumptive amounts of child support unless court makes written findings of fact).

injustice.⁸⁶ The proposed restatement's principles will be debated both nationally and in Kentucky. On the one hand, the restatement principles could provide certainty and, according to the drafters, compensation only for measurable financial losses incurred because of the marriage. Others, however, may find the attempts to limit responsibility for a former spouse, particularly in long-term marriages, objectionable.⁸⁷

III. CHILD CUSTODY JURISDICTION

Kentucky courts have avoided conflict between this state's courts and courts of sister states in child custody matters by interpreting both the Parental Kidnapping Act of 1980 ("PKPA")⁸⁸ and the Uniform Child Custody Jurisdiction Act ("UCCJA")⁸⁹ to limit Kentucky's custody

⁸⁶ See K.R.S. § 403.211(2); THE AMERICAN LAW INSTITUTE, *supra* note 2, § 5.05(4).

⁸⁷ The restatement drafters rejected a large body of literature arguing that long-term homemakers are entitled to share in the post-dissolution income of their spouses, although the drafters claim to have reached results similar to those suggested in this literature. See *id.* § 5.05, cmt. c. For arguments that dependent spouses should be entitled to share in the income of a former spouse, see June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994); Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1994-95); Joan M. Krauskopf, *Comments on Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 417 (1994); Jane Rutheford, *Duty in Divorce: Shared Income As a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993). A recent article discussing the proposed restatement is J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801.

⁸⁸ 28 U.S.C. § 1738A; see *Cann v. Howard*, 850 S.W.2d 57 (Ky. Ct. App. 1993) (holding that Kentucky courts may not modify visitation provisions of Ohio decree); *Wieczorek v. Sebastian*, 751 S.W.2d 38 (Ky. Ct. App. 1988) (holding Kentucky emergency custody order invalid because of prior Ohio decree).

⁸⁹ K.R.S. § 403.420; see *Wood v. Graham*, 633 S.W.2d 404 (Ky. 1982) (declining to exercise jurisdiction because child had been improperly removed from his legal custodian); *Rockwell v. Henning*, 731 S.W.2d 11 (Ky. Ct. App. 1987) (declining to exercise jurisdiction when child lived entire life in Florida until eight days before petition for modification).

jurisdiction.⁹⁰ Appellate courts have applied rules limiting this state's jurisdiction without distinguishing clearly between two types of cases: those in which a Kentucky court rendered the initial decree⁹¹ and those in which a party requests modification of a sister state decree.⁹² This failure to differentiate between the two types of cases and to explain clearly this state's position on continuing jurisdiction has caused unnecessary confusion, may have inappropriately limited the ability of trial courts to deal with difficult custody cases, and has not given full play to the federal PKPA.⁹³

A recent Supreme Court of Kentucky case illustrates the court's reluctance to confront the PKPA directly. In *Brighty v. Brighty*,⁹⁴ the court avoided explication of the federal Act's impact on custody jurisdiction in this state by holding that enforcement of a Kentucky decree through the contempt process did not depend on either the UCCJA or the federal PKPA.⁹⁵ The parents in *Brighty* had been divorced in Kentucky in 1985.⁹⁶ In 1988, the custodial mother remarried and left Kentucky.⁹⁷ In 1990, the father sought to enforce his visitation rights in Kentucky. The Jefferson

⁹⁰ There are some exceptions. See *Bock v. Graves*, 804 S.W.2d 6 (Ky. 1991); *Bruenig v. Silverman*, 563 S.W.2d 482 (Ky. Ct. App. 1978).

⁹¹ See *Bryant v. Bryant*, 545 S.W.2d 938 (Ky. 1977); *Honigsberg v. Goad*, 550 S.W.2d 471 (Ky. 1976); *Turley v. Griffin*, 508 S.W.2d 764 (Ky. Ct. App. 1974). The Court of Appeals of Kentucky has erroneously stated that the Parental Kidnapping Act of 1980 ("PKPA") does not prevent a Kentucky court from exercising subject matter jurisdiction to decide a child custody case. See *Karahalios v. Karahalios*, 848 S.W.2d 457 (Ky. Ct. App. 1993). The PKPA's language is addressed to modification and enforcement, but the Act nevertheless has an impact on initial custody litigation because it determines whether the decree rendered will be enforceable and not subject to modification by another state. See 28 U.S.C. § 1738A(a).

⁹² Kentucky courts have clearly recognized the PKPA's control over this state's ability to modify a sister state decree. See *Cann v. Howard*, 850 S.W.2d 57 (Ky. Ct. App. 1993). However, they have not discussed whether this state's rules, in combination with the PKPA, prevent a sister state from modifying a Kentucky decree. Kentucky's failure to state clear rules on continuing jurisdiction may have led to the result in *Pierce v. Pierce*, 640 P.2d 899 (Mont. 1982), a case in which a Montana court exercised jurisdiction over a child who had been wrongfully retained in that state, modifying a prior Kentucky divorce decree.

⁹³ See 28 U.S.C. § 1738A.

⁹⁴ *Brighty v. Brighty*, 883 S.W.2d 494 (Ky. 1994).

⁹⁵ See *id.* at 496.

⁹⁶ See *id.* at 495.

⁹⁷ See *id.*

Circuit Court held the mother in contempt for her failure to provide visitation, but it remanded the contempt sentence on the condition that the mother comply with the visitation provisions of the decree.⁹⁸ In 1991, the mother and child moved to New Jersey, where the mother apparently failed to provide visitation.⁹⁹ The noncustodial father again sought to enforce his rights, but in the second Kentucky hearing on this issue the mother argued that the lengthy absence of the child from the state resulted in Kentucky's loss of jurisdiction to determine the father's visitation rights.¹⁰⁰

The Supreme Court of Kentucky held that enforcement jurisdiction in child custody cases was different from modification jurisdiction.¹⁰¹ It found that the Jefferson Circuit Court retained jurisdiction to enforce its previously entered and unmodified decree, whether or not it would have been the appropriate forum for custody modification.¹⁰²

Although the Kentucky court's rule follows an interpretation used by some courts in other states,¹⁰³ it also raises both practical and theoretical issues. As a practical matter, the Kentucky court's contempt ruling can affect a party residing in another state only if the party is before the Kentucky court or if the state in which the contemnor resides is willing to use its own contempt sanctions to enforce the Kentucky order.¹⁰⁴ The

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ Both parties appeared in court. This state's power over the mother was not questioned. The UCCJA does not require personal jurisdiction over a nonresident parent. *See* K.R.S. §§ 403.440, .450. Instead, the Kentucky statute focuses on subject matter jurisdiction. *See* Cann v. Howard, 850 S.W.2d 57 (Ky. Ct. App. 1993). However, the mother's appearance before the Kentucky court had a practical impact. *See infra* note 104.

¹⁰¹ *See Brighty*, 883 S.W.2d at 496.

¹⁰² *See id.*

¹⁰³ *See, e.g.,* Levis v. Markee, 771 S.W.2d 928 (Mo. Ct. App. 1989); *In re* Paternity of J.L.V., 426 N.W.2d 112 (Wis. Ct. App. 1988); Marquiss v. Marquiss, 837 P.2d 25 (Wyo. 1992). The cases cited by the Kentucky court hold that an original forum retains jurisdiction to hold a party in contempt as a mechanism for enforcing its decree, but they do not hold that a forum must enforce a sister state's contempt order. *See also* Beck v. Beck, 306 S.E.2d 580 (N.C. Ct. App. 1983) (holding that the North Carolina court had continuing jurisdiction to enforce custody order through contempt proceeding against mother; personal jurisdiction satisfied by service on mother's attorney).

¹⁰⁴ In *Brighty*, the mother's presence in Kentucky allowed the trial court to enforce its own order for contempt. If the mother had not appeared in the show cause proceeding and had been long absent from the state, the result is less clear.

problem of extra-territorial enforcement of the contempt sanction is likely to involve the same questions that would be raised by the assertion of modification jurisdiction; that is, a New Jersey court asked to enforce the Kentucky contempt order would likely ask whether Kentucky had jurisdiction to issue the order.¹⁰⁵ Without more, the alleged distinction between enforcement and modification jurisdiction is not helpful because it does not answer concretely the question whether Kentucky would claim the right to control decisions about access to the child in a specific custody case.

Kentucky courts might adopt rules granting this state's courts continuing jurisdiction in child custody cases. The federal PKPA gives Kentucky the right to assert jurisdiction in cases similar to *Brighty*, but only if the state claims that jurisdictional right as a matter of state law.¹⁰⁶

Section 454.220 permits the exercise of this state's long-arm jurisdiction in instances in which a nonresident has been absent from the state for less than one year. Unless sections of this state's UCCJA serve as an independent long-arm statute, *see* K.R.S. §§ 403.430, .510, section 454.220 may limit this state's ability to bind a nonresident. The *Brighty* court did not discuss the question of personal jurisdiction over the mother, but other states have implied that a party charged with contempt may raise that issue. *See, e.g.,* *Dyer v. Surratt*, 466 S.E.2d 584 (Ga. 1996) (holding that mother failed to raise issue of personal jurisdiction in a timely manner). Kentucky case law does not indicate that this state enforces other states' contempt orders, even when it must decline modification jurisdiction. *See Cann v. Howard*, 850 S.W.2d 57 (Ky. Ct. App. 1993), in which an Ohio court had held the mother in contempt for refusing visitation. The Kentucky court refused to modify visitation after the mother moved to Kentucky, but there is also no evidence that it enforced the Ohio court's contempt order. *Cf. Pretot v. Pretot*, 905 S.W.2d 868 (Ky. Ct. App. 1995) (holding that circuit court lacks jurisdiction to hold father in contempt for violation of sister state child support order); *Mott v. Rivazfar*, 653 N.Y.S.2d 760 (N.Y. App. Div. 1997) (declining modification jurisdiction but refusing to enforce foreign contempt order). A forum state would normally enter an order domesticating the sister state decree and also enter its own show cause order for failure to comply with the decree. *See Mitchell v. Mitchell*, 437 So.2d 122 (Ala. Civ. App. 1982) (holding that the enforcing state's contempt rules apply if a decree is entitled to enforcement); *State ex rel. Butler v. Morgan*, 578 P.2d 814 (Or. Ct. App. 1978) (indicating that a sister state decree registered for enforcement may be enforced by a contempt order of the court in which the decree is registered).

¹⁰⁵ *See Mott*, 653 N.Y.S.2d at 760 (declining modification jurisdiction but refusing to enforce foreign contempt order).

¹⁰⁶ *See* 28 U.S.C. § 1738A(d); *McLain v. McLain*, 569 N.W.2d 219 (Minn. Ct. App. 1997); *Shupe v. Shupe*, 916 P.2d 744 (Mont. 1996); *Petty v. Petty*, 890 P.2d 1364 (Okla. Ct. App. 1995). The federal Act does require, as a condition for

The federal Act's reliance on state law as the basis for the claim of continuing jurisdiction means that the treatment accorded to Kentucky decrees by sister states will depend on a clear explanation of this state's rules.¹⁰⁷ If Kentucky decrees are to be respected, enforced, and not modified by sister states because Kentucky claims continuing jurisdiction, the Supreme Court of Kentucky must make clear the claim of continuing jurisdiction.

To date, the supreme court has failed to do so, but there are cases in which Kentucky appellate courts have flirted with the notion of continuing jurisdiction. In both *Dillard v. Dillard*¹⁰⁸ and *Bock v. Graves*,¹⁰⁹ the results can best be explained by the concept of continuing jurisdiction. These cases further increase the uncertainty surrounding continuing jurisdiction.

The *Dillard* litigation involved a child whose parents had been divorced in Kentucky in 1987.¹¹⁰ After the divorce, the mother's boyfriend physically abused the child.¹¹¹ Consequently, the trial court removed the child from the mother's custody and awarded custody to the father. The father left Kentucky, resided in South Carolina for several years, and then moved with the child to Tennessee.¹¹² After the father's new wife reported the father's acts of domestic violence to the child's mother, the mother

continuing jurisdiction, that one of the parties or the child continue to reside in the forum that rendered the initial custody decree. See *Beddow v. Beddow*, 556 N.Y.S.2d 780 (N.Y. App. Div. 1990). Recent cases in which the courts of other states retained continuing jurisdiction are *Smith-Helstrom v. Yonker*, 544 N.W.2d 93 (Neb. 1996); *Lewis v. Second Judicial District Court*, 930 P.2d 770 (Nev. 1997).

¹⁰⁷ State law need not refer specifically to continuing jurisdiction. The UCCJA's section on significant connection may be interpreted to provide the basis for continuing jurisdiction. See Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1980) [hereinafter Bodenheimer, *Interstate Custody*]; Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977); Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1218 (1969) [hereinafter Bodenheimer, *Legislative Remedy*].

¹⁰⁸ *Dillard v. Dillard*, 859 S.W.2d 134 (Ky. Ct. App. 1993).

¹⁰⁹ *Bock v. Graves*, 804 S.W.2d 6 (Ky. 1991).

¹¹⁰ See *Dillard*, 859 S.W.2d at 134.

¹¹¹ See *id.* at 135.

¹¹² See *id.*

moved for custody modification in the Allen Circuit Court.¹¹³ The Court of Appeals of Kentucky held that the trial court had properly exercised jurisdiction over the child, who retained significant connections with the state of Kentucky. The *Dillard* court may have been hampered by an inadequate trial record, but it nevertheless failed to explain why Kentucky might appropriately assert jurisdiction to modify custody in the case before the court. A helpful explanation would have shown that the assumption of jurisdiction was permissible under the federal PKPA,¹¹⁴ as long as Kentucky embraced the notion of continuing jurisdiction as a matter of state law.

In *Bock*, the Kentucky trial court granted custody of two children to the mother when it awarded the divorce, but specifically stated in the decree that it would retain continuing jurisdiction over the case.¹¹⁵ The mother moved from Kentucky, first to Virginia and then to Alaska.¹¹⁶ The father continued to visit the children, but in May 1990, the mother moved in an Alaska court to modify his visitation. Shortly thereafter, the father asked the original Kentucky court for a show cause order enforcing visitation. The trial judge eventually granted the father custody of the children. The mother then filed a writ of prohibition against the trial judge.¹¹⁷ The Supreme Court of Kentucky treated the issue of retained jurisdiction as a factual dispute resting on the particular judge's conduct, but it also denied the writ of prohibition because there was no conclusive showing that the trial judge had lost jurisdiction as a matter of law. If earlier precedent requiring "maximum contacts" between the child and Kentucky had been applied,¹¹⁸ the trial judge would have lacked jurisdiction. *Bock* thus implies that there are some cases in which Kentucky courts may retain continuing jurisdiction.

¹¹³ See *id.*

¹¹⁴ See 28 U.S.C. § 1738A(d). Subsection (d) states, "The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." The reference in subsection (d) to subsection (c)(1) means that the initial forum must have "jurisdiction under the law of such State." *Id.* § 1738A(c)(1); see *McLain v. McLain*, 569 N.W.2d 219 (Minn. Ct. App. 1997).

¹¹⁵ See *Bock v. Graves*, 804 S.W.2d 6 (Ky. 1991).

¹¹⁶ See *id.* at 7.

¹¹⁷ See *id.* at 8.

¹¹⁸ See *Turley v. Griffin*, 508 S.W.2d 764 (Ky. Ct. App. 1974); see also *Bryant v. Bryant*, 545 S.W.2d 938 (Ky. 1977); *Honigsberg v. Goad*, 550 S.W.2d 471 (Ky. 1976); *Hawley v. Shaver*, 528 S.W.2d 669 (Ky. Ct. App. 1975).

If *Dillard* and *Bock* implicate the possibility of continuing jurisdiction, there are other, earlier cases that contradict that possibility.¹¹⁹ Kentucky courts adopted an early rule intended to avoid the inappropriate use of the significant connection ground of the UCCJA.¹²⁰ They held that this state could not serve as a child custody forum on the basis of significant connection when a child had an established home state elsewhere.¹²¹ That rule indicated an admirable attempt at jurisdictional restraint, but the restraint may have been far broader than was actually necessary.¹²²

Several of the seminal cases limiting custody jurisdiction are cases in which a Kentucky court rendered the initial custody decree, but determined

¹¹⁹ See cases cited *supra* note 118.

¹²⁰ Like the PKPA, the UCCJA has several grounds for the assumption of custody jurisdiction, including a finding that the forum is the child's home state, see K.R.S. § 403.420(1)(a), or that the child and at least one of the contestants has a significant connection with this state and there is substantial evidence necessary to the custody decision in this state, see *id.* § 403.420(1)(b). Under the UCCJA, home state jurisdiction may be an alternative to significant connection jurisdiction. The PKPA bars the alternative use of home state and significant connection by prefacing the significant connection portion of the statute, 28 U.S.C. § 1738A(c)(2)(B)(ii), with the caution that the section may not be used if another state court can claim home state jurisdiction. See *id.* § 1738A(c)(2)(B)(i). In addition, the PKPA grants superiority to continuing jurisdiction over home state jurisdiction. See *id.* § 1738A(d).

¹²¹ See *Turley*, 508 S.W.2d at 764; see also *Bryant*, 545 S.W.2d at 938; *Honigsberg*, 550 S.W.2d at 471; *Hawley*, 528 S.W.2d at 669.

¹²² One influential interpretation of the UCCJA argues that the drafters intended that the significant connection section would serve two purposes. The first was to preserve jurisdiction in a forum that had rendered an initial custody decree; the second, to provide an alternative for those cases in which a child had no home state. See Bodenheimer, *Interstate Custody*, *supra* note 107, at 208; see also Bodenheimer, *Legislative Remedy*, *supra* note 107, at 1218. However, this view was not uniformly followed. State courts had some trouble separating the approved uses of significant connection jurisdiction, namely, as a fall-back for cases in which a child did not have a home state and to retain power in the initial forum, from the easily demonstrated but inappropriate use as an ever-available alternative to home state jurisdiction. Some states weakened the Uniform Act by asserting initial jurisdiction in cases in which the alleged significant connections were not more weighty than the jurisdictional claim of the child's home state. In exercising restraint and attempting to use significant connection jurisdiction in a limited manner, Kentucky courts adopted a rule for modification of their own decrees that would have been more appropriate as a restraint on initial custody decisions.

that it should not take jurisdiction over the case after the child established another home state.¹²³ For example, in *Turley v. Griffin*, a Kentucky court rendered the initial divorce decree, but the Court of Appeals of Kentucky held that this state should not assert jurisdiction to modify custody after the child had been gone from Kentucky for more than six months,¹²⁴ the period required to establish that another state is the home state.¹²⁵

Given the *Turley* rule, the appellate court in *Dillard* might have had some difficulty in distinguishing *Turley* and the case before it.¹²⁶ Both involved children who had moved away from Kentucky but had noncustodial parents who continued to live in the state. Under the PKPA's rules, these are situations in which a state in Kentucky's position may indeed claim continuing jurisdiction.¹²⁷ However, *Turley's* rule purports to disavow the continuing jurisdiction possibility in favor of the child's new home state.

A clear judicial explanation of the PKPA's rules in *Turley/Dillard/Brighty*-type cases would provide both assistance and flexibility to trial courts.¹²⁸ Arguably, Kentucky appellate courts need not reverse *Turley* nor abandon the outcome of *Brighty* in order to claim the benefits of the continuing jurisdiction rule. The *Brighty* court distinguished between enforcement jurisdiction and modification jurisdiction, noting that only the latter type of case would concern a court with a child's best interest,¹²⁹ and implying that the supreme court prefers that this state adjudicate custody only if Kentucky has optimum access to relevant evidence needed

¹²³ See cases cited *supra* note 118.

¹²⁴ See *Turley*, 508 S.W.2d at 766.

¹²⁵ See K.R.S. § 403.410(5).

¹²⁶ See *Dillard v. Dillard*, 859 S.W.2d 134 (Ky. Ct. App. 1993). Although *Bock v. Graves*, 804 S.W.2d 6 (Ky. 1991), might be distinguished because the trial court's order contained a specific provision for continuing jurisdiction, it seems illogical to say that a trial court may exercise jurisdiction not recognized by the state's highest court.

¹²⁷ See 28 U.S.C. § 1738A(d).

¹²⁸ The Supreme Court of Kentucky should distinguish between cases similar to *Cann v. Howard*, 850 S.W.2d 57 (Ky. Ct. App. 1993) and *Wieczorek v. Sebastian*, 751 S.W.2d 38 (Ky. Ct. App. 1988), and *Turley/Dillard/Brighty* cases. In the *Cann/Wieczorek* class of cases, this state's courts have a federally imposed obligation to enforce the other state's custody decree, which they may not modify unless the requirements of the PKPA are met. In contrast, *Turley/Dillard/Brighty* cases implicate this state's right to the enforcement of its own decrees elsewhere.

¹²⁹ See *Brighty v. Brighty*, 883 S.W.2d 494, 496-97 (Ky. 1994).

for a best interest determination. The Supreme Court of Kentucky could reasonably hold that Kentucky trial courts may claim continuing jurisdiction in custody cases if Kentucky retains a significant connection to the child whose custody is in dispute and substantial evidence concerning the child's best interest is available in this state.¹³⁰ However, it could also leave trial courts free to decline continuing jurisdiction if a child's move away from the state has made the new home state a preferable forum and the benefits of conducting the litigation in the forum with access to the relevant evidence outweighs any possible unfairness to the Kentucky parent.¹³¹

Such a rule would recognize that the federal Act grants power to an initial forum to retain continuing jurisdiction, but also that there will be instances in which the stability and certainty provided by the federal rule are outweighed by the possibility that continued litigation in the original Kentucky forum will result in serious inefficiencies. A Kentucky court should recognize the federal interest in certainty and stability, prompting it to retain continuing jurisdiction, when two conditions are present. One of the conditions relates to fairness; the other relates to efficiency. The fairness problem can best be illustrated by reference to the position of a litigant whose child moves away from Kentucky with a custodial parent. If a move away from Kentucky automatically dissolves the jurisdictional connection with this state, the move itself can provide a litigation advantage to the out-of-state party. A Kentucky noncustodial parent whose child resides elsewhere is always at a disadvantage if subsequent litigation must go on in the state of the child's residence. The Kentucky resident must hire an out-of-state attorney, travel to the other state, and finance an away-from-home court proceeding if he or she wishes to modify custody. The federal PKPA's offer of continuing jurisdiction makes certain that

¹³⁰ Jurisdiction retained under the continuing jurisdiction rule trumps the jurisdiction of the child's new home state. *See McDow v. McDow*, 908 P.2d 1049 (Alaska 1996). For a discussion of the connections between the child and the state that might trigger continuing jurisdiction, see *Greenlaw v. Smith*, 869 P.2d 1024 (Wash. 1994). The Washington court noted that a child should have more than a slight connection to the state, but also said that continued visitation in the state would be sufficient. *See id.* at 1033.

¹³¹ *See Pettinato v. Johnson*, 674 So.2d 148 (Fla. Dist. Ct. App. 1996); *Solomon v. Solomon*, 701 A.2d 1199 (Md. Ct. Spec. App. 1997); *Manley v. Hoag*, 917 P.2d 1011 (Okla. Ct. App. 1996); *Liska v. Liska*, 902 P.2d 644 (Utah Ct. App. 1995).

litigants whose states do claim continuing jurisdiction are protected from this possibility.

On the other hand, the advantage as between two parents is not the only concern that a state might have in a child custody case. Most custody courts would agree that the child's best interests lie at the heart of custody litigation.¹³² Moreover, a Kentucky court should have no interest in serving as the custody forum if the child has a long-established residence in another state, most of the evidence relevant to a custody decision is in that other state, and there is no evidence that the custodial parent's move or new residence was part of a scheme to disadvantage the noncustodial parent.¹³³ In such a case, the Kentucky court's interest in efficient litigation might outweigh its concern that the noncustodial parent be treated protectively. If *Turley* represents that conclusion, its holding could exist alongside a slightly revised *Brighty* rule, namely that the Kentucky trial court may retain continuing jurisdiction when the nonresident parent's activity strongly implicates fairness concerns, because it intentionally disadvantages the other party.

Kentucky courts also have faced cases involving international custody disputes. In *Harsack v. Harsack*,¹³⁴ the Court of Appeals of Kentucky held that Finland was not the "habitual residence" of minor children who had recently emigrated to the United States, rejecting the mother's arguments that would have deprived this state of subject matter jurisdiction. The Harsacks had moved from Finland to Texas, but Mr. Harsack was unable to find work in that state. After the couple separated, Mr. Harsack came to northern Kentucky, where he had relatives. Mrs. Harsack argued that the children's habitual residence was in Finland and that, under the Hague Convention On International Child Abduction,¹³⁵ custody had to be adjudicated in that country. The Court of Appeals of Kentucky held that the Harsack's "settled purpose" in

¹³² Many state legislatures agree. *See, e.g.*, K.R.S. § 403.270.

¹³³ A parent's willful conduct in impeding visitation would be a ground for asserting continuing jurisdiction. *See Wilson v. Wilson*, 465 S.E.2d 44 (N.C. Ct. App. 1996), a case in which the initial forum refused to decline jurisdiction not only because of the child's continued connection to the forum, but also because of the custodial parent's willful activity.

¹³⁴ *Harsack v. Harsack*, 930 S.W.2d 410 (Ky. Ct. App. 1996).

¹³⁵ *See Hague Convention on the Civil Aspects of International Child Abduction*, S. Doc. No. 99-11 (1985) [hereinafter *Hague Convention*].

moving to the United States made this country the children's habitual residence.¹³⁶

The Hague Convention, and its federal implementing statute, the International Child Abduction Remedies Act ("ICARA"),¹³⁷ provide remedies for parents of children who have been wrongfully removed from the country of their habitual residence.¹³⁸ If a parent seeking the child's return proves that the child was removed from its habitual residence, the forum must order the child's return and may not consider the underlying custody dispute.¹³⁹ As a result, any custody determination must be made in the country of habitual residence. As the United States Court of Appeals for the Sixth Circuit has noted, habitual residence is not the same as domicile.¹⁴⁰ A child's domicile is generally determined as a matter of law, but habitual residence is a factual determination based on the child's past experience rather than the future intentions of his or her parents.¹⁴¹

The *Harsacky* court's use of the parental "settled purpose" to make the habitual residence determination focused on the intention of the children's parents in moving to the United States. The appellate court found that the move was more than a temporary one, enabling the children to acquire an American habitual residence.¹⁴² This analysis unfortunately confuses

¹³⁶ See *Harsacky*, 930 S.W.2d at 414-15.

¹³⁷ 42 U.S.C. §§ 11601-11610 (1994).

¹³⁸ See *Hague Convention*, *supra* note 134. For an excellent primer on the Hague Convention and the implementing legislation, the International Child Abduction Remedies Act ("ICARA"), see Linda Silberman, *Hague Convention On International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994). If a parent proves that children have been wrongfully removed from a habitual residence, only limited defenses prevent the child's return. Article 13b of the Hague Convention provides a defense if return would cause grave risk of physical or psychological harm or otherwise place the child in an intolerable position. Article 20 provides a defense if the country to which return is sought does not provide for fundamental human rights.

¹³⁹ See *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

¹⁴⁰ See *id.*; see also Silberman, *supra* note 138, at 20-24.

¹⁴¹ See Silberman, *supra* note 138, at 20-24. For a general discussion of habitual residence see GRAHAM & KELLER, *supra* note 9, § 14.48.

¹⁴² A move need not be permanent to result in a child's acquisition of a habitual residence. See *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (stating that it was immaterial that the child had not lived in Australia for as long as he had lived in the United States; Australia was the habitual residence).

domicile and habitual residence.¹⁴³ A more appropriate inquiry would have asked whether the children's residence in this country was so significant that their presence here could be described as habitual. No particular time is required to establish a habitual residence.¹⁴⁴ Parents need not necessarily establish a domicile in this country, but the children's presence here must be complete and longstanding enough to be habitual. If children have been enrolled in school for some time and have formed new relationships or social attachments, their presence is more likely to be habitual.

IV. SUBSTANTIVE RULES GOVERNING CHILD CUSTODY

Several changes mark important trends in Kentucky child custody decisions. First, appellate courts have not only accepted joint custody as a possible resolution for child custody disputes, but they also have embraced the joint custody concept.¹⁴⁵ Second, appellate courts have required parties seeking custody modification to meet rigorous standards,¹⁴⁶ whether the modification would change a sole custody or joint custody arrangement. Finally, major litigation has addressed both third-party custody¹⁴⁷ and grandparent visitation rights.¹⁴⁸

¹⁴³ In addition to physical presence, domicile depends on the intention to remain for an indefinite period of time. *See* *St. John v. St. John*, 163 S.W.2d 820, 822-23 (Ky. 1942). Children take their parents' domicile as a matter of law since they do not have the capacity for the requisite intention.

¹⁴⁴ *See Feder*, 63 F.3d at 217.

¹⁴⁵ *See Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993) (court-ordered joint custody permissible); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. Ct. App. 1996) (joint custody of child born out-of-wedlock affected dispute over child's appropriate surname); *Aton v. Aton*, 911 S.W.2d 612 (Ky. Ct. App. 1995) (joint custody award does not require equal residential custody); *Chalupa v. Chalupa*, 830 S.W.2d 391 (Ky. Ct. App. 1992) (joint custody the preferred solution).

¹⁴⁶ *See Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990) (holding that pursuant to section 403.340(2)(c), a party seeking modification of a custody decree must demonstrate serious endangerment to child's physical, mental, moral, or emotional well-being as a predicate to modification).

¹⁴⁷ *See Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995); *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995); *Fitch v. Burns*, 782 S.W.2d 618 (Ky. 1989); *Davis v. Collingsworth*, 771 S.W.2d 329 (Ky. 1989).

¹⁴⁸ *See King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992); *Baker v. Perkins*, 774 S.W.2d 129 (Ky. Ct. App. 1989).

The supreme court's decision in *Squires v. Squires*¹⁴⁹ stopped short of treating joint custody as a statutorily preferred solution in custody disputes, primarily because the Kentucky custody statute states no legislative preference.¹⁵⁰ Nevertheless, the court spoke at length about the benefits of joint custody and permitted trial courts to impose joint custody on objecting parents as long as the child's best interest was served by a joint custody award. The court indicated that a child's best interest would be served by a joint custody award unless there was no reasonable likelihood of future parental cooperation.¹⁵¹

In subsequent cases, the Court of Appeals of Kentucky has addressed joint custody modification.¹⁵² Modification of joint custody requires preliminary findings that parents can no longer cooperate. In *Mennemeyer*

¹⁴⁹ *Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993). At least one intermediate appellate opinion announces a "preference" for joint custody. See *Chalupa*, 830 S.W.2d at 391. The trend toward joint custody encompasses children born out-of-wedlock. See *Hazel*, 918 S.W.2d at 742. In *Hazel* the parties disputed the child's surname. The appellate court held that the best-interest test should apply in determining the child's surname and listed a number of factors for trial courts to consider in evaluating the child's best interest. See *id.* at 744-45. Some of the *Hazel* factors are similar to those discussed in *Squires*. Both appellate opinions permit trial courts to consider whether joint custody or bearing a father's surname will strengthen the bond between the child and his or her father. Less optimistic readers may wonder whether courts should distinguish between awarding joint custody because of an existing parent-child bond and awarding joint custody to promote bonding. Similar concerns might arise over naming. In spite of the *Squires* court's statement that post-dissolution families should mirror intact families, there are instances in which that general homily may be dangerous for children. Imposing joint custody on a family that has experienced a pattern of domestic violence can subject both parents and children to continued danger.

¹⁵⁰ Section 403.270 permits a trial court to award joint custody if it is in the best interest of the child.

¹⁵¹ Significant risks might attend a parent's refusal to cooperate if a trial court found that refusal to be unwarranted. Nationally, a number of courts have imposed "friendly parent" rules, awarding custody to the parent most likely to provide reasonable access to the other parent. See *Ford v. Ford*, 700 So.2d 191, 196-97 (Fla. Dist. Ct. App. 1997) (discussing relationship between "friendly parent" rules and domestic violence problems).

¹⁵² Cases decided before *Squires* had held that a court modifying a joint custody award was required to conduct a *de novo* hearing on the assumption that a joint custody award was "no award." See *Erdman v. Clements*, 780 S.W.2d 635, 637 (Ky. Ct. App. 1989); *Benassi v. Havens*, 710 S.W.2d 867, 869 (Ky. Ct. App. 1986).

v. *Mennemeyer*,¹⁵³ the court held that a trial court inappropriately modified the residential placement of a child whose parents had joint custody because the lower court made no finding of inability or bad faith refusal to cooperate.¹⁵⁴ Similarly, in *Stinnett v. Stinnett*,¹⁵⁵ the Court of Appeals of Kentucky held that a trial court may not conduct the required modification hearing without some showing that one or both of the parties cannot cooperate as a joint custodian.¹⁵⁶

Appellate courts should reconsider the rules adopted in *Mennemeyer* and *Stinnett*, and should also rethink appellate decisions holding that a prior joint custody award is not a true award of custody.¹⁵⁷ *Squires* makes clear that joint custody is an option available to a trial court convinced that joint decision-making is in the child's best interest. If joint custody is a co-equal possibility with sole custody, it ought to be governed by the same statutory scheme,¹⁵⁸ unless there are other structural reasons for treating joint custody differently.

There are two important aspects to joint custody. The first is the right of decision-making. In joint custody, both parents must cooperate in making decisions about the child's care, training, and protection. Neither parent's decisional right outweighs the other's, unless the court specifies that one of the parents will control a particular decision.¹⁵⁹ A second aspect of joint custody concerns the child's physical placement. Even though joint custodians must cooperate on making decisions for the child's welfare, they cannot both have physical custody of the child at the same time. In many cases, the parents will cooperate in planning for a child's residential placement; in some cases, a court will have to dictate the residential arrangements for the child because the parents cannot agree. Decision-making rights and residential placement are not necessarily co-extensive.¹⁶⁰ One parent might have equal decision-making power with the other parent,

¹⁵³ *Mennemeyer v. Mennemeyer*, 887 S.W.2d 555 (Ky. Ct. App. 1994).

¹⁵⁴ See *id.* at 557-58.

¹⁵⁵ *Stinnett v. Stinnett*, 915 S.W.2d 323 (Ky. Ct. App. 1996).

¹⁵⁶ See *id.* at 324.

¹⁵⁷ See *Erdman*, 780 S.W.2d at 637; *Benassi*, 710 S.W.2d at 869.

¹⁵⁸ Arguably then, joint custody modification would be subject to section 403.340 (modification of custody decree) and subject to the standard set out in *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990). See *supra* note 146 and accompanying text.

¹⁵⁹ See *Burchell v. Burchell*, 684 S.W.2d 296, 299 (Ky. Ct. App. 1984).

¹⁶⁰ See *Aton v. Aton*, 911 S.W.2d 612, 614-15 (Ky. Ct. App. 1995).

but have actual physical custody of the child for a smaller portion of the time.

Mennemeyer's rule treats the two aspects of joint custody as inextricably intertwined, holding that a court cannot alter residential placement without finding that joint custody should not continue.¹⁶¹ On the facts of *Mennemeyer*, the rule may be explicable. The mother intended to move to Florida and to take the child with her. The father sought to have placement altered so that the child would reside with him.¹⁶² Thus, the *Mennemeyer* facts interwove decision-making power (about where the child would live) with residential placement. To the extent that a child's residence is a decision made by his or her parents, arguments over residential placement of a child inherently involve disputes about decisions affecting the child. The reverse, however, may not be true. Some decision-oriented arguments may not involve residential placement.¹⁶³

Keeping the two aspects of joint custody separate would help appellate courts develop a modification standard that fits within this state's statutory directives,¹⁶⁴ but takes into account differences between the structure of sole custody and joint custody's more flexible structure. Joint custody awards should be modifiable whenever parental inability to cooperate has a significant, negative impact on the child, the standard required by section 403.340 in all cases. The provisions of section 403.340 that predicate modification on proof of new facts, arising after the previous decree or unknown to the court at the time the prior decree was entered, should apply in joint custody modification, as should the statutory requirement that the child's present condition seriously endanger his or her physical, mental, moral, or emotional health.

Courts should interpret section 403.340's demand that the present custodian be retained to mean that the prior arrangement will be retained unless it would cause serious harm to the child. However, a sensible appellate rule would permit a trial court to alter residential placement without altering decision-making authority except in respect to residence. Trial courts should be given the freedom to identify and correct that portion of the joint custody award that has malfunctioned, preserving those aspects

¹⁶¹ See *Mennemeyer v. Mennemeyer*, 887 S.W.2d 555, 557-58 (Ky. Ct. App. 1994).

¹⁶² See *id.* at 556. For an extended discussion of parent relocation, see 16 GRAHAM & KELLER, *supra* note 9, § 21:24.

¹⁶³ See *Burchell v. Burchell*, 684 S.W.2d 296 (Ky. Ct. App. 1984).

¹⁶⁴ See K.R.S. § 403.340 (Michie Supp. 1996).

of the award that are not problematic. Moreover, the rule that modification of joint custody requires a *de novo* hearing, as if no award had been made, is contrary to the modification statute (section 403.340), unrealistic, and wasteful of court resources.

Third-party custody rights and grandparent visitation continue to raise issues for Kentucky courts. At the same time that grandparents have been granted greater access to children through the implementation of a grandparent visitation statute¹⁶⁵ and case law interpreting that statute,¹⁶⁶ grandparents have also been subject to a strict standard requiring proof of parental unfitness when they seek child custody.¹⁶⁷ These trends may provide both too much and too little, as the trends favor grandparents seeking visitation against the united wishes of parties to an intact marriage,¹⁶⁸ but give no weight to a grandparent's *de facto* child custody exercised over a significant period of time.

Appellate courts in this state generally have followed a standard requiring a third party seeking child custody to show parental unfitness,¹⁶⁹ a rule that applies to grandparents seeking child custody. Recent appellate decisions emphasize the unfitness standard in new contexts, focusing on a parent's "superior right" to custody in instances in which a *de facto* parent cannot show waiver of the parent's right. The decisions demand that trial courts consider the waiver issue carefully, even when the third party has had actual custody of the child for a substantial period of time. In *Greathouse v. Shreve*,¹⁷⁰ the Supreme Court of Kentucky held that a father whose child had been in the maternal grandmother's custody for a number of years had not necessarily waived his superior right to custody because he did not know that he had a right to custody.¹⁷¹ In *Shifflet v. Shifflet*,¹⁷² the

¹⁶⁵ Section 405.021 recently has been amended to provide that grandparent visitation may survive termination of the parental rights of the grandparent's son or daughter, unless the circuit court finds that the child's best interest precludes the visitation. *See id.* § 405.021(1). The statute also provides that a court may grant "noncustodial parent visitation rights" to a grandparent whose son or daughter is deceased and who provides child support for the child. *Id.* § 405.021(3).

¹⁶⁶ *See* text accompanying *infra* notes 180–82.

¹⁶⁷ The unfitness standard comes from section 405.020.

¹⁶⁸ *See* *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992).

¹⁶⁹ *See* K.R.S. § 405.020; *see also* *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989); *Davis v. Collingsworth*, 771 S.W.2d 329, 330 (Ky. 1989); *Sumner v. Roark*, 836 S.W.2d 434, 439 (Ky. Ct. App. 1992).

¹⁷⁰ *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995).

¹⁷¹ *See id.* at 388, 391.

¹⁷² *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995).

same court imposed a similar rule in a contest between the child's natural mother and her maternal grandmother, requiring the waiver to be shown by clear and convincing evidence.¹⁷³

The constitutionally protected nature of the parent-child relationship underlies the requirement that a third party generally show parental unfitness to gain child custody in preference to the child's parent.¹⁷⁴ Courts considering protection of the parent-child relationship should note, however, that the protection afforded is not absolute.¹⁷⁵ Moreover, the Constitution protects the relationship between parents and their children, not the mere status of parent and child without the supporting relationship. For example, in more than one case the United States Supreme Court has noted that a state rule permitting the termination of an unwed father's parental rights if he has no previous relationship with his biological child does not violate constitutional standards of fairness.¹⁷⁶

States also have a protective obligation toward minor children.¹⁷⁷ When the state's protective obligation and its role as *parens patriae* over minor children clashes with the protected nature of the parent-child relationship, the protective role may weigh more heavily in the constitutional balance.

These general rules might inform debate over third-party custody rights in Kentucky. Removal of children from a long-term custodian serving as a *de facto* parent raises the prospect of significant emotional damage to the child, particularly if that *de facto* parent has served as the child's exclusive care-giver.¹⁷⁸ Focusing on parental waiver of superior custody rights in these cases gives no weight to the state's duty to protect the child's welfare and no thoughtful consideration to the child's independent rights. Grandparents and other third parties who serve as long-term *de facto* custodians should be able to raise the child's interests and needs without

¹⁷³ See *id.* at 394.

¹⁷⁴ See *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁷⁵ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983).

¹⁷⁶ See *Lehr*, 463 U.S. at 262.

¹⁷⁷ See *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁷⁸ See generally Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045 (1996); Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145 (1994).

resorting to proof of parental waiver in a manner similar to criminal cases or contractual disputes.¹⁷⁹

At the same time that Kentucky courts have limited the rights of grandparents to seek custody by imposing the third-party standard, they have interpreted the grandparent visitation statute expansively. In *King v. King*,¹⁸⁰ the Supreme Court of Kentucky upheld both the constitutionality of the grandparent visitation statute and a trial court order granting visitation to a grandfather whose son and daughter-in-law wished to deny that visitation. *King* establishes that grandparent visitation may be awarded outside of the divorce context. A visitation award does require a best-interest determination by the trial court.¹⁸¹ In *King*, the child's parents conceded that they had no safety concerns and acknowledged that the grandfather loved and cared for the child, with whom he had a longstanding relationship.¹⁸²

V CHILD SUPPORT

Child support continues to be an area of both legislative and judicial activity. The Kentucky legislature made the Uniform Interstate Family Support Act ("UIFSA") effective January 1, 1998, as mandated by federal law.¹⁸³ In addition, courts have clarified some aspects of child support guidelines.¹⁸⁴

UIFSA may change several aspects of Kentucky child support law. The Act's provisions provide expansive jurisdiction to determine child

¹⁷⁹ A long-term *de facto* custodian's ability to retain custody of a minor child need not necessarily mean that a parent would entirely lack access to the child. Parents could retain visitation rights, *see* K.R.S. § 403.320, and they might also regain custody under the custody modification statute, *see id.* § 403.340. However, a child's interests and needs, rather than parental rights, would be the primary focus of the litigation.

¹⁸⁰ *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992).

¹⁸¹ *See id.* at 631.

¹⁸² *See id.* at 632-33.

¹⁸³ *See* 42 U.S.C. § 666 (1994). Congress has also enacted the Federal Full Faith And Credit For Child Support Orders Act, 28 U.S.C. § 1738B, which bars a second state's modification of a previously entered child support order if the order was made consistently with the Act. *See generally* Patricia Wick Hatamyar, *Critical Applications and Proposals for Improvement of the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act*, 71 ST. JOHN'S L. REV. 1 (1997).

¹⁸⁴ *See* text accompanying *infra* notes 244-68.

support,¹⁸⁵ although other Kentucky statutes may hamper the Act's intended effectiveness.¹⁸⁶ The Act will replace the Uniform Reciprocal Enforcement of Support Act ("URES")¹⁸⁷ and will eventually result in a nationwide system in which only one state has jurisdiction to modify support awards.¹⁸⁸

UIFSA will apply to support orders for minor children and spouses or former spouses.¹⁸⁹ The Act governs the treatment of both temporary and final orders of support,¹⁹⁰ whether the order provides for monetary support or for other payments, such as payments for health care, reimbursement of arrearages, or payments of costs and attorney fees.¹⁹¹

The Act's basic structure models the federal PKPA,¹⁹² adopting a scheme that demands enforcement of previously entered orders as long as the state issuing the order had appropriate jurisdiction.¹⁹³ The Act expands

¹⁸⁵ See K.R.S. § 407.5201. For example, section 8 provides that this state may assert personal jurisdiction on any basis consistent with the state and federal Constitutions. A number of states continue to treat the presence of a child within the state as insufficient to establish personal jurisdiction over a nonresident obligor. See *Heineken v. Heineken*, 683 So.2d 194 (Fla. Dist. Ct. App. 1996); *Heinle v. Fourth Judicial District Court*, 861 P.2d 171 (Mont. 1993); *In re Marriage of Peck*, 920 P.2d 236 (Wash. Ct. App. 1996). That result is compelled by the United States Supreme Court decision in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) (holding that divorced father in New York, who allowed his daughter to live with her mother in California, was not thereby subject to in personam jurisdiction in California in mother's action for child custody). Moreover, there are cases in which a parent's attempts to enforce visitation are not treated as actions subjecting him or her to personal jurisdiction. See *Puhlman v. Turner*, 874 P.2d 291 (Alaska 1994); *Cann v. Howard*, 850 S.W.2d 57 (Ky. Ct. App. 1993).

¹⁸⁶ See text accompanying *infra* note 197.

¹⁸⁷ K.R.S. §§ 407.010-480.

¹⁸⁸ For an excellent discussion of the Act and its relation to the Federal Full Faith and Credit For Child Support Orders Act, 28 U.S.C. § 1738B, see Hatamyar, *supra* note 183. See also Margaret Campbell Haynes, *Federal Full Faith and Credit for Child Support Orders Act*, 14 DEL. LAW. 26 (Spring 1996).

¹⁸⁹ See K.R.S. § 407.5101(3) (defining duty of support).

¹⁹⁰ Although section 407.5101(21) defines support order to include a temporary order, other statutory sections provide that temporary support orders issued ex parte or pending resolution of a jurisdictional conflict do not create continuing, exclusive jurisdiction in the issuing tribunal. See *id.* § 407.5205(5).

¹⁹¹ See *id.* § 407.5101(21) (defining support order).

¹⁹² 28 U.S.C. § 1738A (1994).

¹⁹³ See K.R.S. § 407.5205 (granting continuing, exclusive jurisdiction to a tribunal issuing an order consistent with forum law, which would include the requirement of personal jurisdiction over the obligor, see *id.* § 407.5201).

this state's ability to claim jurisdiction over nonresidents beyond the boundaries now permissible under section 454.220, the family obligations long-arm statute. In many cases, Kentucky courts will be able to use section 407.5201, the UIFSA jurisdictional statute, to claim personal jurisdiction over a nonresident parent, issue an appropriate support order, and demand enforcement of that order by other states.¹⁹⁴ In some cases, however, Kentucky will not be able to claim personal jurisdiction over a nonresident obligor. If a state in which a possible support recipient resides lacks personal jurisdiction over the obligor, the recipient may use the Act's two-state procedure to establish support.¹⁹⁵ However, a sister state establishing the support order will then have continuing, exclusive jurisdiction over support determinations and that state's order will be enforceable and not subject to modification by a Kentucky court.¹⁹⁶

The extended personal jurisdiction available under the Act could be limited by other Kentucky statutes addressing personal jurisdiction. Commentators have long noted that section 454.165 stands as a barrier to the exercise of personal jurisdiction over some nonresidents who otherwise might be subject to jurisdiction without violating any federal constitutional strictures.¹⁹⁷ Section 454.165 provides that no personal judgment may be

¹⁹⁴ The UIFSA jurisdictional statute permits this state to claim personal jurisdiction on the following bases: (1) the individual obligor is personally served within this state; (2) the individual obligor consents to jurisdiction or waives the personal jurisdiction issue; (3) the obligor resided in this state with the child; (4) the individual resided in this state and provided prenatal expenses and support for the child; (5) the child resides in this state as a result of the obligor's acts or directives; (6) the obligor engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; (7) the individual asserted parentage in a putative father registry; and (8) on any other basis consistent with the United States and state Constitutions. *See id.* § 407.5201.

¹⁹⁵ *See id.* §§ 407.5203, .5304, .5305.

¹⁹⁶ *See* Hatamyar, *supra* note 183, at 36-38. The same result could occur in a modification scenario. As Professor Hatamyar notes, a recipient could seek an increase in child support while residing in State *A* by proceeding in that state if State *A* had entered the original child support order and the recipient continued to reside in the state. If, however, the recipient chooses to seek modification in the obligor's state, State *B*, she must consent to that state's jurisdiction and State *B* thereafter has continuing, exclusive jurisdiction over the order, at least as long as the obligor resides in State *B*. *See id.* at 37-38.

¹⁹⁷ *See* John R. Leathers, *Rethinking Jurisdiction and Notice in Kentucky*, 71 Ky. L. J. 755 (1982-83) (drawing attention to the difficulties caused by section 454.165).

entered against a party who is constructively served unless he or she is served pursuant to section 454.210, the general long-arm statute. Nothing in the UIFSA provides for service through the general long-arm statute's mechanisms. However, no section of the statute forbids such service, and section 407.5202 provides that a tribunal exercising personal jurisdiction over a nonresident may apply the forum's procedural and substantive law. If section 407.5202 were read as a directive requiring service pursuant to section 454.210(3), the general long-arm statute, the limitations in section 454.165 might be avoided. A better solution could be crafted by the General Assembly, for that body could amend section 454.165 so that it did not apply to obligations arising from marriage or the parent-child relationship.

Kentucky's jurisdiction may also be limited by UIFSA's rule on simultaneous proceedings.¹⁹⁸ Under the simultaneous proceedings rule, a prior petition filed in another state can cut off this state's ability to assume jurisdiction. If the Kentucky petition is the second-filed petition, this state's court may exercise jurisdiction only if two conditions are met. First, the Kentucky petition must have been filed before the time for filing a responsive pleading expired in the other state.¹⁹⁹ Second, the party contesting jurisdiction in the state of the first-filed petition must make a timely jurisdictional challenge in that state.²⁰⁰

If Kentucky gains personal jurisdiction over a nonresident obligor under section 407.5201, the trial court may apply the Kentucky child support guidelines to determine the child support obligation. UIFSA's choice-of-law rule for single-state proceedings is contained in section 407.5202, which provides that a state with personal jurisdiction over a nonresident may apply not only its own procedural and substantive rules, but its own choice-of-law rules to determine the support obligation.

Future litigation will define more clearly the relationship between jurisdiction and choice of law in child support cases. For the present, however, UIFSA's introduction raises some interesting possibilities. When Kentucky acts in a single state proceeding, UIFSA directs the use of this

¹⁹⁸ See K.R.S. § 407.5204.

¹⁹⁹ See *id.* § 407.5204(1)(a). Similar rules also limit this state's ability to act when the petition filed in Kentucky is the first petition, but the respondent makes a timely jurisdictional challenge in Kentucky and files a petition in the other state before the time expires for filing a responsive pleading under Kentucky's rules.

²⁰⁰ See *id.* § 407.5204(1)(b). However, if the second-filed petition is filed in the child's home state, that state has priority over the first-filed state to determine child support. See *id.* § 5204(2)(c); see also Hatamyar, *supra* note 183, at 17

state's general choice-of-law rules,²⁰¹ rather than the UIFSA choice-of-law rules applicable to actions in which Kentucky is a responding state or enforcement proceedings.²⁰² Kentucky's general approach to choice of law has varied over time, but may be characterized as involving either governmental interest analysis or most-significant-relationship determinations.²⁰³ Kentucky has no specific choice-of-law rule for child support determinations, unless section 403.212 is interpreted as a statutory directive on choice of law.²⁰⁴ If the child support guidelines statute is not a choice-of-law directive, a trial court arguably might be free to use general choice-of-law rules.

Choice-of-law considerations are not likely to play a large role in child support determinations, but they could surface as more than a theoretical exercise in some instances.²⁰⁵ Kentucky's general choice-of-law rules have called for the application of this state's laws when the litigation involved

²⁰¹ See K.R.S. § 407.5202 (single-state proceeding); *id.* § 407.5303 (Kentucky acting as responding state).

²⁰² See *id.* § 407.5604.

²⁰³ See *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967). For cases involving contracts, appellate courts have adopted a most-significant-relationship approach. See *Paine v. LaQuinta Motor Inns, Inc.*, 736 S.W.2d 355 (Ky. Ct. App. 1987), *overruled on other grounds by* *Oliver v. Schultz*, 885 S.W.2d 699 (Ky. 1994).

²⁰⁴ K.R.S. Section 403.212(1) provides that "[t]he following provisions and child support table shall be the child support guidelines established for the Commonwealth of Kentucky." An appellate court might read this section to mean that in any child support proceeding in this state, the legislature intended for the Kentucky child support guidelines to apply. Another possible explanation is that the legislature never gave any thought to choice of law in developing the child support guidelines. Like workers' compensation or other administrative proceedings, child support determinations have no choice-of-law function. A court with jurisdiction applies its own guidelines to resolve the case, and any interested state with jurisdiction may apply its rule without violating constitutional prohibitions.

²⁰⁵ One possible area might involve the age of majority and consequent termination of child support duties. See *Tucker v. Hill*, 763 S.W.2d 144 (Ky. Ct. App. 1988) (holding that Kentucky's age of majority terminated father's support duty after Indiana divorce obligations were subject of enforcement proceeding in this state). UIFSA would change this result. In an enforcement proceeding, section 407.5604 provides that the issuing state's law governs the nature, extent, amount, and duration of support.

a false conflict.²⁰⁶ One might argue that there are some child support cases in which another state's child support guidelines should be applied because any conflict between those guidelines and the Kentucky guidelines is a false conflict. Suppose, for example, that a Kentucky trial court had personal jurisdiction over a nonresident obligor from another state whose child support guidelines provided extended support for college education.²⁰⁷ A Kentucky trial court might apply the other state's rule under either a most-significant-relationship or governmental interest analysis. The court could theorize that Kentucky's child support guidelines were not intended to limit the obligations of nonresidents or to punish resident children.²⁰⁸ In that case, the court's choice between the higher obligation produced by the sister state guidelines and the lower obligation produced by the Kentucky guidelines would depend on consideration of the statute's underlying policies and considerations of fairness to both parties, including an examination of the parties' expectations.²⁰⁹

If a Kentucky court issues a child support order consistent with this state's laws,²¹⁰ it has continuing, exclusive jurisdiction over the order as

²⁰⁶ See *Arnett*, 433 S.W.2d at 109; *Wessling*, 417 S.W.2d at 259. A false conflict occurs when only one state has any interest in the application of its policy to resolve the dispute. See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).

²⁰⁷ The obligor may have consented to this state's jurisdiction, been served within the state, or fall under one of the other provisions of section 407.5201. For purposes of this hypothetical, the child lives in Kentucky at the time of the action.

²⁰⁸ Of course, there is also an argument that this state's legislature has set the standard for support for children residing in this state by implementing child support guidelines. To make a support award under another state's higher standards, the trial court would have to interpret the child support guidelines as minimum standards that might not apply if party expectations made it more fair to rely on another state's guidelines. For example, an obligor who lived for a significant period of time with children in another state might be said to expect the application of that state's standard although he or she might not be subject to its personal jurisdiction.

²⁰⁹ A similar result is not possible when Kentucky acts as a responding state to award support for nonresident children because the UIFSA choice-of-law rules dictate the use of the forum state's child support guidelines. See K.R.S. § 407.5303(2).

²¹⁰ The rules for continuing, exclusive jurisdiction over spousal support orders are somewhat different. Section 407.5205(6) provides that a Kentucky court issuing a spousal support order has continuing, exclusive jurisdiction "throughout the existence of the support obligation." *Id.* The act does not require the supported spouse to maintain a Kentucky residence and does not specify which state's law

long as Kentucky remains the residence of the obligor, the individual obligee, or the child,²¹¹ unless each individual party files a written consent permitting another state's tribunal to assume continuing, exclusive jurisdiction.²¹² The Act's continuing, exclusive jurisdiction provisions prohibit modification of the order by another state's tribunal and require other states to enforce the order without modification.

Not all child support determinations can be resolved under UIFSA's single-state procedure, in spite of the significant expansion of grounds for the assertion of personal jurisdiction over nonresident obligors. The Act, therefore, incorporates rules for two-state proceedings. Two-state proceedings may be used to establish support orders²¹³ and to enforce support orders and income-withholding orders from another state without registration.²¹⁴

In two-state proceedings, Kentucky may serve either as the initiating or responding tribunal. If Kentucky serves as the initiating tribunal,²¹⁵ this state forwards the statutorily required documents to the appropriate court, support enforcement agency, or state information agency in a responding state.²¹⁶ As responding tribunals, Kentucky courts have numerous powers, including the ability to issue or enforce a support order,²¹⁷ render a paternity judgment,²¹⁸ order income withholding,²¹⁹ determine arrearages and specify the method of payment,²²⁰ enforce orders by civil or criminal contempt,²²¹ set aside property for the payment of support obligations,²²² place liens on property or order execution on the obligor's property,²²³ require the obligor to provide the court with personal information on

determines whether the obligation continues.

²¹¹ See K.R.S. § 407.5205(1)(a).

²¹² See *id.* § 407.5205(1)(b).

²¹³ See *id.* § 407.5301(2)(a).

²¹⁴ See *id.* § 407.5301(2)(b). Separate rules apply to the enforcement of support orders registered in this state. See *id.* §§ 407.5601-.5608.

²¹⁵ A proceeding in an initiating state may be commenced either by an individual petitioner or an agency providing support. See *id.* § 407.5301(3).

²¹⁶ See *id.* § 407.5304.

²¹⁷ See *id.* § 407.5305(2)(a).

²¹⁸ See *id.* § 407.5305(2)(b).

²¹⁹ See *id.* § 407.5305(c).

²²⁰ See *id.* § 407.5305(d).

²²¹ See *id.* § 407.5305(e).

²²² See *id.* § 407.5305(f).

²²³ See *id.* § 407.5305(g).

location and employment,²²⁴ issue bench warrants or writs of arrest in appropriate cases,²²⁵ enter seek work orders,²²⁶ and award reasonable attorneys' fees and costs.²²⁷

UIFSA directs a forum, acting as a responding tribunal, to apply the child support guidelines of the forum state to determine the amount of support payable by the obligor.²²⁸ The same rule applies in other states acting as responding tribunals. If a Kentucky court cannot assert personal jurisdiction over a nonresident obligor pursuant to section 407.5201, a Kentucky petitioner may use the two-state process to claim support against the nonresident. In that case, Kentucky will serve as the initiating state and the obligor's state will be the responding state. The support payable will be determined by the responding state's child support guidelines.²²⁹ Moreover, once the responding state issues the child support order, that state is the state with continuing, exclusive jurisdiction over the order because it is the forum that issued the child support order.²³⁰ The responding state then remains the forum with continuing, exclusive jurisdiction as long as the obligor resides in that state and no statutory, written consent to alter jurisdiction is filed.²³¹

The Act permits a party to register an order issued in another state for enforcement in Kentucky.²³² Kentucky courts must recognize and enforce orders issued by other states and registered in this state,²³³ but may not modify those orders as long as the issuing state had and retains jurisdiction. This UIFSA section should work a significant change in the enforcement process. Under URESA, a child support order was often subject to modification in the second forum because the judgment was modifiable in the first forum. As a result, an order issued in one state could be modified by a second state, although the modification did not nullify the initial order's

²²⁴ *See id.* § 407.5305(h).

²²⁵ *See id.* § 407.5305(i).

²²⁶ *See id.* § 407.5305(j).

²²⁷ *See id.* § 407.5305(k).

²²⁸ *See id.* § 407.5303(2). Support guidelines also determine an obligor's support duty.

²²⁹ Section 407.5604 would have a counterpart in the responding state's law.

²³⁰ *See id.* § 407.5205.

²³¹ *See id.* §§ 407.5205, .5206.

²³² *See id.* §§ 407.5601. The rules on registration apply both to support orders and to income-withholding orders. *See id.* See section 407.5602 for the procedure to register an order for enforcement.

²³³ *See id.* § 407.5603.

effectiveness, at least within the state that issued the initial order.²³⁴ This produced two orders, each with spheres of validity. An obligor who satisfied the order of his or her own current state nevertheless might be accruing arrearages in a state that issued a prior order. UIFSA corrects that problem by denying to the second, enforcing forum the right to modify the issuing state's order, unless the issuing state no longer has continuing, exclusive jurisdiction.²³⁵

Section 407.5604 provides specifically that the issuing state's law governs the nature, extent, amount, and duration of support payments, the payment of other support obligations, and the payment of arrearages.²³⁶ For example, a Kentucky court must now enforce support obligations for post-secondary education if the issuing state ordered the payment of that obligation, even though the general Kentucky rule does not require payment of college expenses.²³⁷ Similarly, an order with an automatic escalation clause or an order for higher payments than those called for under Kentucky guidelines would be enforceable in this state without modification.

Enforcement choice-of-law provisions generally require the enforcing state to respect the determinations of the issuing state, but this rule has one exception. Under section 407.5604, the statute of limitations in a proceeding for arrearages is the statute in the issuing state or the enforcing state, whichever provides a longer period of time.²³⁸

²³⁴ Kentucky appellate courts held that this rule prevented Kentucky from granting a modification to a nonresident recipient, even when this state, acting as a responding state, was the obligor's residence. *See Commonwealth ex rel. Ball v. Musiak*, 775 S.W.2d 524, 526 (Ky. Ct. App. 1989). UIFSA would permit modification of the sister state order, but only if the recipient consents in writing to this state's modification jurisdiction. Thereafter, this state would retain continuing, exclusive jurisdiction over the order.

²³⁵ Section 407.5611 provides that a forum in which a child support order is registered for enforcement may modify that order only if, after notice and hearing, it finds that none of the parties continue to reside in the issuing state, the petitioner is not a resident of the forum, and the respondent is subject to the forum's personal jurisdiction. Modification is also permitted if a party or child is subject to personal jurisdiction and all parties have filed certain written consents in the issuing tribunal. *See id.*

²³⁶ *See id.* § 407.5611.

²³⁷ *Cf. Tucker v. Hill*, 763 S.W.2d 144 (Ky. Ct. App. 1988) (holding that child support payments cease at age eighteen where Indiana decree was silent regarding termination date).

²³⁸ Statutes of limitation may reflect a forum's interest in preventing stale litigation or the forum's notion of repose to the defendant. *See Walker v. Armco*

Because states will continue to face the problem of multiple child support orders for some time, UIFSA provides a hierarchy to determine the order entitled to enforcement. Section 407.5207 states that Kentucky courts must apply the following rules to determine the child support order entitled to enforcement. Kentucky courts must recognize and enforce another state's child support order if only one order has been issued.²³⁹ If two or more tribunals have issued child support orders for the same obligor and child, and only one of those tribunals would have continuing, exclusive jurisdiction under UIFSA, the order from the state with continuing, exclusive jurisdiction must be recognized.²⁴⁰ If two or more tribunals have issued orders and more than one of those tribunals could claim continuing, exclusive jurisdiction, the Act provides two different possibilities. First, if one of the states issuing an order is the child's current home state,²⁴¹ that order must be recognized. If not, the most recent order must be recognized.²⁴² If previous orders have been issued for the same obligor and child by two or more states, none of which would have continuing, exclusive jurisdiction, the forum state may issue an order that will then be recognized by other states.²⁴³ Of course, the forum state must meet all of the other prerequisites for continuing, exclusive jurisdiction, the most important of which is that it have personal jurisdiction over the obligor and remain the residence of at least one of the parties.

The federally mandated imposition of child support guidelines in all states,²⁴⁴ including Kentucky, has refocused child support disputes from questions of equity within an individual family to interpretation of the particular state's child support guidelines.²⁴⁵ Kentucky child support

Steel Corp., 446 U.S. 740, 751 (1980). A forum's application of its own statute of limitations does not violate the Full Faith and Credit Clause. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-29 (1988).

²³⁹ *See* K.R.S. § 407.5207(1)(a).

²⁴⁰ *See id.* § 407.5207(1)(b).

²⁴¹ *See id.* § 407.5207(1)(c). Section 407.5101(4) defines "home state." The definition is the same as that used in the Uniform Child Custody Jurisdiction Act. *See id.* § 403.410(5).

²⁴² *See id.* § 407.5207(1)(c).

²⁴³ *See id.* § 407.5207(1)(d).

²⁴⁴ *See generally* Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695.

²⁴⁵ *See* Margaret Campbell Haynes, *A Review of Child Support Guidelines: Interpretation and Application*, 31 FAM. L.Q. 133 (1997) (reviewing LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION).

guidelines are no exception to this trend.²⁴⁶ The primary area of interpretive concern for Kentucky courts has related to determinations of income under the child support guidelines.

Kentucky's child support guidelines determine child support obligations by reference to the gross income of both parents.²⁴⁷ In many cases, actual parental gross income is readily determinable, but there are some cases in which one parent alleges that the reported gross income of the other parent is not an appropriate gauge of ability to pay child support because it does not reflect actual earning capacity.²⁴⁸ If a court determines that one or both parents is either voluntarily unemployed or underemployed, it may calculate child support based on potential income, setting the obligation by earning capacity rather than by actual earnings.²⁴⁹

The statutory section permitting a court to determine child support obligations by reference to earning capacity has been the subject of significant litigation and also of legislative amendment. Early cases decided under the guidelines statute showed that appellate courts were reluctant to hold that a party was voluntarily unemployed or underemployed if there was no evidence of the unemployed or underemployed party's bad faith.²⁵⁰ Disturbed that the bad faith standard was an inappropriate burden to place on child support recipients, the General Assembly

²⁴⁶ See *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. Ct. App. 1997) (holding that child support guidelines apply to modification although separation agreement was entered into before guideline adoption); *Leathers v. Ratliff*, 925 S.W.2d 197, 200 (Ky. Ct. App. 1996) (applying rule continuing child support for child who remains in high school after majority).

²⁴⁷ See K.R.S. § 403.212(3). "Gross income" is defined by section 403.212(2)(b), (c).

²⁴⁸ The child support guidelines establish a minimum support level of \$60 per month for one child even if the obligor has no income. See *id.* § 403.212. Recently, in *Brashears v. Commonwealth*, 944 S.W.2d 873, 874-75 (Ky. Ct. App. 1997), the appellate court required an obligor to provide child support although his sole income was AFDC drawn for another child.

²⁴⁹ See K.R.S. § 403.212(2)(d); see generally Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN.L. REV. 647 (1997).

²⁵⁰ See *Keplinger v. Keplinger*, 839 S.W.2d 566, 568 (Ky. Ct. App. 1992) (holding that the trial court should not have imputed income to wife, who was in school, absent showing of bad faith); *McKinney v. McKinney*, 813 S.W.2d 828, 828-29 (Ky. Ct. App. 1991) (finding that a father who suffered repeated layoffs and call backs was not underemployed when he took a more secure job at a lower wage).

amended section 403.212(2)(d) to provide that a court might find a parent voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the amount of child support.

The impact of that amendment is unclear. Anecdotal evidence suggests that trial courts may continue to take all of the facts and circumstances surrounding employment or the lack of employment into account in determining whether a party is voluntarily unemployed or underemployed. Most trial courts consider carefully whether a parent is avoiding child support obligations in favor of other expenditures,²⁵¹ has a history of nonpayment, or is engaging in a genuine effort to satisfy his or her obligations to children. A legislative determination that no bad faith need be found to impute a higher earning capacity to a parent may not be sufficient to deter trial courts from considering a wide variety of factors in deciding whether someone is voluntarily underemployed or unemployed.

Trial courts have also had to determine the role of entitlement payments in defining gross income under the child support guidelines. The Kentucky statute defines gross income to include Supplemental Security Income ("SSI") payments,²⁵² but that definition may violate federal limitations imposed on the payments. Courts from some states have found that SSI benefits are not income,²⁵³ holding that the federal prohibition on assignment of the payments precludes a state from treating them as income.

Social Security Disability ("SSD") benefits, unlike SSI entitlements, represent amounts deducted from the employee's salary.²⁵⁴ Disability

²⁵¹ See *Stewart v. Madera*, 744 S.W.2d 437, 439 (Ky. Ct. App. 1988) (discussing the "misplaced priorities" of a non-custodial father in spending more on recreational vehicle payments and gasoline for motor vehicles than on his four teenage children).

²⁵² See K.R.S. § 403.212(2)(b). For a general discussion of Supplemental Security Income ("SSI") benefits see *Sullivan v. Zebley*, 493 U.S. 521 (1990). The federal statute governing SSI is 42 U.S.C. §§ 1381-1383.

²⁵³ Compare *Cox v. Cox*, 654 N.E.2d 275, 277 (Ind. Ct. App. 1995) (SSI recipient without other income cannot be held in contempt for failure to pay child support); *Becker County Human Services v. Peppel*, 493 N.W.2d 573, 576 (Minn. Ct. App. 1992) (SSI not treated as income when determining child support payments); *Nicholson v. Gavin*, 615 N.Y.S.2d 458, 459 (N.Y. App. Div. 1994) (SSI benefits may not be considered in determining obligor's ability to pay child support); and *Tennessee Dep't of Human Services ex rel. Young v. Young*, 802 S.W.2d 594, 597 (Tenn. 1990) (federal rule bars treatment of SSI as income); *with Whitmore v. Kenney*, 626 A.2d 1180, 1185 (Pa. Super. Ct. 1993) (federal rule does not prevent state from considering SSI).

²⁵⁴ See 42 U.S.C. §§ 301-433 (1994).

benefits are intended to replace lost income. In *Miller v. Miller*,²⁵⁵ the Court of Appeals of Kentucky held that an obligor should be credited with SSD payments made directly to his children. The obligor also requested credit for the excess difference between the ordered child support and SSD payments. He asked that the credit be applied to accrued arrearages. The appellate court directed the trial court to consider the equities in applying excess amounts to arrearages, but it noted that no excess should be applied to arrearages accruing before the disabling injury.²⁵⁶

Kentucky's child support guidelines permit few deductions from parental gross income. A parent is entitled to a deduction from gross income for amounts paid for health care insurance.²⁵⁷ A maintenance obligor is also entitled to a deduction for pre-existing orders for current maintenance if actually paid.²⁵⁸ In addition, some parents will be entitled to deductions for child support payments made to "prior born children." Kentucky's current rule seems to enshrine a "first-family-first" rule.²⁵⁹ The rule operates to provide a deduction in at least two circumstances. First, a parent subject to pre-existing court orders for child support may deduct the ordered amounts from gross income if he or she is actually providing the

²⁵⁵ *Miller v. Miller*, 929 S.W.2d 202 (Ky. Ct. App. 1996). The Court of Appeals of Kentucky has also held that courts may consider a child's own SSI benefits in setting child support obligations. *See Barker v. Hill*, 949 S.W.2d 896, 897-98 (Ky. Ct. App. 1997).

²⁵⁶ *See Miller*, 929 S.W.2d at 204-05.

²⁵⁷ *See* K.R.S. § 403.212(2)(g). Section 403.211(7) requires that a court order determine which parent has responsibility for health care coverage. The statute defines health care coverage to include payments for insurance, necessary deductibles, and also co-payments. In addition, section 403.211(8) mandates that the court allocate responsibility for extraordinary medical expenses, defined as any expenses in excess of \$100 per child per calendar year, under the same proportionate rule governing basic child support. Each parent thus pays a percentage of extraordinary medical expenses determined by the ratio that his or her gross income bears to total gross income of both parents. Kentucky's statutes permit parents to provide medical coverage to dependent children beyond the age of majority under certain circumstances. *See id.* § 403.212(7). Parents must provide medical coverage for children who are primarily dependent on them for support and remain full-time students if the health care insurer permits the coverage and the child is under twenty-five.

²⁵⁸ *See id.* § 403.212(2)(g). The current statute now makes clear that obligors are entitled to deductions for pre-existing maintenance orders and also for maintenance ordered to be paid in the current proceeding.

²⁵⁹ *See id.* § 403.212(2)(e), (g).

support and if the support is for children who are older than the children involved in the proceeding before the court.²⁶⁰ The rule avoids problems similar to those raised in *Marksberry v. Riley*.²⁶¹ In *Marksberry*, children from a first family were entitled to less support than children from a second family after the father agreed with his second wife on a support amount. The second family award was then deducted from his gross income to determine the first wife's rights to child support modification.²⁶² A prior-born child rule avoids this result. A second aspect of the rule involves obligors whose children are not the subject of the proceeding but are legally dependent on the obligor with whom they reside.²⁶³ If a legally dependent child resides with the obligor, the obligor may have a child support obligation imputed to him or her for that child's support.²⁶⁴

Joint custody continues to complicate child support computation. The Court of Appeals of Kentucky has said that equal physical custody of children does not necessarily mean that no child support need be ordered.

²⁶⁰ See *id.* § 403.212(2)(g).

²⁶¹ *Marksberry v. Riley*, 889 S.W.2d 47 (Ky. Ct. App. 1994).

²⁶² See *id.* at 48.

²⁶³ See K.R.S. § 403.212(2)(g).

²⁶⁴ See *id.* § 403.212(2)(e), (g). Section 403.212(g)(4) provides that the amount imputed is the amount that would result from the application of the guidelines to prior-born children. The guideline amounts for a second child in the family are not equivalent to the amounts for one child. For example, an obligor with a total gross income of \$2000 per month owes \$350 for one child and \$512 for two children. See *id.* § 403.212(6). Thus, the first-child amount of \$350 is raised only \$162 if there are two children in the family. A court imputing support for a prior-born child deducts from the obligated parent's income the entire one-child amount, thereby lowering the gross income available for the second child's benefit. Suppose that *A*, a widower with a minor child, *C*, marries *B*. *A* and *B* then have a child, *D*. If *A* and *B* divorce, *A* has an obligation imputed to him for the support of *C*. If *A* had a \$2000-per-month income and *B* had no income, *A*'s imputed obligation for *C* would be \$350. However, *A*'s obligation for *D* would be set on a gross income of \$1650, so that the obligation would be between \$293 and \$308 per month. See *id.* The *A-C* household, one adult and one child, would have a total of \$1692 (if the \$308 figure were used) and the *B-D* household would have a total of \$308 per month, assuming *B* would have no other income. If *B* had \$1000-per-month income, that income would not be relevant to *A*'s imputed obligation for *C* because *B* has no legal responsibility for *C*. However, *A*'s obligation for *D* would be computed on the basis of his \$1650 income added to *B*'s \$1000 income, or \$2650. The total child support obligation would be between \$424 and \$435, and *A* would owe 62.26%, or if the \$435 figure were used, approximately \$270. The rule applies without regard to the actual ages of *C* and *D* or the difference in their ages.

In *Downey v. Rogers*,²⁶⁵ the court noted that some parental expenses continue even when children do not reside in the home, while others are abated.²⁶⁶ The court also implied that disparity in parental earning capacity might affect child support awards in joint custody cases.²⁶⁷

Trial courts retain significant discretion to determine appropriate child support obligations when parents enjoy joint custody. Courts may need discretion because joint custody can involve a variety of residential arrangements as well as differences in parental income that would undermine the joint custody arrangement and detrimentally affect the child if some payments were not required. Rules permitting deviation from the child support guidelines grant trial courts substantial discretion to find the equities in individual situations. Nevertheless, the existence of that discretion means that joint custody cases are not likely to exhibit the horizontal equity²⁶⁸ provided elsewhere by the child support guidelines. Similarly situated families may receive different treatment in the matter of child support as a result of a trial court's discretion in joint custody cases. The General Assembly could, of course, adopt a rule that would apply to all joint custody cases, restoring horizontal equity, but it seems unlikely that appellate courts will craft a such a rule.

VI. DOMESTIC VIOLENCE, PROTECTIVE SERVICES FOR CHILDREN, TERMINATION OF PARENTAL RIGHTS, AND ADOPTION

The General Assembly has buttressed protection against family violence by passing state statutes²⁶⁹ implementing the federal Violence Against Women Act.²⁷⁰ The Kentucky statutes govern enforcement of foreign protective orders,²⁷¹ which must be given full faith and credit.²⁷² They also provide for certification of Kentucky orders to facilitate

²⁶⁵ *Downey v. Rogers*, 847 S.W.2d 63 (Ky. Ct. App. 1993). More recently, the Court of Appeals of Kentucky has held that an obligor with primary residential custody need not make offsetting payments to a former spouse for the portion of time that the children spent with her. *See Brown v. Brown*, 952 S.W.2d 707, 708 (Ky. Ct. App. 1997). *Brown* did not involve high-income parties. *See id.*

²⁶⁶ *See Downey*, 847 S.W.2d at 64.

²⁶⁷ *See id.*

²⁶⁸ "Horizontal equity" means that obligors with the same income pay the same amount of child support.

²⁶⁹ *See* K.R.S. §§ 403.751-.784.

²⁷⁰ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

²⁷¹ *See* K.R.S. § 403.7521.

²⁷² *See* 18 U.S.C. § 2265.

enforcement of those orders by other states.²⁷³ Other recent amendments to Kentucky statutes prohibit the publication of a domestic violence victim's or minor child's address in documents issued in connection with emergency protective orders and made available to the public.²⁷⁴ Other statutory changes also require courts considering child custody to take allegations of domestic violence into account in making a custody determination.²⁷⁵

Increased emphasis on child safety as a primary goal of child protective services may develop from activities of the 1998 General Assembly.²⁷⁶ Both nationally and in Kentucky, child advocates have called for strengthening protective agencies' right to remove at-risk children from homes as well as decreasing the time that children spend in foster care before a decision is made on an appropriate permanent placement.²⁷⁷ The focus on child safety may result in significant changes in dependency and neglect law, as well as agency interpretation of the reasonable efforts required prior to moving for termination of parental rights.²⁷⁸ Pilot projects across the

²⁷³ See K.R.S. § 403.751.

²⁷⁴ See *id.* § 403.770(1).

²⁷⁵ See *id.* § 403.270(2).

²⁷⁶ After this Article was completed, the Kentucky General Assembly passed House Bill 142, which made numerous changes to the Kentucky Unified Juvenile Code. These changes were designed to emphasize protection of children. See *id.* § 600.010 (adding protection of children to the policy statement of the Kentucky Unified Juvenile Code). Among the more significant changes are amendments to section 625.090, the termination-of-parental-rights statute, to permit termination if a parent has been convicted of a felony that involved the infliction of serious physical injury to the child, *id.* § 625.090(2)(d), or has had parental rights to a previously born child terminated involuntarily, *id.* § 625.090(2)(h).

²⁷⁷ See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996).

²⁷⁸ The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997), requires states to continue reasonable efforts to reunify families, but also provides that no reunification efforts need be made if the child has been subject to aggravated circumstances, a parent has assaulted or killed another child, or a parent's rights to a sibling have been involuntarily terminated. See *id.* § 101. Kentucky statutes require that courts consider whether a child may be reasonably protected by alternative means less restrictive than removal. See K.R.S. § 620.130. In addition, section 625.090(2)(c) requires a court terminating parental rights to determine whether the Cabinet for Families and Children has rendered or attempted to render all reasonable services. See Debra Ratterman Baker, *Reducing Delays Created By Reasonable/Diligent Efforts Requirement in Termination Grounds*, 14 A.B.A. JUV. & CHILD WELFARE L. REP. 124 (Oct. 1995). For two views on the efficacy and appropriateness of state reasonable efforts requirements, compare

state may address the negative impact of foster care on very young children. In addition, efforts to reduce judicial delay in termination of parental rights cases and increased judicial attention to permanency planning for children will play a significant role in protecting at-risk children.

The extent to which the termination process may be altered to provide increased protection for children will depend not only on changes in process made at the trial court level, but also on appellate court interpretation of this state's statutory grounds for termination.²⁷⁹ Section 625.090 provides that a circuit court may not order termination of parental rights unless it finds by clear and convincing evidence, a constitutionally required standard,²⁸⁰ that one or more of the statutory grounds for termination have been met. When a parent's actions or failure to act severely harms a child, the statutory standards are not often the subject of judicial debate. However, appellate court attitudes to long-term inadequate parenting are less clear. Kentucky courts have focused on parental rights in termination cases, but they have not discussed limitations that states may impose on those rights when parental behavior is harmful because of its persistent or chronic nature.

Arguably, Kentucky's statutes currently provide the necessary basis for terminating the parental rights of parents whose poor parenting is not likely to be remedied by further social services and whose chronic failures signal a dismal future for their children. If a parent has failed to provide essential care and protection for a child for a period not less than six months, section 625.090(1)(d) permits a court to terminate parental rights after proof that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child. Appellate courts might find in

David J. Herring, *Inclusion of the Reasonable Efforts Requirements in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992) with Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 U. PITT. L. REV. 211(1992).

²⁷⁹ Recent federal legislation provides significant incentives for states to define clearly some circumstances in which child safety is the paramount concern. See The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, § 101. For a discussion of the legislation, see Miriam Rollin, *Legislative Update: The Adoption and Safe Families Act of 1997*, 16 A.B.A. CHILD L. PRAC. 166 (Jan. 1998).

²⁸⁰ See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding due process requires a "clear and convincing evidence" standard to completely and irrevocably sever the rights of parents to a natural child).

this standard a direction that parents of very young children, if provided with intensive social services designed to improve parenting skills, may lose parental rights if they fail to show improvement in parenting skills. The six-month period might be read not merely as a minimum grace period afforded to the parent, but as a legislative determination of an appropriate time span for agency efforts directed at young children.²⁸¹

Assuring safe, permanent homes for all of Kentucky's children remains a challenge for Kentucky courts and social service agencies. Over the last ten years, the General Assembly has strengthened Kentucky's adoption laws, removing some of the problems with private adoptions and attempting to insure that child placement is not disrupted by revocation of consent to adoption.²⁸² While these changes in adoption laws protect both biological and prospective adoptive parents,²⁸³ the primary reason for reforming adoption law is to assure the welfare of the involved children. Providing permanency for all Kentucky children will require attention not only to privately litigated adoption cases, but to public programs promoting adoption and supporting adoptive families.

²⁸¹ Cf. CAL. WELF. & INST. CODE § 361.5 (West Supp. 1998) (identifying instances in which no reunification efforts need be made). An example of California's rule is that state's omission of reunification services if a parent has been convicted of causing another minor's death. See *id.*; see also COLO. REV. STAT. § 19-1-102(1.6) (1997) (providing for expedited termination of parental rights and permanent placement of children under six years of age).

²⁸² For an overview of Kentucky's private adoption laws, see Mitchell A. Charney & Mary A. Maple, *Private Adoption in Kentucky*, UK/CLE Publications (1994). See also generally 16 GRAHAM & KELLER, *supra* note 9, at 319-39.

²⁸³ Some problems related to the rights of unwed fathers remain. Section 625.065 limits the rights of unwed fathers to participate in adoption proceedings, but those limitations leave significant opportunities for some unwed fathers. For example, section 625.065(1)(d) requires only that the father commence a judicial proceeding claiming parental rights. No time limit is stated in this section, unlike section 625.065(1)(b), which requires action to be taken within sixty days after the child's birth. Cases that demonstrate the long-term problems caused when a putative father is not appropriately before the court are *Whittington v. Cunnagin ex rel. Englert*, 925 S.W.2d 455 (Ky. 1996); *Unknown Person ex rel. Englert v. Whittington*, 737 S.W.2d 676 (Ky. 1987).