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## Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?

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# Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?

BY CAROLYN S. BRATT\*

## INTRODUCTION

Courts and legislatures always have granted widows some protection from the economic hardships that their husbands' deaths cause.<sup>1</sup> At the earliest common law, a surviving wife was entitled to dower in the form of a right to remain in her husband's home along with the other heirs after the husband's death.<sup>2</sup> By the time of the Magna Carta in 1215, the surviving wife had a dower right to a life estate in one-third of the real property of which her husband was seized of an estate of inher-

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<sup>1</sup> A husband had more extensive rights in his wife's property at common law than a wife had in her husband's property. Upon marriage, the husband had control over all of his wife's personalty during his life and an estate *jure uxoris* in all lands of which his wife was seized of a present freehold estate during the marriage. This estate "by the marital right" endowed the husband with the right to all the rents and profits from his wife's land for as long as both parties lived. The husband also had the power to convey or mortgage his wife's land for their joint lives without any duty to account to her for monies he received for the conveyance or mortgage. If issue of the marriage were born alive, the husband became entitled to curtesy initiate in the lands of which the wife was seized of an estate of inheritance during the marriage. Curtesy initiate was a larger right than the estate *jure uxoris* because it lasted for the husband's life even if his wife predeceased him. After his wife's death, the husband's life interest in his wife's inheritable estates in land was called curtesy consummate. For a general introduction to the estate by the marital right, see R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *THE LAW OF PROPERTY* 77-79 (1984); C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 54 (1962). For a thorough discussion of the origin and development of the concept, see Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345 (1949).

<sup>2</sup> Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42 (1948).

itance during the marriage.<sup>3</sup> Dower enabled the widow to meet some of her future support needs, but because dower had to be "assigned" to the widow, it did not meet her immediate needs for shelter and sustenance after her husband's death. The rights of quarantine and estovers developed to bridge this gap in support between the husband's death and the allotment of the widow's dower. Quarantine gave the widow the right to remain in the mansion house for forty days after her husband's death.<sup>4</sup> During this interval, the heirs were required to assign the widow dower. The right of estovers enabled the widow to take reasonable sustenance from the decedent's property including the right to kill animals for food during her quarantine.<sup>5</sup>

Today, the states have enacted a variety of statutory devices that provide protection for families who might otherwise experience financial hardship upon the death of a spouse or parent. The older types of statutory safeguards take the form of homestead and personal property exemptions. Typically, the probate homestead exemption attempts to protect the decedent's family by statutorily exempting a portion of the decedent's aggregate interest in real property used as a permanent residence from creditors of the estate.<sup>6</sup>

The homestead allowance adopted by some states to address the postmortem financial needs of the decedent's family is the contemporary counterpart of the homestead exemption. A homestead allowance is a dollar allowance which has priority over the claims of creditors of the decedent's estate and is payable to

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<sup>3</sup> 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 421 (2d ed. 1911). No one knows why the wife's fractional interest became fixed at one-third. One author suggests that the development is traceable to ancient Sumeria that had a number system based upon the number three. See McWhurter, *The Ancient Origins of Texas Probate Law*, 49 TEX. B.J. 1060, 1062 (1986).

<sup>4</sup> *Wyll v. Kallenbach*, 76 S.W.2d 34, 36 (Ky. 1934). A contemporary right of quarantine for surviving spouses has been codified in Kentucky. See KY. REV. STAT. ANN. § 392.050 (Bobbs-Merrill 1984) [hereinafter KRS].

<sup>5</sup> *Wyll*, 76 S.W.2d at 36. In lieu of the widow's common law right of estovers, KRS § 391.030(1)(c) (1984) grants a \$7,500 personalty exemption to the surviving spouse.

<sup>6</sup> See, e.g., N.Y. CIV. PRAC. L. & R. § 5206 (McKinney 1978). The act benefits the decedent's surviving spouse and minor children by providing an exemption of a lot of land with a dwelling thereon not exceeding \$10,000 in value from applying to satisfy a money judgment of the decedent's creditors.

certain statutorily determined members of the decedent's family<sup>7</sup>

The traditional personal property exemption excepts specific items of tangible personal property used in day to day living from the claims of the decedent's creditors.<sup>8</sup> Many states have replaced these statutes with statutes that do not enumerate the specific items of tangible personal property that are exempt from the claims of the decedent's creditors. Rather, the statutes permit certain family members to select articles of tangible personal property up to a maximum dollar amount from the decedent's estate free from creditors' claims.<sup>9</sup>

A number of jurisdictions also augment the traditional family protection devices with a family allowance. The family allowance is a monetary award payable by the decedent's personal representative, usually without prior court authorization, to certain members of the decedent's family during the estate administration period.<sup>10</sup> The allowance is intended to provide support for the decedent's family during the estate administration period.

The statutorily created family protection devices not only take different forms, but they serve a number of different functions. Sometimes, the exemptions and allowances available to the decedent's surviving spouse and children function both to protect the recipients from financial hardship after the decedent's estate has been administered and to provide protection during the probate process. For example, a family allowance addresses the immediate needs of the family following the decedent's death;

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<sup>7</sup> See, e.g., UNIFORM PROBATE CODE § 2-401 (1983) [hereinafter UPC] which awards \$5,000 to a surviving spouse. If there is no surviving spouse, the decedent's minor children are entitled to share the \$5,000 allowance equally. "The homestead allowance is exempt from and has priority over all claims against the estate." *Id.*

<sup>8</sup> See, e.g., VA. CODE ANN. § 34-26 (1984) which exempts, among other things, the family Bible, wedding and engagement rings, family pictures, schoolbooks, all cats, dogs, birds, squirrels, rabbits and other pets, 1 cow, 1 horse, 6 chairs, 6 plates, 1 table, 12 knives, 12 forks, 2 dozen spoons, 2 basins, 1 pot, 1 oven, 6 pieces of wooden or earthenware, 1 dining room table, 1 buffet, china press, 1 icebox, 1 freezer, 1 washing machine and dryer, 1 spinning wheel, 1 pair of cards, 1 axe, 50 bushels of shelled corn, 200 pounds of bacon, 3 hogs, all canned and frozen goods, and 1 cooking stove.

<sup>9</sup> See, e.g., UPC § 2-402 which awards "household furniture, automobiles, furnishings, appliances and personal effects" not to exceed \$3,500 in value to the surviving spouse, or, if no surviving spouse exists, to the decedent's children.

<sup>10</sup> See, e.g., *id.* at § 2-403 which awards to the surviving spouse and minor children a "reasonable allowance in money out of the [decedent's] estate for their maintenance during the period of administration."

a homestead allowance, because it is awarded as part of the final settlement of the decedent's estate, provides the recipients with a lump sum of money as they enter the post-probate period. Whether by design or not, all family protection devices also serve to protect the recipients from total disinheritance by the decedent.

Kentucky continues to use the homestead exemption as one mechanism for cushioning the decedent's family from the economic impact of the decedent's death.<sup>11</sup> A monetary exemption has been substituted for the traditional personalty exemption of specific items of tangible personal property. The surviving spouse or the decedent's children, if no surviving spouse exists, receive an exemption from distribution and sale of personal property, including money on hand or in a bank, up to the amount of \$7,500.<sup>12</sup> Kentucky does not grant a separate family allowance for the decedent's family, but the surviving spouse is permitted to receive up to \$1,000 of the personalty exemption during the period of estate administration.<sup>13</sup> The common law right of a widow to quarantine pending allotment of dower is still available in Kentucky, but it is awarded without regard to the gender of the surviving spouse.<sup>14</sup>

This Article begins with an exploration and a critique of the homestead and personalty exemptions currently available in Kentucky.<sup>15</sup> Particular attention is given to the limits of these family protection devices as mechanisms for effectively sheltering the decedent's family from adverse economic consequences caused

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<sup>11</sup> KRS §§ 427.070, .100 (1970 & Supp. 1986).

<sup>12</sup> *Id.* at § 391.030(1)(c).

<sup>13</sup> *Id.* at § 391.030(2).

<sup>14</sup> *Id.* at § 392.050. The surviving spouse is entitled, from the time of the decedent's death until dower is allotted, to receive one-half of the rents and profits of the decedent's real estate. The surviving spouse is also entitled to hold the dwelling house, yard, garden, stable and lot on which the stable stands, and an orchard until dower is allotted.

<sup>15</sup> This Article does not include any discussion of the surviving spouse's right of quarantine pending allotment of dower. The right of quarantine is a mechanism for supplying the surviving spouse's immediate needs upon the death of the decedent, and it also serves as a whip to compel the decedent's intestate takers to arrange for the allotment of dower to the surviving spouse at the earliest possible moment. *Wyll*, 76 S.W.2d at 38. Unless, and until, Kentucky eliminates all remnants of common law dower from the surviving spouse's share, a right of quarantine is still needed regardless of the type of family protection devices in effect in Kentucky.

by the decedent's death. This in-depth critique of Kentucky's family protection devices is followed by a proposed new method for protecting the decedent's family from financial hardship.

## I. KENTUCKY'S HOMESTEAD EXEMPTION

### A. *History and General Nature of the Homestead Exemption*

Homestead exemption laws in this country are not in derogation of the common law, but rather are remnants of the common law proscription against taking a debtor's land in satisfaction of a debt.<sup>16</sup> At common law a person's home and contiguous land were inalienable by the owner and were not subject to the payment of a creditor's claim.<sup>17</sup> After the proscription against alienation of land was removed, creditors still could not sell the debtor's land to satisfy a debt.<sup>18</sup> In 1838, a statute was adopted which permitted the sale of an English debtor's land to satisfy a creditor's judgment.<sup>19</sup>

The Republic of Texas adopted the first homestead law in this country in 1839.<sup>20</sup> Kentucky enacted its homestead law in 1866.<sup>21</sup> Today, homestead laws exist in every state except Delaware, Maryland, Pennsylvania, Rhode Island, the District of Columbia and New Jersey.<sup>22</sup> Most homestead statutes are designed to protect the debtor's home and family, not to guarantee the debtor a certain dollar amount of property free from creditors' claims.<sup>23</sup> Unlike bankruptcy laws, homestead laws do not

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<sup>16</sup> For an account of the development of creditor's rights to debtor's property, see T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 369, 370-72 (4th ed. 1949).

<sup>17</sup> *Riggs v. Sterling*, 27 N.W. 705, 707 (Mich. 1886).

<sup>18</sup> *Id.*

<sup>19</sup> 1 & 2 Vict. 949, ch. 110, § 42 (1838).

<sup>20</sup> W. NUNN, *A STUDY OF THE TEXAS HOMESTEAD AND OTHER EXEMPTIONS* 2 (1931).

<sup>21</sup> 1865 Ky. Acts 494. The General Assembly passed the Act in December 1865, and it became effective in February 1866.

<sup>22</sup> Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1290 & n.10 (1950). Delaware, Rhode Island, and the District of Columbia exempt only chattels from execution. Maryland and Pennsylvania provide an exemption of \$100 and \$300 of value, respectively, in either realty or personalty. Because of the insignificant amount exempted, these statutory provisions cannot protect the debtor's home. Bratt, *Cooperative Apartments: A Survey of Legal Treatment and an Argument for Homestead Protection*, 1978 U. ILL. L. FORUM 759, 763 n.17.

<sup>23</sup> R. WAPLES, *HOMESTEAD AND EXEMPTION* 3 (1892).

discharge the debtor of her or his liability for debts. The creditor may prosecute a claim against the debtor, and a court can enter a judgment against the debtor. The homestead exemption merely makes the homestead unavailable for satisfaction of the judgment.<sup>24</sup> Homestead legislation does not limit its benefits to the poor. In most states, any person, regardless of financial status, may claim the protection.<sup>25</sup>

Kentucky's homestead legislation<sup>26</sup> is designed to protect the debtor's home and family.<sup>27</sup> During the debtor's lifetime, the statute provides for an *intervivos* homestead. The debtor's aggregate interest, not exceeding \$5,000, in real or personal property that the debtor or a dependent of such debtor uses as a permanent residence is "exempt from sale under execution, attachment or judgment."<sup>28</sup> After the debtor's death, the exemption continues as a probate homestead for the use and benefit of the debtor's surviving spouse and unmarried infant children.<sup>29</sup>

Originally, a \$1,000 monetary limit existed on the value of the residence protected as a homestead in Kentucky.<sup>30</sup> As this was a generous amount in 1866, Kentucky's homestead exemption provided meaningful protection both to the debtor while she or he was alive and thereafter to the debtor's surviving spouse. However, the limitation on the monetary value of the homestead remained unchanged until 1980 when it was raised to \$5,000.<sup>31</sup> The increase was not responsive to current economic conditions. One thousand dollars in 1866 dollars equals almost \$12,000 in 1985.<sup>32</sup> Because the increase was really too little, too late, Kentucky's current homestead exemption does not accomplish the essential purpose of all homestead legislation of pro-

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<sup>24</sup> *Id.* at 8; see *Lear v. Lear*, 28 S.W.2d 32 (Ky. 1930) (*intervivos* homestead is not an estate but an exemption).

<sup>25</sup> *Waples*, *supra* note 23, at 3.

<sup>26</sup> KRS §§ 427.060-.100 (1970 & Supp. 1986).

<sup>27</sup> *Brewer v. Brewer*, 105 S.W.2d 582, 584 (Ky. 1937).

<sup>28</sup> KRS § 427.060. The exemption may be taken in a burial plot for the debtor or dependent rather than in property used as a permanent residence.

<sup>29</sup> *Id.* at §§ 427.070, -.100; *Lear*, 28 S.W.2d at 33; *Russell v. Russell's Assignees*, 10 Ky. Op. 470, 471 (1880); *Little's Guardian v. Woodward*, 77 Ky. 585, 587 (1879).

<sup>30</sup> *Dig. Gen. Laws Ky.* 714 (Clarke Supp. 1865-66).

<sup>31</sup> 1980 Ky. Acts 236, § 4.

<sup>32</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* (1975).



tecting homes and families. In fact, the homestead exemption is rarely an issue today in the division of a decedent's estate. The most recent reported case involving homestead litigation arose in 1958.<sup>33</sup>

Kentucky's probate homestead is derived from the debtor's *intervivos* homestead.<sup>34</sup> Therefore, many of the statutory and caselaw rules for an *intervivos* homestead exemption burden the probate homestead even though the probate homestead is intended to protect the debtor's family, not the debtor.

Actual residence on the land is the *sine qua non* of any claim to a homestead exemption. The recent amendments to Kentucky's homestead laws<sup>35</sup> do not change the longstanding requirement that the claimant can only claim the *intervivos* homestead in land the claimant actually occupies as a residence.<sup>36</sup> Nor do they alter the fact that the claimant can only claim the probate homestead in land the decedent actually occupied as a residence at the time of death.<sup>37</sup> If the decedent dies seized of property in which she or he did not reside, the surviving spouse may only claim dower in that property.<sup>38</sup>

By statute, neither the *intervivos* nor the probate homestead exemption prevents the sale of the debtor's residence if the debt or liability sued upon existed *prior* to the purchase of the land.<sup>39</sup> The person claiming the protection of the homestead exemption must allege and prove that the debt sued upon arose after the purchase of the debtor's land.<sup>40</sup> The claimant is not required to reside on the land at the time the debt was contracted as long as the land was purchased before the liability arose and the claimant occupies the land at the time the execution is attempted.<sup>41</sup>

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<sup>33</sup> Lunsford v. Witt, 309 S.W.2d 348 (Ky. 1958).

<sup>34</sup> Runyon v. Runyon's Adm'r, 95 S.W.2d 802, 803 (Ky. 1936); *Lear*, 28 S.W.2d at 33; *Little's Guardian*, 77 Ky. at 587-88.

<sup>35</sup> KRS § 427.060 (1980 & Supp. 1986).

<sup>36</sup> E.g., *Moore v. Phillips*, 7 Ky. L. Rptr. 221, 221 (1885).

<sup>37</sup> *Tinsley v. Tinsley*, 235 S.W. 730, 731 (Ky. 1921); *Dehoney v. Bell*, 30 S.W. 400, 401 (Ky. 1895); *Preston v. Preston*, 13 Ky. Op. 507, 507 (1885).

<sup>38</sup> *Harris v. Howard*, 81 S.W. 275, 275 (Ky. 1904); *Preston*, 13 Ky. Op. at 507-08.

<sup>39</sup> KRS § 427.060 (The homestead exemption "shall not apply if the debt or liability existed prior to the erection of improvements" on the land.).

<sup>40</sup> *Runyon*, 95 S.W.2d at 803.

<sup>41</sup> *Holder's Adm'r v. Holder*, 87 S.W. 1100, 1100 (Ky. 1905).

Even if the property is subject to liability because the debt existed prior to the acquisition of the land or because the spouses waived their rights to claim a homestead pursuant to Kentucky Revised Statute section 427.100 (hereinafter KRS), the surviving spouse is entitled to a homestead in the decedent's land if sufficient other security with which to satisfy the debt exists. In *Tillett v. Curd*,<sup>42</sup> the wife mortgaged her land to secure her debt for money she borrowed from a creditor. Both the wife and husband executed the note evidencing the debt.<sup>43</sup> After the wife's death, the mortgagee filed suit to foreclose the mortgage. Because the mortgaged property had sufficient value, the high court directed a sale of enough of the land to satisfy the decedent's indebtedness to the mortgagee, and allotted the husband a probate homestead in the remainder of the tract.

A claimant cannot claim an intervivos or probate homestead in partnership property. By statute, a partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. "When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws."<sup>44</sup> Similarly, "[a] partner's right in specific partnership property is not subject to dower, curtesy, or allowances to [the surviving spouse,] heirs or next of kin."<sup>45</sup>

### *B. Property Interests Sufficient to Support a Homestead Exemption*

The surviving spouse and infant children are not entitled to a probate homestead unless the decedent was entitled to an intervivos homestead exemption at death<sup>46</sup> because the rights of a surviving spouse and infant children to a probate homestead

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<sup>42</sup> 35 S.W. 920, 920 (Ky. 1896).

<sup>43</sup> *Id.*, cf. KRS § 427.100 (1974) (homestead exemption waived if "in writing, subscribed by the defendant and his spouse, and acknowledged and recorded in the same manner as conveyances of real estate.").

<sup>44</sup> KRS § 362.270(2)(c) (1987); see *Ellis v. Johnson*, 12 Ky. Op. 163, 164 (1883).

<sup>45</sup> KRS § 362.270(2)(e).

<sup>46</sup> *Runyon*, 95 S.W.2d at 803; *Higgins v. Higgins*, 78 S.W. 1124, 1124 (Ky. 1904); *Harpending's Ex'rs v. Wylie*, 76 Ky. 158, 162 (1877).

derives from the decedent's right to an *intervivos* homestead. Prior to 1980, only a debtor who was a "bona fide housekeeper with a family resid[ing] in this state" was eligible to claim an *intervivos* homestead.<sup>47</sup> The statutes also expressly limited the exemption to land.<sup>48</sup> However, a 1980 statutory amendment extended the homestead exemption to any individual debtor regardless of whether the debtor had a family.<sup>49</sup> The 1980 statutory amendment also authorized a homestead exemption in either real or personal property that the debtor or a dependent of the debtor used as a permanent residence.<sup>50</sup> Thus, a single debtor's interest in her or his mobile home now falls within the statutory definition of an *intervivos* homestead.

Even with this expanded statutory definition, the homestead statutes do not define the nature or quantum of the property interest that a claimant must possess to support a claim of an *intervivos* homestead in real or personal property that the debtor uses as a permanent residence. Case law does establish that the claimant need not have a present possessory fee simple absolute interest in the property to claim the *intervivos* exemption.<sup>51</sup> Any present possessory freehold estate, including the life estate, should be sufficient.<sup>52</sup> Of course, if the *intervivos* homestead is in property the debtor holds as a life tenant, no property interest would exist in which the surviving spouse and infant children could claim a probate homestead after the debtor's death.

Although no Kentucky cases deal with this issue directly, other states uniformly recognize that the owner of an estate for years can claim the *intervivos* homestead protection regardless of whether the term of the lease is one year or one hundred years.<sup>53</sup> The tenant's right to an *intervivos* homestead exemption

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<sup>47</sup> KRS § 427.060 (1970).

<sup>48</sup> *Id.*

<sup>49</sup> 1980 Ky. Acts 236 § 4.

<sup>50</sup> *Id.*

<sup>51</sup> *Howard v. Mitchell*, 105 S.W.2d 128, 134 (Ky. 1937).

<sup>52</sup> See *Suter v. Quarles*, 58 S.W. 990 (Ky. 1900) (Surviving husband was entitled to an *intervivos* homestead in land in which he had a life estate as tenant by curtesy.); *Robinson v. Smithey*, 80 Ky. 636 (1883)(life estate).

<sup>53</sup> For a list of cases from other jurisdictions regarding leaseholds, see Annotation, *Estate or Interest in Real Property to Which a Homestead Claim May Attach*, 74 A.L.R.2d 1355, 1378 (1960) [hereinafter Annotation, A.L.R.2d]; Annotation, *Estate or Interest in Real Property to Which a Homestead Claim May Attach*, 89 A.L.R. 511, 555-56 (1934) [hereinafter Annotation, A.L.R.].

does not extend beyond the lease term.<sup>54</sup> If the lease extends beyond the tenant's death, several states have permitted the surviving spouse and minor children to claim a probate homestead in the unexpired leasehold.<sup>55</sup> The argument against such a result rests on the technical classification of a leasehold interest as personal, not real, property. As some homestead statutes are limited to preserving a homestead only in land, a denial of a homestead exemption in a leasehold interest may be technically correct. As Kentucky's newly amended homestead statutes specifically permit the exemption in both real and personal property the debtor uses as a permanent residence,<sup>56</sup> this problem is avoided.

Some courts have permitted *intervivos* homesteads in a residence occupied under an estate from period to period.<sup>57</sup> There are conflicting decisions in other states dealing with whether the estate at will or at sufferance are property interests sufficient to support a claim for an *intervivos* homestead.<sup>58</sup> Because neither of these rather ephemeral nonfreehold interests survive the tenant's death, no interest exists in land or personalty in which a surviving spouse or infant child could claim a probate homestead.

A future interest is an insufficient basis for claiming an *intervivos* homestead.<sup>59</sup> The rationale articulated by Kentucky's highest court for this rule is that any other rule would permit two persons, the owner of the present estate and the owner of the future interest, each to have a homestead in the same land at the same time.<sup>60</sup> Most state courts reach the same result but predicate their decisions on the idea that a present right to occupy the property is essential in making a homestead claim. When property ownership is divided between a present estate

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<sup>54</sup> *Miller v. Farmers' State Bank*, 279 P. 351, 353 (Okla. 1929).

<sup>55</sup> See *Stombaugh v. Morey*, 58 N.E.2d 545 (Ill. 1944). *Contra Moncur v. Jones*, 31 N.W.2d 759 (S.D. 1948).

<sup>56</sup> KRS § 427.060.

<sup>57</sup> *In re Foley*, 97 F. Supp. 843 (D. Neb. 1951) (oral month-to-month lease).

<sup>58</sup> See Annotation, A.L.R.2d, *supra* note 53, at 1379; Annotation, A.L.R., *supra* note 53, at 588-60.

<sup>59</sup> *People's Bank of Shepherdsville v. Kulmer*, 159 S.W. 809, 811 (Ky. 1913)(reversion).

<sup>60</sup> *Id.*

and one or more future interests, the future interest owners have no present right or claim to occupy the property while the present estate continues.<sup>61</sup>

Equitable, rather than legal, title can be sufficient to support a claim of a homestead exemption. For example, a purchaser-debtor's interest under a purchase contract, or title bond, that gave the vendee a present right of possession can be sufficient to support the probate homestead claim of the vendee's surviving spouse against most creditors of the purchaser-debtor. However, the homestead exemption does not preclude the seller from subjecting the land to payment of the unpaid purchase money.<sup>62</sup>

If the land is occupied but not fully paid for prior to the creation of the debt sued on, the land is liable to the extent of purchase money paid after the debt's creation.<sup>63</sup> Similarly, the homestead exemption does not apply if the debt existed before improvements were built on the land.<sup>64</sup> The homestead exemption does protect the debtor's or the debtor's surviving spouse's investment in improvements and purchase money paid before the creation of debts sued on by the creditor.<sup>65</sup> For example, assume the purchaser-debtor contracted to purchase a residence for \$9,000 and paid \$6,000 on the purchase price prior to creating another debt. After creating the second debt, the debtor paid the vendor the remaining \$3,000 of the purchase price. As the debtor's interest in the land at the time the second debt was created was equal to or greater than \$5,000, the value of the homestead exemption, the debtor or the debtor's surviving spouse and infant children may use the entire amount of the homestead exemption if the second creditor sues them. Conversely, if the purchaser-debtor had only paid \$3,000 on the purchase price prior to creating the second debt, only \$3,000 of homestead protection is available in an action by the second creditor.

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<sup>61</sup> *Keesee v. Bushart*, 158 S.W.2d 915, 916 (Ark. 1942)(contingent remainder); *Cross v. Fruehauf Trailer Co.*, 93 N.W.2d 233, 236-37 (Mich. 1958)(vested remainder); *Gulf Prod. Co. v. Continental Oil Co.*, 61 S.W.2d 185, 188 (Tex. Civ. App. 1933)(possibility of reverter).

<sup>62</sup> *Persifull v. Hind*, 11 S.W. 15, 16 (Ky. 1889); KRS § 427.060.

<sup>63</sup> *Mosely v. Bevins*, 15 S.W. 527, 528 (Ky. 1891). *Mosely* expressly overruled the contrary holding in *Griffin v. Proctor's Ad'mr*, 77 Ky. 571 (1879) that a homestead is exempt from the payment of unpaid purchase money.

<sup>64</sup> KRS § 427.060.

<sup>65</sup> *Darnell v. Smith's Ex'x*, 32 S.W. 745, 745-46 (Ky. 1895).

Although no Kentucky cases are on point, other courts have found that a beneficiary's equitable interest in a trust when coupled with occupancy of the trust property is sufficient to support an *intervivos* homestead exemption for the beneficiary.<sup>66</sup> The trustee's legal title without any beneficial interest in an express or implied trust cannot support a claim for a homestead exemption. In *Rivers v Morris*,<sup>67</sup> a wife and husband were named trustees of certain land for their infant children until all the children reached the age of twenty-one. The husband thereafter died and the wife remarried. After the wife died, her second husband claimed a probate homestead in the land that was the subject matter of the trust. The court determined that the trustee-wife did not have an interest in the land at her death sufficient to support her second husband's claim to a probate homestead.<sup>68</sup>

Kentucky follows the general rule that naked possession, without any title, is sufficient to support a homestead claim as against all the world except the true owner or one having better title.<sup>69</sup> In *Howard v Mitchell*,<sup>70</sup> the surviving spouse was entitled to a probate homestead in land the decedent had adversely possessed for eight years prior to the decedent's death. The surviving spouse's subsequent possession of the land by virtue of her probate homestead was tacked onto the decedent's eight years of adverse possession to satisfy the statutory period and perfect title to the land subject to the surviving spouse's homestead in the remainder takers.

A probate homestead may be claimed in the decedent's interest in land that the decedent occupied with the claimant as tenants in common. In *Sams v Sampson*,<sup>71</sup> the surviving husband and his deceased wife had owned and occupied land together as tenants in common each with an undivided one-half

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<sup>66</sup> See 1 A. SCOTT, THE LAW OF TRUSTS § 149 (1939).

<sup>67</sup> 78 S.W. 196 (Ky. 1904).

<sup>68</sup> *Id.* at 197; see *Wilson v. Campbell*, 20 S.W. 609, 609 (Ky. 1892)(rejected the use of parol evidence by heirs of first wife who tried to establish that the land the decedent occupied and held in his own name at death was actually held by him in trust for his first wife and not available as a homestead for his second wife).

<sup>69</sup> *Howard*, 105 S.W.2d at 133-34.

<sup>70</sup> 105 S.W.2d 128, 133-34 (Ky. 1936).

<sup>71</sup> 255 S.W.2d 626, 629 (Ky. 1953).

interest. As the surviving spouse, the husband was entitled to elect homestead in his wife's undivided one-half interest.

The surviving spouse's right to claim a probate homestead in the deceased spouse's interest in jointly held property does not mature into a legal right until the spouse's death. In *Lear v Lear*,<sup>72</sup> a husband and wife jointly owned and resided on property worth less than the homestead exemption amount. The spouses separated and the wife brought an action for a sale of the jointly owned property and the division of the proceeds of the sale. The husband alleged that his right to claim a probate homestead in his wife's interest in the joint property, if he survived her, precluded her from forcing a sale of the jointly owned property. The court entered a judgment against the husband because the surviving spouse's right to claim a probate homestead in the deceased spouse's interest in jointly held property does not create an estate or vested interest in the other spouse's property during their joint lifetime.<sup>73</sup>

Respecting the theory that courts should construe liberally the homestead exemption to fulfill its beneficial purpose of protecting the debtor's home and family,<sup>74</sup> Kentucky's highest court has held that a person can claim a probate homestead in a separate but contiguous tract of land which the decedent uses in connection with the tract of land occupied as a residence.<sup>75</sup> In *Buckler v Brown*,<sup>76</sup> a wife and husband each owned separate tracts of contiguous land. Their house was located on the wife's tract, but they cultivated and used the husband's tract in connection with their residence on the wife's land. As the spouses regarded, cultivated, and claimed the two separate parcels of land as one tract, the court treated them as one for the purpose of the widow's probate homestead in her deceased husband's

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<sup>72</sup> 28 S.W.2d 32 (Ky. 1930).

<sup>73</sup> *Id.* at 33.

<sup>74</sup> *Brewer*, 105 S.W.2d at 584.

<sup>75</sup> *Farmer v. Hampton*, 156 S.W. 1041, 1042-43 (Ky. 1913) (probate homestead in separate, non-contiguous tracts of land); *Holder's Adm'r*, 87 S.W. at 1100 (probate homestead in separate tract of land contiguous to the tract the spouses rented and lived on); *Buckler v. Brown*, 39 S.W. 509, 509 (Ky.) (probate homestead in separate, but contiguous, tracts of land), *reh'g denied*, 39 S.W. 825 (Ky. 1897).

<sup>76</sup> 39 S.W. 509, *reh'g denied*, 39 S.W. 825 (Ky. 1897).

tract of land.<sup>77</sup> Of course, the value of the two tracts cannot exceed the homestead amount of \$5,000.<sup>78</sup>

### C. *Homestead Claimants*

Prior to the 1980 amendments to Kentucky's homestead statutes, only a claimant who was a "bona fide housekeeper with a family resid[ing] in [the] state" could claim the intervivos homestead.<sup>79</sup> Currently, the intervivos exemption is available to any "individual debtor."<sup>80</sup> Therefore, those cases dealing with the effect of the subsequent death or removal of the housekeeper's family from the homestead on the claimant's right to an intervivos homestead are no longer relevant.<sup>81</sup>

Although the probate homestead exemption initially was limited to widows,<sup>82</sup> today the exemption is available to either a surviving wife or husband.<sup>83</sup> As long as the decedent was entitled to a homestead in land she or he owned at death, that right passes to the decedent's surviving spouse.<sup>84</sup> The surviving spouse who claims the homestead exemption must share the right of occupancy with the decedent's minor children,<sup>85</sup> but the surviving spouse may claim homestead even when there are no children.<sup>86</sup> A surviving spouse's separation from the decedent at the time of the death does not affect the survivor's right to homestead.<sup>87</sup> However, if the surviving spouse was separated from the decedent and living in adultery when the decedent died, the offender would have no right or interest, including no claim to homestead,

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<sup>77</sup> *Id.*, see *Mason v. Columbia Fin. & Trust Co.*, 35 S.W. 115, 115 (Ky. 1896) (intervivos homestead permitted in contiguous, but separately owned, tracts of land).

<sup>78</sup> KRS § 427.060.

<sup>79</sup> *Id.*, *Foreman v. Cook*, 127 S.W.2d 856, 858 (Ky. 1939); *Brewer*, 105 S.W.2d at 583.

<sup>80</sup> KRS § 427.060.

<sup>81</sup> *E.g.*, *Eastern State Hosp. v. Cottle*, 256 S.W. 1101 (Ky. 1924); *Redmond's Adm'x v. Redmond*, 66 S.W. 745 (Ky. 1902).

<sup>82</sup> *Little's Guardian*, 77 Ky. at 587.

<sup>83</sup> KRS §§ 427.070, -.100.

<sup>84</sup> See *Ritter v. Huffman*, 50 S.W. 1101 (Ky. 1899); *Crigler v. Connor*, 11 S.W. 202 (Ky. 1889); *Gavin v. Sanders*, 12 Ky. Op. 280 (1883).

<sup>85</sup> KRS § 427.070(1).

<sup>86</sup> *Ellis v. Davis*, 14 S.W. 74, 75 (Ky. 1890); *Eustache v. Rodaquest*, 74 Ky. 42, 46 (1874); *Gasaway v. Woods*, 72 Ky. 72, 74 (1872).

<sup>87</sup> *Redmond's Adm'x*, 66 S.W. at 746.



in the decedent's property.<sup>88</sup> The birth of an out-of-wedlock child to the surviving widow four years after the decedent's death does not constitute adultery or a bar to the widow's right to homestead.<sup>89</sup>

As originally enacted in 1866, Kentucky's probate homestead statute applied to the decedent's children without any reference to the child claimant's age.<sup>90</sup> That original probate homestead exemption is codified today in KRS section 427.100. Although the statute is now phrased in terms of the decedent's "surviving spouse," without reference to the surviving spouse's gender, it continues to refer to the decedent's "children." Nonetheless, the homestead exemption is actually only available to the decedent's unmarried "infant" children.<sup>91</sup> In 1873, the legislature adopted an additional probate homestead provision specifically limited to the surviving wife or husband and the decedent's "unmarried infant children."<sup>92</sup> The 1873 homestead exemption is codified in KRS section 427.070. Kentucky's highest court has consistently restricted the duration of the children's occupancy of the probate homestead to their infancy and interpreted KRS section 427.070 as a limitation on the probate homestead referred to in section 427.100.<sup>93</sup>

The Kentucky courts never have expressly decided whether the infant children's homestead continues as a common interest to all the children until the youngest child reaches the age of majority or applies only to the infant children as the older children come of age.<sup>94</sup> The court has determined that when several children are entitled to a homestead, a creditor cannot complain because those arriving at eighteen remain in the homestead with the underage children.<sup>95</sup> Infant children may assert their continuing right to occupy the homestead against the de-

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<sup>88</sup> KRS § 392.090(2) (1984).

<sup>89</sup> *Farmer*, 156 S.W. at 1043.

<sup>90</sup> *Little's Guardian*, 77 Ky. at 586.

<sup>91</sup> KRS § 427.070.

<sup>92</sup> *Little's Guardian*, 77 Ky. at 586.

<sup>93</sup> *Id.* at 587-88; *Loyd v. Loyd*, 6 Ky. L. Rptr. 551, 554 (1885).

<sup>94</sup> *Miller v. Mills*, 7 Ky. L. Rptr. 221, 224 (1885) (court expressly refused to decide issue).

<sup>95</sup> *Lawrence v. Lawrence's Adm'r*, 10 Ky. Op. 353 (1879). Since this decision, the age of majority has changed from 21 to 18.

cedent's adult children as well as against the decedent's creditors who want the land sold.<sup>96</sup>

The fact that the decedent's infant children were not living with the decedent at the time the decedent died does not deprive the children of their homestead right.<sup>97</sup> The infant children may use their homestead exemption even though a parent is not alive to claim it with them.<sup>98</sup>

#### *D. Claims Barred by the Homestead Exemption*

During the debtor's lifetime, the intervivos homestead exemption protects the debtor's residence, not exceeding \$5,000 in value, from sale under execution, attachment or judgment.<sup>99</sup> The creditor may enforce any rightful claim against the debtor's other assets, but the creditor cannot use the debtor's residence to satisfy the debt. After the debtor's death, the residence remains immune from the creditors' claims because the exemption continues for the benefit of the debtor's surviving spouse and infant children.<sup>100</sup> The probate homestead protects the residence from both claims proved by creditors in an action to settle the estate of the decedent and against executions, attachments or judgments of creditors who perfected their claims during the decedent-debtor's lifetime.<sup>101</sup>

Regardless of whether the decedent has any creditors, the surviving spouse and infant children also may use the probate homestead exemption against the decedent's heirs. Thus, if a spouse and adult children survive the decedent, the adult children would inherit the decedent's property subject to the surviving spouse's right to the probate homestead exemption in the decedent's property used as a residence.<sup>102</sup>

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<sup>96</sup> *Loyd*, 6 Ky. L. Rptr. at 555.

<sup>97</sup> *Potter v. Redmon's Guardian*, 96 S.W. 529, 530 (Ky. 1906) (children were living with their mother's kindred at their father's death); *Dillard v. Hunt*, 7 Ky. Op. 625 (1874) (children were placed in an orphanage after their surviving parent's death).

<sup>98</sup> *Loyd*, 6 Ky. L. Rptr. at 554; *Little's Guardian*, 77 Ky. at 587.

<sup>99</sup> KRS § 427.070.

<sup>100</sup> *Id.*, *id.* at § 427.100.

<sup>101</sup> *Myers' Guardian v. Meyers' Administrator*, 12 S.W. 933 (Ky. 1890).

<sup>102</sup> See *Lancaster v. Redding*, 26 S.W. 1013, 1014 (Ky. 1894) (homestead exemption awarded to surviving spouse in land decedent's adult child, a stepchild of the surviving

Because the homestead exemption gives the surviving spouse and infant children the right to control and occupy the residence, their occupancy of the land is not adverse or hostile to the heirs who inherited the property subject to the homestead rights of the spouse and infant children.<sup>103</sup> Mere occupancy of the land by one entitled to a probate homestead exemption, regardless of the duration, will not permit the homestead claimant to acquire title by adverse possession as against the decedent's heirs.<sup>104</sup> However, the surviving spouse or infant children's permissive or rightful possession pursuant to the probate homestead in the decedent's land can be converted into adverse possession.<sup>105</sup> To convert the homestead claimant's rightful possession into possession adverse to the decedent's heirs, the homestead claimant must clearly and unequivocally repudiate the heirs' interest.<sup>106</sup> The homestead claimant must assert possession based on the claimant's own right and not by virtue of the homestead exemption. In *Smith v Richey*,<sup>107</sup> the surviving spouse lived on the land for almost fifty years after the decedent's death. During her occupancy, the widow referred to the land as her own and sold trees from the land. Her actions, however, were insufficient to convert her rightful possession as a probate homestead claimant into adverse possession against the heirs who had inherited the land subject to her homestead rights.<sup>108</sup>

As discussed previously in this Article, claimants cannot raise the homestead exemption against the claims of certain of the decedent's creditors. KRS section 427.060 expressly provides that the exemption does not apply in a proceeding to foreclose a mortgage given by the owner of the homestead land or for purchase money due thereon. The statute further provides that

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spouse, inherited); *Loyd*, 82 Ky. at 526 (homestead exemption awarded to infant children in land they inherited with decedent's adult children); *Eustache*, 74 Ky. at 46 (homestead awarded to surviving spouse in land inherited by decedent's sister); *Gasaway*, 72 Ky. at 74 (homestead awarded to surviving spouse in land decedent's collateral heirs inherited).

<sup>103</sup> *Carter v. Monarch*, 188 S.W. 379, 379 (Ky. 1916).

<sup>104</sup> *Smith v. Richey*, 215 S.W. 429, 430 (Ky. 1919) (surviving spouse did not acquire title to homestead property by adverse possession after occupying the land for 47 years after decedent's death).

<sup>105</sup> R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *supra* note 1, at 762.

<sup>106</sup> *Id.* at 758.

<sup>107</sup> 215 S.W. 429 (Ky. 1919).

<sup>108</sup> *Id.* at 430.

the exemption does not apply if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon. However, the debtor need not have resided on the land at the time she or he contracted the debt to qualify for the homestead exemption. As long as the land was purchased before the liability arose and the claimant occupied the homestead when the creditor attempted to subject the land to payment of the debt, the homestead exemption applies.<sup>109</sup> Even if the property is subjected to liability because the debt preceded the debtor's acquisition of the land or because the spouses waived their probate homestead rights in the land, the surviving spouse nevertheless may claim a homestead in the land if the decedent left sufficient other property to satisfy the debt.<sup>110</sup>

If the land is not fully paid for before the debtor creates the debt sued on, the land is liable to the extent of purchase money paid after the debt was created.<sup>111</sup> Similarly, the homestead exemption does not protect the value of improvements erected on the property after the debt sued on was created.<sup>112</sup> Conversely, the homestead exemption does protect the debtor as well as the debtor's surviving spouse and infant children to the extent of the amounts not exceeding \$5,000 paid on the purchase price or the value of improvements made before the debtor created the debt.<sup>113</sup>

### *E. Time for Claiming the Homestead Exemption*

A majority of the states do not require a formal homestead declaration to secure the exemption. In those states, the claimant's occupancy or notice to specified persons of a homestead claim at the time of levy or sale of the property is sufficient to establish the exemption.<sup>114</sup> In Kentucky, the claimant need not

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<sup>109</sup> *Holder's Adm'r*, 87 S.W. at 1100.

<sup>110</sup> *Tillett*, 35 S.W. at 920.

<sup>111</sup> *Mosely*, 15 S.W. at 528. *Contra Griffin*, 77 Ky. at 571 (A homestead in land held under title and bond is not waived by a mortgage in which the wife did not join. Such a homestead cannot be subjected to debt payment created after the land's purchase but before it was paid for or conveyed to the purchaser.).

<sup>112</sup> KRS § 427.060.

<sup>113</sup> *Darnell*, 32 S.W. at 746.

<sup>114</sup> *Haskins*, *supra* note 22 at 1312.

assert or claim the exemption until a creditor seeks to use the property to satisfy a debt.<sup>115</sup> In *First National Bank of Jackson v Oliver*,<sup>116</sup> a father made an intervivos gratuitous transfer of his residence to his son. At the time of the transfer, the father's creditors could not have used the residence to satisfy any debts he owed them because the residence was worth less than the amount that the homestead statutes exempted. After the father's death, his creditors attempted to set aside the transfer and to use the land to satisfy debts the father had incurred before he transferred the property. Because the father's intervivos homestead exemption created an exemption for the land when the transfer occurred,<sup>117</sup> the court allowed the son to keep the land even though the father had not claimed the intervivos homestead exemption during his lifetime.

In *In re Gibson*,<sup>118</sup> the court allowed the surviving spouse of a debtor who had been adjudged a bankrupt prior to death to claim either dower or a probate homestead in the proceeds of the sale of the debtor's home. The trustee in a bankruptcy proceeding had sold the debtor's interest in the home before the debtor died. Under KRS section 427.090, the debtor could have claimed an amount equal to the homestead exemption from the proceeds of the trustee's sale as exempt property for purposes of purchasing another homestead. The debtor could have asserted this right at any time before a final order disposing of the property was entered.<sup>119</sup> The debtor died without making such a claim. The debtor's failure to claim the intervivos exemption in the bankruptcy proceeding did not preclude the surviving spouse from claiming the surviving spouse's probate homestead in the exempt proceeds from the sale of the residence in the incompleted bankruptcy proceeding.<sup>120</sup> Because the homestead exemption only provides the surviving spouse with a right

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<sup>115</sup> *First Nat'l Bank of Jackson v. Oliver*, 150 S.W.2d 894, 896 (Ky. 1941).

<sup>116</sup> 150 S.W.2d 894 (Ky. 1941).

<sup>117</sup> KRS § 427.060.

<sup>118</sup> 33 F Supp. 838 (E.D. Ky. 1940).

<sup>119</sup> *First Nat'l Bank of Scottsville v. Duncan*, 276 S.W. 848, 848 (Ky. 1925) (debtor entitled to homestead in proceedings arising from the sale of property to pay debts and could assert such right at any time before a final order disposing of such proceeds occurs).

<sup>120</sup> *In re Gibson*, 33 F Supp. at 840.

to enjoy the exempted land for life, the surviving spouse in *In re Gibson* received only the income from a court-ordered investment of the exempt fund. The claimant may apply for and obtain the probate homestead at any time before the decedent's estate is distributed.<sup>121</sup>

### *F Valuation and Allotment of the Homestead Exemption*

Neither the debtor's probate homestead nor the intervivos homestead of the surviving spouse and infant children can exceed \$5,000 in value.<sup>122</sup> A specific statutory procedure exists for valuing and allotting an intervivos homestead. KRS section 427.080 provides that two disinterested housekeepers of the county must value and set apart the debtor's homestead for the debtor. The court selects these appraisers. If they disagree about the land's value, the officer making the sale acts as an umpire. The appraisers must record in writing the valuation of the debtor's land occupied as a residence, sign the writing, and return the writing to the court.

The value of the decedent's residence must also be established when the surviving spouse elects to take the probate homestead exemption. However, no express statutory method exists for valuing and allotting the probate homestead. Case law does establish that the value of the decedent's residence for purposes of the probate homestead is a question of fact.<sup>123</sup> On appeal, the court will not disturb the trial court's determination of value unless it is apparent from the record that the judgment is not supported by the weight of the evidence.<sup>124</sup> The claimant can establish the value of the decedent's residence through testimony of landowners in the area, through testimony of those engaged in buying and selling land, and through other experts.<sup>125</sup> A witness must possess actual knowledge upon which to base her

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<sup>121</sup> *Wilson's Adm'r v. Wilson*, 156 S.W.2d 832, 836 (Ky. 1941) (The homestead right was the right of exemption for the benefit of the debtor and the deceased debtor's widow and infant children and could be applied at any time before the property's proceeds were distributed.).

<sup>122</sup> KRS §§ 427.060, .070, .100.

<sup>123</sup> *See, e.g., Farmer*, 156 S.W. at 1041.

<sup>124</sup> *Id.* at 1042.

<sup>125</sup> *Id.*

or his opinion of the value of the residence. Otherwise, the witness is incompetent to establish the homestead's value on the date of death.<sup>126</sup>

In valuing the decedent's residence for probate homestead purposes, the surviving spouse's interest in the land as a concurrent owner with the decedent does not count.<sup>127</sup> For example, assume that the decedent had an undivided one quarter interest in the family residence as a tenant in common with the surviving spouse who had an undivided three quarters interest in the land. Also, assume that the total value of the residence was \$20,000 at the time of the decedent's death. The decedent's concurrent interest is worth \$5,000 (one-quarter of \$20,000) while the surviving spouse's individual interest is worth \$15,000 (three-quarters of \$20,000). The surviving spouse is entitled to a probate homestead in the decedent's entire interest because the decedent's interest does not exceed the permissible homestead limit of \$5,000.

If the value of the decedent's interest in the property used as a residence is less than the \$5,000 exemption, the surviving spouse does not get to make up the deficiency from the decedent's property not occupied as a residence during the decedent's life.<sup>128</sup>

The surviving spouse and minor children receive the probate homestead exemption without reference to the kind or to the value of other property they may possess in their own right.<sup>129</sup> The source of their separate property is also irrelevant in fixing their homestead rights.<sup>130</sup> Thus, if the decedent makes an *inter vivos* gift of property to the surviving spouse, the value of the gift is not counted in determining the surviving spouse's probate homestead.<sup>131</sup>

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<sup>126</sup> *Shields v. Parsons*, 18 S.W.2d 961, 962 (Ky. 1929) (deceased's daughter's testimony that she thought the homestead was worth a certain amount without showing her knowledge of the value was incompetent to prove the homestead's value).

<sup>127</sup> *Miles v. Hall*, 75 Ky. 105 (1876).

<sup>128</sup> *Id.* at 109.

<sup>129</sup> *Taylor v. Shelton*, 13 S.W.2d 506, 506 (Ky. 1929) (surviving spouse's ownership of another piece of property suitable for a residence immaterial in determining the surviving spouse's right to a probate homestead in the decedent's land used as a residence).

<sup>130</sup> *Sansbery v. Simms' Adm'x*, 3 Ky. L. Rptr. 303, 305-06 (1881).

<sup>131</sup> *Id.*

If property allocated to the surviving spouse and infant children as a probate homestead thereafter increases to a value greater than the exempted amount of \$5,000, the decedent's creditors and heirs cannot reach the excess value until the probate homestead ends.<sup>132</sup> In *Turner's Guardian v Turner's Heirs*,<sup>133</sup> the residence of an insolvent decedent was worth only \$1,000 (the amount of the homestead exemption at the time of the case) when it was allotted to the decedent's infant children. Thereafter, the infant children's guardian, with the court's permission, divided the land into town lots and sold the lots for \$5,400. The court permitted the children to enjoy the use of the interest on all of the sale's proceeds until the youngest child reached the age of majority. When the youngest child reached the age of majority, the entire principal was distributed to the decedent's creditors.

The intervivos homestead exemption prevents the sale of the debtor's residence, either absolutely or subject to the debtor's occupancy, if the land is worth no more than the statutory amount of \$5,000.<sup>134</sup> If the debtor's residence is worth more than the \$5,000 statutory exemption, the debtor receives a homestead not to exceed \$5,000 before the remainder of the land is available to the creditors. The creditors may force a sale of all the land the debtor used as a residence only if the value of the land exceeds the \$5,000 exemption and the land cannot be divided without greatly reducing its value. In such a situation, however, the debtor must receive \$5,000 of the proceeds of the sale to enable the debtor to purchase another homestead.<sup>135</sup>

In keeping with the purpose of a homestead exemption to secure a home to the debtor and the debtor's family, under the probate homestead an actual homestead for the use of the surviving spouse and infant children should be allocated whenever practicable.<sup>136</sup> If the decedent's residence is worth less than \$5,000, the heirs cannot force a sale of the residence and a division of the proceeds between the heirs and the decedent's surviving

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<sup>132</sup> *Turner's Guardian v. Turner's Heirs*, 13 S.W. 6, 7 (Ky. 1890).

<sup>133</sup> 13 S.W. 6 (Ky. 1890).

<sup>134</sup> KRS § 427.090; *see Taylor v. Loller's Ex'rs*, 3 S.W. 165, 166 (Ky. 1887).

<sup>135</sup> KRS § 427.090.

<sup>136</sup> *Thompson v. Thompson's Adm'r*, 105 S.W. 1185, 1187 (Ky. 1907).



spouse and infant children.<sup>137</sup> When the residence's value exceeds the statutory amount, the law favors the physical partition of the land to permit the actual setting off of the residence to the spouse and infant children rather than a sale of the land and a division of its proceeds between the decedent's heirs and the decedent's surviving spouse and infant children.<sup>138</sup> The decedent's heirs can force a sale of the land and a division of the proceeds only if the property used as a residence is worth more than \$5,000 and an actual homestead in favor of the surviving spouse and infant children cannot be set off without greatly reducing the value of the property.<sup>139</sup>

The probate homestead statute expressly provides that the decedent's land may be sold, subject to the rights of the surviving spouse and infant children, "if a sale is necessary to pay the *debts* of the decedent."<sup>140</sup> This statutory grant of power to sell the decedent's residence if necessary to pay the debts of the decedent is not expressly limited to the sale of a residence valued at more than \$5,000. However, in *Dillard v Hunt*,<sup>141</sup> Kentucky's highest court held that the probate homestead cannot be sold at the instance of the decedent's creditors unless the property will bring a price exceeding the statutory exemption.

If the decedent's residence is sold subject to the surviving spouse or infant children's probate homestead, the cost of the sale is subtracted from the proceeds of the sale, and then the claimants' homestead rights are allocated from the remaining proceeds.<sup>142</sup> The court has a number of options when allocating the probate homestead to the surviving spouse and infant children. The court may direct the investment of \$5,000 for the use of the surviving spouse for life and for the infant children during their minority.<sup>143</sup> The claimant may receive the entire statutory

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<sup>137</sup> *Anderson's Adm'r v. Creekmore*, 287 S.W. 941, 942 (Ky. 1926).

<sup>138</sup> *Taylor*, 13 S.W.2d at 506; *Duff v. Duff*, 140 S.W. 540, 541 (Ky. 1911).

<sup>139</sup> *Duff*, 140 S.W. at 540.

<sup>140</sup> KRS § 427.070(1) (emphasis added); see *National Loan & Bldg. Ass'n No. 1 of Newport v. Maloney*, 60 S.W. 12, 13 (Ky. 1900) (sale of deceased debtor's homestead subject to widow and infant children's occupancy); *Schmidt v. Oliges*, 12 Ky. Op. 756 (1884); *Russell*, 10 Ky. Op. at 470 (when owner dies, heirs can sell homestead to pay debts).

<sup>141</sup> 7 Ky. Op. 625, 627 (1874).

<sup>142</sup> *Mangrum v. Mangrum*, 287 S.W. 532, 534 (Ky. 1926).

<sup>143</sup> *Sansberry*, 3 Ky. L. Rptr. at 307.

amount of \$5,000, and the court may require bond with good security for its return to the heirs at the claimant's death.<sup>144</sup> Finally, the court may direct that the claimant receive absolutely the present value of the claimant's interest in the \$5,000.<sup>145</sup>

### G. *Waiver of the Homestead Exemption*

KRS section 427.100 provides the only method for the voluntary mortgaging, releasing, or waiving of the homestead exemption. The mortgage, release, or waiver must be in writing, and the debtor and the debtor's spouse must subscribe the writing. The document must be acknowledged and recorded in the same manner as are conveyances of real estate.<sup>146</sup>

In *Carr v Britton*,<sup>147</sup> the spouses mortgaged property used as their residence to obtain a loan. Both spouses properly signed, acknowledged, and recorded the mortgage instrument, but it did not contain any express reference to the mortgagor's homestead. The mortgagor and the mortgagor's spouse sought to have an *intervivos* homestead in the land set aside for them after the mortgage was foreclosed upon the theory that the waiver provisions of KRS section 427.100 only apply to mortgages in which the homestead exemption is expressly waived. The court determined that the homestead exemption could be waived by implication. If the language of the mortgage instrument, whether in the warranty or elsewhere, evidences the mortgagors' intention to convey their entire interest in their lands, the claimants have waived the homestead.<sup>148</sup> However, if the surviving spouse joined

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<sup>144</sup> *Id.*

<sup>145</sup> *Mangrum*, 287 S.W. at 553. (Forty year old surviving spouse was given the present value of her life estate in \$1,000, the statutory amount at the time of this case.); *Sansbery*, 3 Ky. L. Rptr. at 307.

<sup>146</sup> *Hensey v. Hensey's Adm'r*, 17 S.W. 333, 334 (Ky. 1891) (A mortgage executed and delivered by both spouses releasing their homestead claims is not sufficient if it is not recorded.).

<sup>147</sup> 103 S.W.2d 300 (Ky. 1937).

<sup>148</sup> *Id.* at 303; see *Arnett v. Salyersville Nat'l Bank*, 46 S.W.2d 124 (Ky. 1931) (husband and wife's mortgage conveying entire estate with warranty covenant held sufficient to relinquish homestead right although did not specifically mention homestead); *Bray v. Ellison*, 83 S.W. 96 (Ky. 1904); *Hays v. Froman*, 45 S.W. 87 (Ky. 1898) (an instrument purporting to convey the wife's entire estate also creates a waiver of her homestead exemption).

in the mortgage with the decedent only for the purpose of releasing dower, the spouse has not waived the probate homestead.<sup>149</sup>

As spouses cannot waive their homestead exemptions except as provided in KRS section 427.100,<sup>150</sup> the surviving spouse is not affected by the decedent's unilateral waiver of the intervivos homestead exemption. The nonwaiving surviving spouse may claim the probate homestead in the family residence after the waiving spouse dies.<sup>151</sup> Although a mortgage given by the decedent without the joinder of the surviving spouse does not defeat the surviving spouse's probate homestead in the property, an intervivos sale of the land by the decedent defeats the spouse's right to later claim a probate homestead in that land.<sup>152</sup> Even if the surviving spouse joins with the decedent in the mortgage of the family's land, the surviving spouse has the right, after the decedent's death, to use and to occupy so much of the land as represents the homestead until the land is sold under a judgment enforcing the mortgage lien.<sup>153</sup> Similarly, a surviving spouse who joins in the mortgage of the homestead land is entitled to a homestead exemption in surplus proceeds left after satisfaction of the mortgage.<sup>154</sup>

KRS section 427.100 does not provide for a homestead waiver by the decedent's infant children. The absence of an express statutory waiver provision for infant children has been construed to constitute a legislative determination that infants are barred from waiving their homestead rights.<sup>155</sup>

#### *H. Forfeiture of the Homestead Exemption—By Intervivos Conveyance*

An intervivos conveyance of the debtor's residence does not end the intervivos homestead. If the property is worth less than

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<sup>149</sup> *Kiesewetter v. Kress*, 68 S.W. 633, 635 (Ky. 1902); cf. *Bloch v. Tarrent's Adm'r*, 91 S.W. 275 (Ky. 1906).

<sup>150</sup> *Lawrence*, 10 Ky. Op. at 355.

<sup>151</sup> *Potter v. Potter's Receiver*, 101 S.W. 905, 908 (Ky. 1907) (surviving spouse did not sign decedent's deed of assignment for the benefit of decedent's creditors).

<sup>152</sup> *Pugh v. Pugh*, 130 S.W.2d 40, 42 (Ky. 1939); *Hanna's Assignee's v. Gay*, 78 S.W. 915, 916-17 (Ky. 1904); *Gullett v. Arnett*, 19 Ky. L. Rptr. 1892 (1898).

<sup>153</sup> *Hersperger v. Smith*, 16 Ky. L. Rptr. 61 (1894).

<sup>154</sup> *McTaggart v. Smith*, 77 Ky. 414 (1878).

<sup>155</sup> *Lawrence*, 10 Ky. Op. at 355.

the statutory amount at the time of the conveyance of the land, the property passes to the debtor's transferee exempt from payment of the debtor's debts.<sup>156</sup> If this were not the rule, the deed could be set aside in the grantor's lifetime. Setting aside the deed would leave the title in the debtor. As the homestead was exempt from the debts of the debtor before the conveyance, it would continue to be exempt when the transaction was set aside.

The result is different, however, when a surviving spouse attempts to convey property held pursuant to the probate homestead exemption. The probate homestead merely confers on the surviving spouse a right of occupancy for as long as the surviving spouse lives on the homestead.<sup>157</sup> It does not give the surviving spouse a vendible life estate in the homestead, but only an estate dependent upon the surviving spouse's continued occupancy.<sup>158</sup> An attempt by the surviving spouse to sell this right of occupancy constitutes an abandonment and irrevocable loss of the right.<sup>159</sup> The transferee acquires no right to occupy the property because the very attempt to execute the sale of the probate homestead right extinguishes the surviving spouse's right of occupancy.<sup>160</sup> The decedent's heirs at law become entitled to immediate possession of the property.<sup>161</sup>

While the surviving spouse's transferee takes nothing under the attempted conveyance of the probate homestead right, the transferee does become an adverse holder of the property vis a vis the decedent's heirs from the time the transferee takes actual possession or possession through a tenant.<sup>162</sup> Therefore, the stat-

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<sup>156</sup> *First Nat'l Bank of Jackson*, 150 S.W.2d at 896.

<sup>157</sup> KRS § 427.070(1).

<sup>158</sup> *Clay's Guardian v. Wallace*, 76 S.W. 388 (Ky. 1903).

<sup>159</sup> *Hager v. Vincent*, 15 S.W.2d 426, 427 (Ky. 1929); *Tobien v. Gentry*, 208 S.W. 325, 326 (Ky. 1919); *Shepard v. Browning*, 160 S.W. 950, 951 (Ky. 1913); *Phillips v. Williams*, 113 S.W. 908, 911 (Ky. 1908), *rev'd on other grounds*, *Consolidation Coal Co. v. Grayson*, 216 S.W. 848, 850 (Ky. 1919); *Freeman v. Mills*, 39 S.W. 826, 827 (Ky. 1897). *Contra Howard*, 105 S.W.2d at 132 (when surviving spouse transferred deed to a family member and continued to use and occupy the land, homestead was not abandoned).

<sup>160</sup> *Hager*, 15 S.W.2d at 427; *Shepard*, 160 S.W. at 951; *Freeman*, 39 S.W. at 827.

<sup>161</sup> *Sams*, 225 S.W.2d at 629.

<sup>162</sup> *Id.* (transferee took possession through a tenant); *see Burchett v. James*, 246 S.W.2d 461 (Ky. 1952) (transferee took actual possession); *Combs v. Ezell*, 24 S.W.2d 301 (Ky. 1930) (transferee took actual possession); *Settle v. Simpson*, 264 S.W. 1092

ute of limitations for the transferee to acquire title by adverse possession begins to run against the decedent's heirs from the date the surviving spouse's transferee took possession of the homestead under the invalid conveyance.<sup>163</sup> Even if some of the heirs of the decedent are infants, the statute of limitations begins to run against all the heirs from the date the surviving spouse's transferee takes possession as long as some of the heirs are then *sui juris*.<sup>164</sup>

Because the character of the probate homestead, a mere right of occupancy in the surviving spouse and infant children, precludes its transfer to an assignee of the surviving spouse, the surviving spouse cannot enforce a note and mortgage given by the transferee to secure payment of the price. The transferee receives nothing by virtue of the attempted sale. Thus, no consideration exists for the transferee's note and mortgage.<sup>165</sup> However, the transferee's promise to pay may become enforceable when the transferee actually benefits from the forfeiture of the probate homestead because the transferee is the owner of the land subject to the surviving spouse's homestead rights, and the surviving spouse's attempted transfer frees the land from the probate homestead claim by working an automatic forfeiture.

In *Overby v. Williams*,<sup>166</sup> the surviving spouse entered into a contract to sell her probate homestead to her son-in-law. The widow took a note from the son-in-law and a mortgage from both the son-in-law and the decedent's daughter to secure the payment of the price. When the widow later attempted to enforce the note and mortgage, the son-in-law and daughter argued that because the widow's homestead interest could not be conveyed, they had received no consideration in exchange for their promise to pay. The court found the consideration necessary to support the note and mortgage in the forfeiture of the widow's homestead.

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(Ky. 1924) (transferee took actual possession); *Campbell v. Whisman*, 209 S.W. 27 (Ky. 1919) (transferee took actual possession).

<sup>163</sup> *Burchett*, 246 S.W.2d at 463-64; *Combs*, 24 S.W.2d at 305; *Settle*, 264 S.W. at 1092.

<sup>164</sup> *Settle*, 264 S.W. at 1094.

<sup>165</sup> See, e.g., *Overby*, 185 S.W. at 823.

<sup>166</sup> 185 S.W. 822 (Ky. 1916).

When an heir or owner of the fee subject to the surviving spouse's probate homestead produces a forfeiture of the probate homestead by entering into a transaction to purchase it from the surviving spouse, the land is relieved of the homestead encumbrances just as if the transfer of the widow's homestead rights had been a valid conveyance. The heir acquires the immediate right to possess the land. This right is valuable and furnishes sufficient consideration for the heir's promise to pay the purchase price. In *Overby*, the son-in-law was not the decedent's heir, but he was married to the sole heir.<sup>167</sup> The court will not always find that the attempted purchase of the surviving spouse's probate homestead by the spouse of the heir makes the heir liable for the purchase price. However, the court viewed this transaction as though the heir had made the purchase because the court found that the daughter instigated the attempted purchase of the widow's probate homestead rights and the daughter directly benefited from the forfeiture.

Not every attempt to convey the surviving spouse's homestead exemption works a forfeiture of the probate homestead. For example, merely offering the land for sale does not cause a forfeiture.<sup>168</sup> Similarly, a conditional sale of the homestead property does not necessarily work a forfeiture of the surviving spouse's probate homestead. In *Moore v Moore*,<sup>169</sup> the widow purported to convey the land which constituted her probate homestead to a third party. The decedent's creditors sought to reach the land using the theory that the conveyance had transferred no interest to the transferee, but instead it had worked a forfeiture of the widow's homestead rights. The court did not find a forfeiture of the probate homestead because parol evidence established that the deed had been made pursuant to the condition that the widow would sell the land to the transferee only if she had the right to sell the land. In *Persifull v Hind*,<sup>170</sup> the surviving spouse was permitted to claim a probate homestead in land the decedent died owning subject to a contract of sale when the purchaser thereafter abandoned the contract.

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<sup>167</sup> *Id.* at 822.

<sup>168</sup> *Gregory v. Oates*, 18 S.W. 231, 232 (Ky. 1892).

<sup>169</sup> 78 S.W. 141 (Ky. 1904).

<sup>170</sup> 11 S.W. 15 (Ky. 1889).

### *I. Forfeiture of the Homestead Exemption—By Abandonment*

Both the intervivos and probate homesteads are lost if the claimant abandons the homestead property.<sup>171</sup> In fact, abandonment is the only method by which the intervivos homestead can be lost.<sup>172</sup> Unlike the probate homestead, if an intervivos homestead is lost because the claimant abandoned the property, the claimant can later reclaim the intervivos homestead by resuming occupancy of the homestead.<sup>173</sup> Once a probate homestead has been abandoned, however, an adult claimant cannot thereafter repossess the property under the protection of the probate homestead exemption.<sup>174</sup>

Although a debtor and the debtor's adult surviving spouse can abandon their respective homestead exemptions by ceasing to occupy the property, a minor cannot so lose its probate homestead.<sup>175</sup> A minor child's right to claim a probate homestead in the decedent's property is not defeated because the child did not occupy the homestead with the decedent at the time of the decedent's death.<sup>176</sup> Even if the minor child does not occupy the property after the decedent's death, but instead the child's guardian rents out the property for the benefit of the child, the property is still protected as the child's probate homestead from claims of the decedent's creditors.<sup>177</sup> Abandonment of the probate homestead by the decedent's surviving spouse does not affect the infant children's rights to enjoy a probate homestead in the property until the youngest child reaches the age of majority.<sup>178</sup>

An infant surviving spouse is similarly protected from loss from abandonment of the probate homestead. By ceasing to occupy the homestead property, a minor surviving spouse does

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<sup>171</sup> See e.g., *Foreman*, 127 S.W.2d at 858 (abandonment of intervivos homestead); *Tinsley*, 235 S.W. at 731 (abandonment of probate homestead).

<sup>172</sup> *Brewer*, 105 S.W.2d at 584.

<sup>173</sup> *Id.*

<sup>174</sup> *Phillips*, 113 S.W. at 911.

<sup>175</sup> *Baker v. Lane*, 118 S.W. 963, 965 (Ky. 1909).

<sup>176</sup> *Potter*, 96 S.W. at 530.

<sup>177</sup> *Id.*

<sup>178</sup> *Phipps v. Acton*, 75 Ky. 375, 377 (1876); KRS § 427.070(1).

not forfeit the right to assert the probate homestead upon arriving of age.<sup>179</sup>

A voluntary relinquishment of a claimant's right to occupy the property free from creditors' claims constitutes an abandonment of either an intervivos or probate homestead. Whether a homestead has been abandoned is a question of fact determined by the specific circumstances of each case. The homestead claimant is not required to live on the land continuously to preserve the homestead exemption.<sup>180</sup> The crucial issue is whether the claimant's cessation of occupancy is temporary and accompanied by the claimant's intention to return and to occupy the property.<sup>181</sup>

No hard and fast rule exists as to the amount or character of the evidence sufficient to establish the fact of abandonment.<sup>182</sup> The claimant's intention to abandon the homestead can be established by parol evidence<sup>183</sup> of the claimant's actions and the circumstances accompanying the claimant's absence from the homestead<sup>184</sup> as well as by statements made by the claimant.<sup>185</sup>

Neither the surviving spouse's absence from the homestead property<sup>186</sup> nor the surviving spouse's holding of the homestead property through a tenant<sup>187</sup> constitutes an abandonment if the surviving spouse intends to return and to occupy the property at some future time.<sup>188</sup>

The length of the surviving spouse's physical absence from the property does not determine whether the absence is "temporary" or "permanent." An absence of any duration may constitute an abandonment because abandonment occurs at the moment the claimant intends to remain away permanently. Thus, in *Hamer v McCown*,<sup>189</sup> a surviving spouse absent from the

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<sup>179</sup> *Love v. McCandless*, 163 S.W. 197, 198 (Ky. 1914).

<sup>180</sup> *Hamer v. McCown*, 21 S.W.2d 833, 834 (Ky. 1929).

<sup>181</sup> *Foreman*, 127 S.W.2d at 858.

<sup>182</sup> *Burch v. Atchison*, 6 Ky. L. Rptr. 636, 637-38 (1885).

<sup>183</sup> *Love*, 163 S.W. at 199.

<sup>184</sup> *Foreman*, 127 S.W.2d at 858.

<sup>185</sup> *See Burch*, 6 Ky. L. Rptr. at 637.

<sup>186</sup> *Evans v. Evans' Adm'r*, 76 Ky. 587, 588 (1878); *Phipps*, 75 Ky. at 375.

<sup>187</sup> *Hamer*, 21 S.W.2d at 834; *Lancaster v. Redding*, 26 S.W. 1013 (Ky. 1894).

<sup>188</sup> *Brewer*, 105 S.W.2d at 584; *Hamer*, 21 S.W.2d at 834.

<sup>189</sup> 21 S.W.2d 833 (Ky. 1929).



homestead for seventeen years was still protected by the probate homestead because the surviving spouse always intended to return. In *Boggess v Johnston*,<sup>190</sup> on the other hand, when the decedent's widow remarried and moved to her new husband's house, the court treated her absence of just seven months from the decedent's home as an abandonment of the probate homestead in the decedent's property. The *Boggess* court reasoned that when a widow takes up residence with her new husband on land that he owns, the new home is presumptively the widow's permanent home.

If phrased in a less sexist manner, the presumption is supportable. Absent a showing of contrary intention, the law may presume reasonably that the home two spouses share is the permanent home of both spouses. Thus, the *Boggess* court's finding that the widow abandoned the probate homestead rested neither on the length of her absence from the homestead nor on her gender, but on the lack of evidence that she left her first husband's property with an intention to return to it later. Her actual return to the property seven months after she remarried and moved to her new husband's home was not the fulfillment of some ever-present and fixed intention to return. It was prompted by her desire to defeat a law suit that her children filed for partition of the decedent's property.

Remarriage of the surviving spouse alone does not constitute an abandonment of the spouse's probate homestead. In *Brewer v. Brewer*,<sup>191</sup> a widow who remarried and moved off the homestead land was permitted to assert the probate homestead exemption to shield the property from the decedent's creditor. The evidence established that the widow had the requisite intention to return to the homestead property. She relinquished her occupancy because the property needed repairs. She left furniture in the dwelling house, and she informed her tenants that she intended to move back to the premises as soon as she could. She also voted in the district where the homestead property was located, and her infant child attended school in that district. In *Taree v. Spriggs*,<sup>192</sup> a widow who remarried was permitted to

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<sup>190</sup> 165 S.W. 413 (Ky. 1914).

<sup>191</sup> 105 S.W.2d 582 (Ky. 1937).

<sup>192</sup> 147 S.W. 754 (Ky. 1912).

continue to enjoy her probate homestead in her first husband's property even though she was frequently absent from the property for significant periods of time. Her second husband travelled extensively and she often went to stay with him. However, she always left most of her furniture and other personal effects in the house as well as someone in charge of the property as her tenant. Upon each departure, she also verbalized her intention to return.

As determination of abandonment depends upon the homestead claimant's intention, no particular act can be identified as an abandonment. The above cases establish that remarriage is not in itself an act of abandonment of the probate homestead in the first spouse's property. Remarriage coupled with the permanent relocation to the second spouse's home will be characterized as an abandonment.<sup>193</sup> Holding the property through a tenant is not an abandonment if the surviving spouse intends to return.<sup>194</sup> However, holding through a tenant will not preserve the probate homestead if the surviving spouse intended to leave the land permanently.<sup>195</sup> Merely moving out of state is not sufficient to cause a forfeiture of the probate homestead, but moving out of state with the intention of making a permanent home somewhere else does work a forfeiture.<sup>196</sup>

The voluntariness of the surviving spouse's absence from the property also affects the court's determination of whether the surviving spouse intended a permanent move. For example, a surviving spouse who is forced by another to leave the property has not abandoned it.<sup>197</sup> Similarly, a surrender of occupancy under duress and ignorance of the claimant's homestead rights is not an abandonment.<sup>198</sup> Even the cessation of occupancy because of confinement in a mental institution does not constitute an abandonment because the absence is not voluntary.<sup>199</sup>

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<sup>193</sup> *Nelson v. Nelson*, 96 S.W. 794, 796 (Ky. 1906).

<sup>194</sup> *Hamer*, 21 S.W.2d at 834; *Lancaster*, 26 S.W. at 1014.

<sup>195</sup> *Bloch*, 91 S.W. at 276.

<sup>196</sup> *See Tinsley*, 235 S.W. at 731.

<sup>197</sup> *See Taree*, 147 S.W. at 755-56.

<sup>198</sup> *Young v. Milward*, 58 S.W. 592 (Ky. 1900).

<sup>199</sup> *National Loan & Bldg. Ass'n No. 1 of Newport*, 60 S.W. at 13.

The decision of Kentucky's highest court in *Burch v Atchison*<sup>200</sup> indicates that equitable considerations can affect the court's determination of whether the homestead claimant's present intention upon leaving the property was to remain away permanently. In *Burch*, the homestead claimant had an intervivos homestead in a farm. After living on the farm for two years, the claimant rented out the land by the year, moved to a city six miles away, and rented a home. The claimant did not return to the farm until five years later. During the interim, the claimant contracted some debts. The creditor obtained judgments, executions issued, and the farm was sold. The claimant brought suit to set aside the execution sale upon the ground that the farm was protected under the intervivos homestead exemption.

In support of its decision that the claimant had abandoned the homestead upon moving to the city, the Kentucky Court of Appeals indicated that a court should be more inclined to find that on leaving the claimant intended to remain away permanently if rights of others intervene during the claimant's absence. For example, a notorious act of leaving such as that which occurred in *Burch* justifiably may give rise to a presumption that subsequent creditors extended credit upon the belief that property formerly occupied as an intervivos homestead was now available to satisfy any indebtedness of the claimant. The same presumption would not be supportable where the debts were created when the debtor personally occupied the property.

#### *J. Miscellaneous Matters Affecting the Homestead Exemption*

If a surviving spouse acquires a probate homestead in the deceased spouse's property, the probate homestead is not destroyed if the surviving spouse later acquires a fee interest in the same property. For example, in *Evansville Coffin Co. v Sumner*,<sup>201</sup> the decedent died survived by a spouse and two infant children. The surviving spouse elected to take the probate homestead in the land that the spouses and children had occupied as a home. Each child inherited an undivided one-half interest in the fee subject to the surviving spouse's probate homestead.

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<sup>200</sup> 6 Ky. L. Rptr. 636 (1885).

<sup>201</sup> 226 S.W. 363 (Ky. 1920).

right.<sup>202</sup> Thereafter, both children died and the surviving spouse inherited the children's fee interests in the land. As the surviving spouse's probate homestead was a mere right of occupancy and not an estate in land, the court held that the probate homestead did not merge into the fee the survivor inherited from the children. Because the survivor had a probate homestead in the land, the deceased spouse's creditors could not force a sale of the land. The fee interest the survivor inherited from the children was protected by the intervivos homestead from the survivor's own creditors.

In *Morgan v Wooton*,<sup>203</sup> a grandparent gave land to his adult child. The child died intestate survived by a spouse and a minor child. The surviving spouse elected to take a probate homestead in the land instead of a dower share. Thus, the infant child inherited the land subject to the probate homestead. Thereafter, the infant child died. Pursuant to Kentucky's ancestral property statute,<sup>204</sup> the land passed back to the grandparent. However, it passed to the grandparent subject to the surviving spouse's right to continue to occupy the land under the probate homestead exemption.

A surviving spouse is barred from claiming a probate homestead if the survivor voluntarily left the decedent and lived in adultery without having become reconciled before the decedent died.<sup>205</sup> Similarly, a spouse convicted of bigamy is barred from claiming a probate homestead.<sup>206</sup> An absolute divorce bars the surviving ex-spouse from asserting any claim, including a claim for a probate homestead, in the estate of the other ex-spouse.<sup>207</sup> A divorce from bed and board, however, does not operate as a bar to a surviving spouse's claim of a probate homestead.<sup>208</sup> Similarly, the right to claim a probate homestead in the deceased spouse's estate is not lost merely because the spouses were not living together when the decedent died.<sup>209</sup> By statute, if the

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<sup>202</sup> KRS § 391.010(1) (1984).

<sup>203</sup> 224 S.W. 665 (Ky. 1920).

<sup>204</sup> KRS § 391.020(2).

<sup>205</sup> *Id.* at § 392.090(2).

<sup>206</sup> *Id.* at § 392.100.

<sup>207</sup> *Id.* at § 392.090(1); see *Skinner v. Walker*, 34 S.W. 233, 235 (Ky. 1896).

<sup>208</sup> KRS § 403.050 (1984).

<sup>209</sup> *Redmond's Adm'x*, 66 S.W. at 747.

surviving spouse took the life of the decedent and was convicted of the felony, that spouse forfeits all interest in and to the decedent's property.<sup>210</sup> The statutory forfeiture provision for murder would also bar an infant child convicted of feloniously killing its parent from claiming a probate homestead in the deceased parent's property. Finally, the surviving spouse is not entitled to claim a probate homestead in the decedent's land if the survivor elects to take dower<sup>211</sup> or elects to take under the decedent's will.<sup>212</sup>

*K. Relationship of Probate Homestead to Dower and Other Rights of the Surviving Spouse*

If the decedent dies intestate, \$7,500 worth of personalty is exempted from distribution for the benefit of the surviving spouse<sup>213</sup> in addition to any other rights the survivor might have in the decedent's estate.<sup>214</sup> However, the surviving spouse must elect between homestead and dower<sup>215</sup> within a reasonable time period after the decedent's death.<sup>216</sup> Until the surviving spouse is assigned either dower or homestead, the survivor is entitled to quarantine.<sup>217</sup>

The surviving spouse's election of either dower or the probate homestead in the decedent's land binds the surviving spouse.<sup>218</sup>

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<sup>210</sup> KRS § 381.280 (1984).

<sup>211</sup> *Sams*, 255 S.W.2d at 629 (husband must elect between dower and homestead); *Berger v. Berger*, 94 S.W.2d 618, 620 (Ky. 1936) (wife must elect between dower and homestead).

<sup>212</sup> *Jarboe v. Hayden*, 117 S.W. 961, 962 (Ky. 1909) (husband taking under wife's will cannot claim a probate homestead in the land); *Oschsver v. German Bldg. & Sav. Ass'n*, 12 Ky. Op. 217 (1883) (wife taking under husband's will cannot claim a probate homestead in the land).

<sup>213</sup> KRS § 391.030(1)(c).

<sup>214</sup> *Blades v. Blades' Adm'r*, 159 S.W.2d 407, 409 (Ky. 1942)(amount exempted from distribution does not become part of the decedent's estate but instead vests in the surviving spouse).

<sup>215</sup> Widow must elect between homestead and dower. *Berger*, 94 S.W.2d at 620; *Thompson*, 105 S.W. at 1187; *Redmond's Adm'r*, 66 S.W. at 747; *Freeman*, 59 S.W. at 4; *Funk v. Walters*, 12 Ky. Op. 761, 763 (1884). Widower must elect between homestead and dower. *Sams*, 255 S.W.2d at 629; *Carpenter v. Hazelrigg*, 45 S.W. 666, 667 (Ky. 1898).

<sup>216</sup> *In re Gibson*, 33 F. Supp. at 840; *White v. Holder*, 118 S.W. 995, 996 (Ky. 1909).

<sup>217</sup> KRS § 392.050.

<sup>218</sup> *James v. Reeves*, 215 S.W. 66, 67 (Ky. 1919).

For example, if the surviving spouse elects to take the probate homestead in lieu of the dower share and thereafter abandons the homestead or attempts to sell it, the survivor's rights to a probate homestead in the land end and the survivor cannot have a dower interest in the land.<sup>219</sup>

The surviving spouse's decision to elect the probate homestead instead of dower does not bar the spouse from claiming a share as an intestate taker under KRS section 391.010 if the decedent is not survived by children, descendants of children, parents, siblings, or the descendants of siblings.<sup>220</sup> In *Eustache v Rodaquest*,<sup>221</sup> under the statutes then in effect, a nonresident alien was entitled to inherit only a very limited interest in the decedent's real estate and was not entitled to inherit any of the decedent's personalty. The decedent was survived by only a spouse and a nonresident, alien sibling. The surviving spouse, as the decedent's only distributee, took all the personalty as well as a probate homestead in the land the decedent's sibling inherited.

Prior to 1894, the dower or curtesy share available to the surviving spouse was only a life interest in the decedent's real property. The widow's dower share was a life estate in one-third of the decedent's surplus real property<sup>222</sup> and the widower's curtesy share, if a child had been born alive during the marriage, was a life estate in all of the decedent's surplus real property.<sup>223</sup> Thus, any election between dower and the probate homestead did not involve the relinquishment of a claim to a share in the decedent's personalty. Under a separate statute,<sup>224</sup> the husband was given all of the wife's surplus personalty if he survived her. A surviving wife received one-third of the husband's surplus personalty when children also survived the decedent and one-half of the husband's surplus personalty if no children survived.<sup>225</sup>

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<sup>219</sup> *Phillips*, 113 S.W. at 911; *Kimberlin v. Isaacs*, 62 S.W. 494, 495 (Ky. 1901).

<sup>220</sup> *Hogan v. Hogan*, 44 S.W. 953, 954 (Ky. 1898); *Eustache*, 74 Ky. at 46.

<sup>221</sup> 74 Ky. 42 (1874).

<sup>222</sup> Ky. Gen. Stat. ch. 52, Art. 4, § 2 (1888).

<sup>223</sup> *Id.* at § 1.

<sup>224</sup> *Id.* at ch. 31, § 11 (1888).

<sup>225</sup> *Id.*

The Weisinger Act, passed in 1894,<sup>226</sup> redefined the surviving spouses' inheritance rights. Regardless of gender, the surviving spouse's dower became a life estate in one-third of the decedent's surplus real property<sup>227</sup> and one-half of the decedent's surplus personalty in fee.

Because the dower share since 1894 has included both real and personal property, the question arises whether the election of the probate homestead under the contemporary dower/curtesy statute bars the surviving spouse from the dower share in the decedent's personalty as well as in the decedent's realty. In *Miller v. Keown*,<sup>228</sup> decided after personalty was included in the statutory definition of dower, the surviving spouse was awarded the personalty exemption provided for in Kentucky General Statutes section 1403(5)<sup>229</sup> and one-half of the surplus personalty.<sup>230</sup> In addition to these amounts, the court said that the survivor was entitled to the use of the house and lot as a homestead as long as the survivor occupied it. Thus, the survivor's election of the probate homestead did not preclude the surviving spouse from receiving the dower share of the decedent's personalty.

The surviving spouse must also elect between the probate homestead and any gift left to the survivor under the testator's will.<sup>231</sup> Consequently, if the surviving spouse elects to take under the testator's will the same land that the probate homestead protected, the surviving spouse takes the property subject to the claims of the decedent's creditors.<sup>232</sup>

Today, the probate homestead is still merely a right of occupancy for the surviving spouse's life. This right may be lost by abandonment or an attempted alienation of the interest.<sup>233</sup> The realty share of contemporary dower/curtesy is a vested fee

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<sup>226</sup> *Id.* at ch. 66, Art. 3, § 2132 (1894).

<sup>227</sup> Today, the surviving spouse's dower/curtesy share in realty is a fee interest in one-half of the decedent's surplus real property. KRS § 392.020.

<sup>228</sup> 195 S.W. 430, 433-34 (Ky. 1917).

<sup>229</sup> Ky. Gen. Stat. ch. 39, § 1403(5) (1894).

<sup>230</sup> *Id.* at ch. 66, Art. 3, § 2137.

<sup>231</sup> *Jarboe*, 117 S.W. at 962; *Oschsner*, 12 Ky. Op. at 218.

<sup>232</sup> *McLean v. Trabue*, 135 S.W. 309, 310 (Ky. 1911), *overruling* *Nichols v. Lancaster*, 32 S.W. 676 (Ky. 1895); *Myers' Guardian v. Myers' Adm'r*, 12 S.W. 933, 934 (Ky. 1890); KRS § 396.060(1) (1984).

<sup>233</sup> *Berger*, 94 S.W.2d at 620.

interest in one-half of the decedent's surplus realty<sup>234</sup> and a life estate in one-third of any real property transferred away during marriage without the release of dower. Surviving spouses may dispose of their dower share as they see fit.<sup>235</sup>

The value of the probate homestead may not exceed \$5,000,<sup>236</sup> but no dollar limit exists on the value of the survivor's dower interest of one-half of the decedent's surplus realty.<sup>237</sup> The probate homestead is assigned to the surviving spouse before the decedent's creditors are satisfied.<sup>238</sup> The dower share is taken from the decedent's surplus realty after the debts, the costs of administration, and the funeral expenses have been paid.<sup>239</sup> Consequently, unless the estate is loaded with debts or is very small, electing dower will be more beneficial to the surviving spouse than electing the probate homestead.

If the surviving spouse does elect to take the probate homestead in the decedent's land, the spouse nevertheless must pay the property taxes on the land.<sup>240</sup> If the surviving spouse does not pay the property taxes, a subsequent tax sale will not deprive the intestate takers who inherited the land subject to the survivor's probate homestead of their remainder interest in the land if they had no notice of the tax sale.<sup>241</sup> The purchaser at the sale merely has a lien against the land for the amount paid plus interest.<sup>242</sup>

If the surviving spouse holds the land as a probate homestead and makes improvements, the spouse is not entitled to a lien for the enhancement of the property as against the intestate takers who inherited the land subject to the probate homestead.<sup>243</sup> In *Smith v Richey*,<sup>244</sup> the defendant made improvements to the homestead property pursuant to an agreement with the surviving

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<sup>234</sup> KRS § 392.020.

<sup>235</sup> *Berger*, 94 S.W.2d at 620; *Phillips*, 113 S.W. at 911.

<sup>236</sup> KRS § 427.060.

<sup>237</sup> *Id.* at § 392.020.

<sup>238</sup> *Id.* at § 427.060.

<sup>239</sup> *Id.* at § 392.020.

<sup>240</sup> *Id.* at § 132.220(4) (1982); see *Carter*, 188 S.W. at 380; *Hersperger*, 16 Ky. L. Rptr. at 61.

<sup>241</sup> *Carter*, 188 S.W. at 380; *Bradley v. Sears*, 127 S.W. 782, 783 (Ky. 1910).

<sup>242</sup> *Bradley*, 127 S.W. at 783.

<sup>243</sup> *Smith*, 215 S.W. at 430.

<sup>244</sup> *Id.*



spouse. The defendant agreed to provide lifetime care for the surviving spouse and the surviving spouse agreed to give the land to the defendant. A probate homestead cannot be transferred to anyone else. Therefore, the defendant took no interest in the land under the agreement with the surviving spouse. As the surviving spouse cannot have a lien against the intestate takers of the land for the value of any improvements the spouse made, the defendant could not have any rights against the intestate takers for the value of the improvements.<sup>245</sup>

When the dower share was only a life interest in the land of the decedent and the surviving spouse elected dower, the land was subject to the claims of the decedent's creditors. However, the surviving spouse could claim an *intervivos* homestead in the dower land to protect it from the surviving spouse's own creditors.<sup>246</sup> Certainly, the *intervivos* homestead is available today to a surviving spouse who elects dower to protect the survivor's fee interest in the land from the survivor's creditors.<sup>247</sup>

If the surviving spouse fails to elect between dower and the probate homestead, the cases state that the court must elect the estate which is most beneficial to the surviving spouse and infant children.<sup>248</sup> However, in every case involving a nonelecting surviving spouse the courts have decided that the survivor elected homestead because the value of the decedent's real property was less than the amount of the homestead. Thus, the election of the probate homestead life estate in the decedent's realty was more beneficial to the surviving spouse than the dower life estate in one-third of all the decedent's realty. Today, the failure to elect would probably result in a decision that the surviving spouse took dower rather than the probate homestead because the dower share of the real property the decedent died owning is now a one-half fee interest while the probate homestead continues to provide a life estate in the decedent's residence worth less than \$5,000.

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<sup>245</sup> *Id.* at 431.

<sup>246</sup> *Suter*, 58 S.W. at 990.

<sup>247</sup> KRS § 427.060.

<sup>248</sup> *Sams*, 255 S.W.2d at 629; *Burchett*, 246 S.W.2d at 463 (widow makes positive election); *Wilson's Adm'r*, 156 S.W.2d at 835; *Anderson v. Sanders*, 236 S.W. 561, 561 (Ky. 1922); see *Campbell*, 209 S.W. at 27; *Carver v. Elmore*, 144 S.W. 1062, 1063 (Ky. 1912).

One Kentucky decision, *Consolidation Coal v Grayson*,<sup>249</sup> may preclude a court from presuming that the spouse elected dower even if dower is the more beneficial interest. In *Consolidation*, a surviving spouse who had not been assigned dower or homestead in the decedent's land leased the land. The court found that the only occupancy right the surviving spouse had prior to the assignment of dower or homestead is the privilege of quarantine as defined in KRS section 392.050. The privilege of quarantine is not an assignable interest.

In *Consolidation*, the purported lessee took no interest in the land because the transaction invalidly attempted to convey the nontransferable quarantine interest. If the principle enunciated in *Consolidation* is good law, the courts must treat a nonelecting spouse's occupancy of the decedent's residence as occupancy according to the nontransferable privilege of quarantine. Any attempt to convey the survivor's quarantine interest would be a nullity. The court could choose between dower and homestead for a nonelecting surviving spouse only in those instances when the court was in the process of administering the decedent's estate and the survivor was merely occupying, not purporting to transfer, the land. The court could then treat the surviving spouse as having elected the more beneficial interest in the land and could then assign the survivor that interest. If dower were assigned, the survivor could thereafter convey that interest, but if the survivor was assigned the probate homestead, the survivor would not have a transferable interest.

#### *L. Effect of Spousal Election on Children's Homestead Exemption*

Two statutory provisions employ different language to describe the permissible claimants of the children's probate homestead. KRS section 427.100 states that the debtor's inter vivos homestead exemption continues after the debtor's death for the benefit of the debtor's surviving spouse and "children." However, KRS section 427.070(1) says that the probate homestead is for the surviving spouse and "the *unmarried infant* children"

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<sup>249</sup> 216 S.W. 848 (Ky. 1919), *overruling Phillips*, 113 S.W. at 908.

of the deceased debtor. The cases treat the language modifying the noun "children" in KRS section 427.070(1) as the controlling language. Once a child reaches the age of majority or marries, the child no longer receives a probate homestead in the deceased parent's property.<sup>250</sup>

The guardian of the infant children must affirmatively claim the probate homestead for the children or it will be lost.<sup>251</sup> The infant children's right to a probate homestead is also lost if the decedent transferred the homestead property prior to death.<sup>252</sup>

The rights of the decedent's infant children to a probate homestead are linked to the surviving spouse's election of either dower or the probate homestead in the decedent's property. For example, if the decedent dies intestate and the surviving spouse elects to take the probate homestead, the children are entitled to jointly occupy the homestead with the surviving spouse.<sup>253</sup> However, if the surviving spouse elects the probate homestead and subsequently forfeits or abandons it, the decedent's unmarried minor children do not lose their right to continue to occupy the homestead.<sup>254</sup>

If the surviving spouse elects to take dower, the decedent's children cannot have a homestead in the decedent's property.<sup>255</sup> However, the court must take the children's homestead rights into account in allotting dower.<sup>256</sup> The infant children's right to a homestead attaches to the land set apart as the surviving spouse's dower.<sup>257</sup> The portion set apart for the surviving spouse and infant children should include the dwelling house if it can be done without materially injuring the interests of others.<sup>258</sup> A subsequent conveyance of the surviving spouse's dower interest does not defeat the children's homestead rights in the land. The

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<sup>250</sup> *Jones v. Crawford*, 84 S.W. 568, 569 (Ky. 1905).

<sup>251</sup> *Howard v. Howard*, 150 S.W.2d 653, 655 (Ky. 1941).

<sup>252</sup> *Hanna's Assignees*, 78 S.W. at 917.

<sup>253</sup> KRS § 427.070(1).

<sup>254</sup> *Id.*, see *Davidson v. Marcum*, 89 S.W. 703, 704 (Ky. 1905); *Phupps*, 75 Ky. at 375.

<sup>255</sup> *Thompson*, 105 S.W. at 1187.

<sup>256</sup> *In re Gibson*, 33 F. Supp. at 841; *Hanna's Assignees*, 78 S.W. at 917; KRS § 427.100.

<sup>257</sup> *Hanna's Assignees*, 78 S.W. at 917.

<sup>258</sup> *Phillips*, 116 S.W. at 688.

purchaser of the surviving spouse's dower takes the land subject to the children's homestead rights.<sup>259</sup> If the surviving spouse receives dower in the form of money instead of land because the property had to be sold, the value of the children's homestead is subtracted from the amount due the surviving spouse and paid to the children's guardian.<sup>260</sup>

If the decedent dies testate devising the homestead to the surviving spouse who elects to take under the provisions of the will, the surviving spouse has no claim to a probate homestead in the property she was devised.<sup>261</sup> The surviving spouse's acceptance of a will gift of the homestead also bars the infant children's homestead in the property if the decedent had no creditors.<sup>262</sup>

The part of KRS section 427.070(1) which provides that termination of the widow's occupancy does not affect the infant children's right to occupy the homestead does not change this result. The statutory rule only applies in cases when the surviving spouse and infant children became entitled to a probate homestead in intestacy and the spouse subsequently forfeits or abandons it. The statute does not apply when the surviving spouse became entitled to the homestead under the terms of the decedent's will.<sup>263</sup> Conversely, if the decedent dies testate devising the homestead to the surviving spouse who elects to take the will gift even though the decedent has creditors and renouncing the will and taking homestead would provide more advantage, the surviving spouse's election does not impair the infant children's right to occupy the homestead.<sup>264</sup>

## II. PERSONALTY EXEMPTION

The common law right of estovers was the widow's right during her quarantine to take reasonable sustenance from the

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<sup>259</sup> *Id.* at 688; *Phillips v. Williams*, 113 S.W. 908, 912 (Ky. 1908).

<sup>260</sup> *Thompson*, 105 S.W. at 1188.

<sup>261</sup> *Best v. Burnam*, 11 Ky. Op. 388, 390 (1881).

<sup>262</sup> *Demarest v. Allen*, 224 S.W. 458, 458 (Ky. 1920); *Hazelett v. Farthing*, 22 S.W. 646, 647 (Ky. 1893); *Ellmore v. Ellmore's Adm'r*, 4 Ky. L. Rptr. 622 (1883), *sub nom.* *Elmore v. Elmore's Adm'r*, 11 Ky. Op. 902 (1883).

<sup>263</sup> *Hazelett*, 22 S.W. at 647.

<sup>264</sup> *Schnabel v. Schnabel's Ex'x*, 56 S.W. 983, 987 (Ky. 1900); *Myers' Guardian*, 12 S.W. at 934.

decedent's property<sup>265</sup> Although a contemporary right of quarantine is codified in KRS section 392.050, the surviving spouse now receives a \$7,500 personalty exemption in lieu of the widow's common law right of estovers.<sup>266</sup>

If the decedent dies intestate, KRS section 391.030(1)(c) exempts personal property or money on hand or in a bank up to \$7,500 from distribution and sale for the surviving spouse, or for the children if there is no surviving spouse. The district court having jurisdiction over the decedent's estate may set apart the \$7,500 for the surviving spouse or for the decedent's children if there is no surviving spouse.

At any time prior to the setting apart of the \$7,500, the surviving spouse may procure an order from the district court authorizing the withdrawal of up to \$1,000 from any bank or depository account belonging to the decedent's estate.<sup>267</sup> The amount withdrawn is charged against the \$7,500 that is exempt from distribution.<sup>268</sup> The surviving spouse, or, if there is no surviving spouse, the children, may take the personalty exemption in tangible personal property as well as in the form of money<sup>269</sup>

### A. *Claimants*

The Kentucky legislature enacted the first personalty exemption statute in 1845.<sup>270</sup> The legislature has made changes in both the identity of those entitled to claim the exemption and the property exempted from distribution and sale. The law in force at the decedent's death determines who is entitled to the exemption and what the claimants take.<sup>271</sup>

Until 1970, only a widow could claim the personalty exemption. Today, the exemption benefits the surviving spouse of the intestate decedent without regard to the survivor's gender.<sup>272</sup> The

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<sup>265</sup> See *Wyly v. Kallenbach*, 76 S.W.2d 34, 36 (Ky. 1934) (discusses the long history of quarantine and estovers).

<sup>266</sup> KRS § 391.030(1)(c) (1984).

<sup>267</sup> *Id.* at § 391.030(2).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at § 391.030(3).

<sup>270</sup> 1844 Ky. Acts 174.

<sup>271</sup> *Oster's Ex'r v. Ohlman*, 219 S.W. 187, 189 (Ky. 1920).

<sup>272</sup> 1970 Ky. Acts 222, § 2.

surviving spouse may take the personalty exemption regardless of whether the decedent has surviving children.<sup>273</sup> Prior to 1974, the surviving spouse had to share the personalty exemption with the decedent's surviving children. Since 1974, the exemption is only available to the decedent's children if no spouse survives the decedent.<sup>274</sup>

Although prior to 1982 only the decedent's infant children were eligible for the exemption, today, if there is no surviving spouse, any child of the decedent, regardless of age, may claim the exemption.<sup>275</sup> Because the statute authorizes only one \$7,500 exemption, if there is more than one surviving child of the decedent, the children must share the \$7,500 exemption.<sup>276</sup> The children are not barred from claiming the exemption merely because the spouse waived her or his right to claim it.<sup>277</sup> The decedent's adopted children are entitled to claim the exemption if there is no surviving spouse,<sup>278</sup> but stepchildren are never permitted to share in the exemption.<sup>279</sup> A child convicted of causing the felonious death of the decedent does not share in the exemption.<sup>280</sup>

### *B. Priority of the Personalty Exemption over Other Claims*

For some purposes, the \$7,500 personalty exemption is treated as vesting absolutely in the surviving spouse, or if there is no surviving spouse, in the decedent's children at the moment of the decedent's death.<sup>281</sup> Thus, the personalty exemption is superior to the claims of the decedent's heirs,<sup>282</sup> general creditors,<sup>283</sup>

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<sup>273</sup> *Chism v. Chism*, 2 Ky. Op. 461, 461 (1868).

<sup>274</sup> 1974 Ky. Acts 299, § 2.

<sup>275</sup> 1982 Ky. Acts 51, § 1.

<sup>276</sup> *Wilson v. Parson's Adm'r*, 50 S.W. 684, 684 (Ky. 1899).

<sup>277</sup> *Brown v. Brown's Adm'r*, 80 S.W. 470, 471 (Ky. 1904).

<sup>278</sup> KRS § 199.520(2) (Supp. 1986).

<sup>279</sup> *Howland's Adm'r v. Harr*, 97 S.W. 358, 359 (Ky. 1906).

<sup>280</sup> KRS § 381.280 (1970).

<sup>281</sup> *Kilburn v. Holliday*, 175 S.W.2d 516 (Ky. 1943); *Blades v. Blades' Adm'r*, 159 S.W.2d 407 (Ky. 1942); *O'Hara v. O'Hara's Adm'r*, 206 S.W. 462, 464 (Ky. 1918), *overruled on other grounds*, 159 S.W.2d 407, 409 (Ky. 1942).

<sup>282</sup> *Blades*, 159 S.W.2d at 409; *Bracken's Heirs v. Bracken*, 32 S.W. 609, 610 (Ky. 1895).

<sup>283</sup> *Kilburn*, 175 S.W.2d at 518; *Bracken's Heirs*, 32 S.W. at 610.

and the decedent's funeral expenses.<sup>284</sup> The exemption also prevails over a claim by one who paid the decedent's debt as the surety on the debt.<sup>285</sup>

The exemption, however, does not prevail over the claims of creditors who have security interests in the insolvent decedent's personalty.<sup>286</sup> For example, in *International Harvester Co. v. Dyer's Administrator*,<sup>287</sup> the decedent died owning equipment in which certain creditors held security interests. Those creditors received priority over the surviving spouse's personalty exemption in the division of the proceeds of the sale of mining equipment. Similarly, a vendor's equitable lien to secure payment of the purchase price of items of personalty the decedent died owning is superior to the surviving spouse's personalty exemption.<sup>288</sup>

Any statutory lien which is granted priority over a security interest in the decedent debtor's personal property is also superior to the personalty exemption.<sup>289</sup> For example, an employee's lien for wages is created by KRS section 376.150. This lien is against both real and personal property used in the employer's business. KRS section 376.160 specifically makes such a lien superior to the lien of any mortgage or other encumbrance against the employer's property created before or after the employee's wages became due. In the *International Harvester* case,<sup>290</sup> the proceeds of the sale of the insolvent decedent's mining equipment were used first to satisfy the employees' lien for wages due to them. The holders of the security interests in the mining equipment had the second claim on the proceeds of the sale of the equipment and the surviving spouse's personalty exemption had third priority.

If a judgment or attachment creditor has levied upon the decedent's personal property prior to the decedent's death, the

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<sup>284</sup> *Kilburn*, 175 S.W.2d at 518; *Blades*, 159 S.W.2d at 407.

<sup>285</sup> *O'Hara*, 206 S.W. at 464.

<sup>286</sup> *Graham v. Graham's Adm'r*, 306 S.W.2d 831, 831 (Ky. 1957) (unrecorded security interest has preference over personalty exemption); *International Harvester Co. v. Dyer's Adm'r*, 178 S.W.2d 966, 969 (Ky. 1944) (recorded security interest has preference over personalty exemption).

<sup>287</sup> 178 S.W.2d 966 (Ky. 1944).

<sup>288</sup> *Collier v. Kant's Adm'r*, 15 Ky. L. Rptr. 845, 845 (1894).

<sup>289</sup> *International Harvester Co.*, 178 S.W.2d at 969.

<sup>290</sup> *Id.* at 968-69.

surviving spouse's personalty exemption does not have priority over such creditors' claims in the proceeds of a postmortem sale of that property.<sup>291</sup> However, if at the time of death, the decedent was entitled to claim an intervivos personalty exemption in the property levied upon by a judgment or attachment creditor,<sup>292</sup> the surviving spouse may assert the decedent's intervivos exemption claim to shelter that property from the creditor's claims.<sup>293</sup> Such sheltered property could be used to satisfy the surviving spouse's personalty exemption.

### C. *Time for Claiming the Personalty Exemption*

Prior to 1968, the exemption statute did not require the claimant to apply for the exemption. The caselaw interpreting the pre-1968 statute held that the exempt property vested instantly in the claimant at the decedent's death without it first being set apart.<sup>294</sup> The administrator had an affirmative duty to set apart the exempt property and incurred liability for failing to do so.<sup>295</sup> Since 1968, the surviving spouse, or if there is no surviving spouse, the decedent's children, must apply to the court having jurisdiction over the decedent's estate to have the \$7,500 personalty exemption set apart.<sup>296</sup>

Before the court sets apart the exempt property or money, the claimant may petition the court for an order authorizing the

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<sup>291</sup> *Blake v. Durrell*, 45 S.W. 883, 883 (Ky. 1898).

<sup>292</sup> *E.g.*, KRS § 427.010 (Supp. 1986) (an individual debtor's exempt personal property such as household furnishings, jewelry, personal clothing and ornaments not to exceed \$3,000 in value); *id.* at § 427.030 (Supp. 1986) (tools not exceeding \$300 used in debtor's trade, one motor vehicle not exceeding \$2,500 of debtor who is a mechanic); *id.* at § 427.040 (Supp. 1986) (professional library, office equipment, instruments and furnishings necessary for practice of minister, attorney, physician, surgeon, chiropractor, veterinarian, or dentist not to exceed \$1,000 and one motor vehicle not exceeding \$2,500 in value).

<sup>293</sup> *Myers's Adm'r v. Forsythe*, 73 Ky. 394, 399 (1874).

<sup>294</sup> *Thompson v. Thompson*, 78 S.W. 418, 419 (Ky. 1904); *Mallory's Adm'r v. Mallory's Adm'r*, 17 S.W. 737, 738 (Ky. 1891). *Contra Williams' Adm'r v. Cambest*, 10 Ky. Op. 553, 554 (1880) (title to personalty vests in administrator upon qualification, and exempt property does not vest in surviving spouse and/or infants until administrator sets it apart).

<sup>295</sup> *Blades*, 159 S.W.2d at 409; *Thompson*, 78 S.W. at 419; *Mallory's Adm'r*, 17 S.W. at 737.

<sup>296</sup> 1968 Ky. Acts 144, § 1.



claimant to withdraw up to \$1,000 from any bank or other depository holding an account of the decedent.<sup>297</sup> Upon presentation of the order, the bank or depository must permit the claimant to withdraw the sum and must lodge the order, recording on the order the amount withdrawn, with the circuit clerk. The clerk must retain the order in the clerk's files for consideration in connection with further proceedings in the estate. The withdrawal is charged against the \$7,500 of property of the estate exempted from distribution. Under the pre-1968 exemption statute, a technical error occurred if the court granted the order for withdrawal of money from a bank or depository account of the decedent unless the order was applied for prior to the appointment of the administrator of the decedent's estate.<sup>298</sup> The current statutory language permits the surviving spouse to apply for such an order any time before the court sets apart the \$7,500 in property or money.<sup>299</sup>

The claimant must apply for the \$7,500 personalty exemption before the final settlement of the decedent's estate. However, an inadvertent failure to apply for the exemption in an interim settlement of the estate does not bar the claim. In *Rau v. Rowe*,<sup>300</sup> the widow was the administrator of the decedent's estate. Through the inadvertence of the widow and her attorney in the preparation of the pleadings for the settlement of her husband's estate, her claim for the personalty exemption was omitted. Property was distributed according to the proposed settlement, but litigation postponed the final settlement of the estate for many years. During the interim, the wife-administrator collected rents on real estate which belonged to the decedent's estate. Upon the final settlement of the estate, the widow claimed her personalty exemption in the rent proceeds. The court granted her claim as a matter of common justice and right.

#### *D. Allotment of the Personalty Exemption*

KRS section 391.030(1)(c) expressly provides that the \$7,500 exemption is taken out of the decedent's personal property. The

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<sup>297</sup> KRS § 391.030(2).

<sup>298</sup> See *Mullins v. Mullins*, 212 S.W.2d 272 (Ky. 1948).

<sup>299</sup> KRS § 391.030(2).

<sup>300</sup> 222 S.W. 1070, 1070 (Ky. 1920).

statute defines personal property as including money on hand or in a bank or other depository. The meaning of personal property is broader than money, however. Personal property includes tangible, movable property as well as intangible rights such as bank deposits, shares of stock and choses in action.<sup>301</sup> The surviving spouse, or the children if there is no surviving spouse, may select from the personal property of the estate to the extent that the value of the property selected does not exceed the statutory amount of \$7,500.<sup>302</sup>

Caselaw in Kentucky recognizes that the personalty exemption can be taken out of insurance money payable to the decedent's estate,<sup>303</sup> but it cannot come out of the proceeds of an insurance policy on the decedent's life payable directly to a third party.<sup>304</sup> Similarly, accumulated disability benefits due to the decedent at the time of death were a proper source for the payment of the personalty exemption in *Canada v. Canada's Administratrix*.<sup>305</sup>

In *Manns v. Manns*,<sup>306</sup> a debt owed to the decedent became the source for the surviving spouse's personalty exemption. Even if the surviving spouse will take the personalty exemption out of a debt owed to the decedent, the decedent's administrator, not the surviving spouse, is the proper party to maintain the action to collect the debt.<sup>307</sup> In *Thompson v. Thompson*,<sup>308</sup> a judgment the decedent had against another was the only significant asset of the decedent's estate that could fund the personalty exemption. The administrator attempted to collect the judgment on behalf of the decedent's estate. The judgment debtor tried to offset the decedent's debt which the judgment debtor had purchased against the amount owed to the decedent's estate. The *Thompson* court did not permit the setoff and avoided giving

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<sup>301</sup> R. BROWN, *THE LAW OF PERSONAL PROPERTY* 1x (3d ed. 1975).

<sup>302</sup> KRS § 391.030(3).

<sup>303</sup> *Frye's Adm'r v. Frye's Adm'r*, 80 S.W.2d 584, 588 (Ky. 1935); *First Nat'l Bank of Horse Cave v. Cann's Ex'r*, 57 S.W.2d 461, 463 (Ky. 1932).

<sup>304</sup> *Thacker v. Cook*, 32 S.W.2d 738, 741 (Ky. 1930).

<sup>305</sup> 32 S.W.2d 330 (Ky. 1930).

<sup>306</sup> 115 S.W. 715 (Ky. 1909).

<sup>307</sup> *Burge v. Burge's Adm'r*, 76 S.W. 873, 874 (Ky. 1903).

<sup>308</sup> 78 S.W. 418 (Ky. 1904).

the decedent's debt priority over the surviving spouse's statutory personalty exemption claim.

Personal property that the decedent dies holding title to as a trustee is not a proper fund from which to pay the trustee's surviving spouse the personalty exemption. The beneficiaries of the trust, not the trustee, own the trust property.<sup>309</sup> If the district court does set aside the surviving spouse's exemption out of personalty subsequently classified as trust fund property, the district court order does not bind those claiming to be beneficiaries of the trust in an action in circuit court.<sup>310</sup> Because the claimants are not parties in the district court proceeding to set aside the surviving spouse's exempt property, they cannot be bound by the proceeding.<sup>311</sup>

On the death of a partner, the decedent's right in specific partnership property vests in the surviving partners.<sup>312</sup> Therefore, the partnership property cannot be used as the fund for the payment of the personalty exemption to the deceased partner's surviving spouse. When the last surviving partner dies, the partnership property vests in that partner's legal representative. However, the surviving spouse of the last partner to die cannot receive partnership property to fund the personalty exemption because that property can only be used for partnership purposes.<sup>313</sup>

If the decedent dies partially testate leaving property to the surviving spouse under a will, the surviving spouse may still take the personalty exemption in any of the decedent's intestate personalty.<sup>314</sup> Absent fraud, the surviving spouse cannot assert the exemption in personalty the decedent gratuitously transferred during her or his lifetime.<sup>315</sup> In the allotment of the personalty exemption, the surviving spouse cannot be charged with the value of personalty that the decedent transferred to the survivor during

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<sup>309</sup> *Bolmer v. United States Fidelity & Guar. Co.*, 11 F Supp. 560, 564 (W.D. Ky. 1935); *VanDyke v. VanDyke*, 2 S.W.2d 1057, 1059 (Ky. 1928).

<sup>310</sup> *Lawson v. Buhl*, 273 S.W.2d 378 (Ky. 1954).

<sup>311</sup> *Id.*

<sup>312</sup> KRS § 362.270(2)(d) (1987).

<sup>313</sup> *Id.*

<sup>314</sup> *Weddington v. Adkins*, 54 S.W.2d 331, 332-33 (Ky. 1932).

<sup>315</sup> *Burge*, 76 S.W. at 874 (when decedent made valid *intervivos* transfer, the property was not part of the estate unless fraud averred).

the decedent's lifetime.<sup>316</sup> If the surviving spouse mistakenly agrees to allow the administrator to charge an intervivos transfer against the personalty exemption and the entire estate is distributed according to that agreement, the surviving spouse may recover the personalty exemption from the intestate takers.<sup>317</sup>

As KRS section 391.030(1)(c) expressly identifies the decedent's personal property as the source of the personalty exemption, the administrator cannot use the decedent's real estate to pay the exemption.<sup>318</sup> However, if the decedent's personalty was improperly consumed to pay the decedent's debts or funeral expenses, the surviving spouse may look to the real estate for reimbursement of the amount exempted under the statute.<sup>319</sup> Similarly, the administrator may use the decedent's real estate to pay the personalty exemption if the decedent's heirs improperly used the personalty instead of allotting it to the surviving spouse.<sup>320</sup>

In *Nesbit v Wood*,<sup>321</sup> the sheriff levied upon the decedent's tobacco (personal property) for nonpayment of taxes on the decedent's real property. To save the personalty, the widow paid the taxes. The tobacco was then allotted to the surviving spouse as her personalty exemption. The *Nesbit* court held that the proceeds of the sale of this mortgaged land should be used to reimburse the surviving spouse for the taxes she had to pay to save the decedent's personalty

#### *E. Waiver, Relinquishment, and Forfeiture of the Personalty Exemption*

Spouses may voluntarily waive their rights to claim the statutory personalty exemption by entering into an antenuptial<sup>322</sup> or postnuptial<sup>323</sup> contract waiving such rights. The contract must

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<sup>316</sup> Grayot's Adm'r's v. Vick, 13 Ky. L. Rptr. 175, 176 (1891).

<sup>317</sup> *Id.*

<sup>318</sup> Kilburn, 175 S.W.2d at 518.

<sup>319</sup> *Id.*, Fitzpatrick's Adm'r v. Fitzpatrick, 155 S.W.2d 463, 464 (Ky. 1941) (only reasonable reimbursement allowed). *Contra Oster's Ex'r*, 219 S.W. at 189 (when widow could not collect from decedent's real estate, executor became personally liable).

<sup>320</sup> Meyers' Adm'r v. Meyers, 50 S.W.2d 81, 83 (Ky. 1932).

<sup>321</sup> 56 S.W. 714 (Ky. 1900).

<sup>322</sup> Brown, 80 S.W. at 470.

<sup>323</sup> Johnson's Adm'r v. Johnson, 22 S.W.2d 124 (Ky. 1929).

satisfy the general requirements for antenuptial or postnuptial agreements.<sup>324</sup> For example, an oral antenuptial agreement waiving the personalty exemption is ineffective because antenuptial agreements must be in writing.<sup>325</sup> Similarly, the waiving spouse must receive consideration for the waiver, or the contract becomes unenforceable.<sup>326</sup> Spouses also may relinquish their statutory personalty exemption in a validly executed separation agreement.<sup>327</sup>

The antenuptial, postnuptial or separation agreement must demonstrate clearly the intention to waive or relinquish the personalty exemption, but particular words are not necessary. In *Johnson's Administrator v. Johnson*,<sup>328</sup> the wife entered into a postnuptial contract in which she specifically relinquished all her interest in her husband's real property, including dower and homestead, as well as any interest she might have in his personal estate. Despite the lack of explicit language releasing any claim to the personalty exemption, the court concluded that a valid postnuptial contractual relinquishment of the exemption had occurred. In *King v. King*,<sup>329</sup> a separation agreement provided that the wife and husband waived all rights to dower and homestead in each other's real estate and in their distributable share in each other's personalty "so that each shall have the same control of their property as though they were single and unmarried." <sup>330</sup> This provision also constituted a valid relinquishment of the surviving spouse's claim to the personalty exemption.

Similarly, a contract that the surviving spouse and heirs made after the decedent's death can operate as a complete satisfaction of all the claims, including any personalty exemption claim that the surviving spouse might make against the decedent's estate.<sup>331</sup> However, adequate consideration must support the settlement

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<sup>324</sup> See L. GRAHAM & J. KELLER, KENTUCKY DOMESTIC RELATIONS LAW (to be published 1988).

<sup>325</sup> *Mallory's Adm'r*, 17 S.W. at 737.

<sup>326</sup> See *Johnson's Adm'r*, 22 S.W.2d at 125.

<sup>327</sup> *King v. King*, 274 S.W.2d 656 (Ky. 1954).

<sup>328</sup> 22 S.W.2d 124 (Ky. 1929).

<sup>329</sup> 274 S.W.2d 656 (Ky. 1954).

<sup>330</sup> *Id.* at 657.

<sup>331</sup> *Teater v. Teater*, 299 S.W. 729, 730 (Ky. 1927).

agreement and it cannot contain false representations concerning the size of the decedent's estate.<sup>332</sup>

KRS section 392.090(2) bars the surviving spouse from claiming the personalty exemption if the survivor voluntarily left the decedent and lived in adultery without afterwards becoming reconciled with the decedent. An absolute divorce bars the surviving former spouse from asserting any claim, including a claim for the personalty exemption, in the decedent's estate.<sup>333</sup> A divorce from bed and board, however, does not bar the surviving spouse's claim for assignment of the personalty exemption.<sup>334</sup> The surviving spouse does not lose the right to claim a personalty exemption in the deceased spouse's estate merely because the spouses were not living together when the decedent died.<sup>335</sup> If the surviving spouse moves to another state after the decedent's death, she or he is not deprived of the personalty exemption.<sup>336</sup>

KRS section 381.280 provides that the survivor forfeit all interest in the decedent's property if the surviving spouse kills the decedent *and* is convicted of the the felony.<sup>337</sup> This statutory forfeiture provision for murder also bars a child who was convicted of feloniously killing its parent from claiming the personalty exemption when there is no surviving spouse.

KRS section 392.100 expressly provides for the immediate forfeiture of the bigamous spouse's dower rights in the first spouse's estate. This civil penalty for a bigamy conviction does not expressly authorize forfeiture of the bigamous spouse's right to claim the personalty exemption in the first spouse's estate. However, it is clear that neither party in a bigamous marriage may claim the personalty exemption in the other's estate whether

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<sup>332</sup> *Rudd v. Rudd*, 214 S.W. 791, 794 (Ky. 1919) (settlement agreement between surviving spouse and one of the decedent's heirs in which the survivor relinquished all claims in the decedent's estate became invalid because the heir had no authority to represent the other heirs, no consideration supported the agreement and it was based on false representations as to the value of the decedent's estate).

<sup>333</sup> KRS § 392.090(1) (1984).

<sup>334</sup> *Id.* at § 403.050.

<sup>335</sup> *International Harvester Co.*, 178 S.W.2d at 969 (surviving spouse residing in another state apart from the decedent at the time of decedent's death); *Meyers' Adm'r*, 50 S.W.2d at 82 (surviving spouse permanently residing apart from the decedent at the time of decedent's death).

<sup>336</sup> *O'Hara*, 206 S.W. at 462.

<sup>337</sup> KRS § 381.280 (emphasis added).

or not there was a bigamy conviction. In *Cox v Monday*,<sup>338</sup> the claimant was denied any marital rights in the decedent's estate, including a claim of the personalty exemption. The claimant had been married to another at the time of her marriage to the decedent. Therefore, the marriage was void and the claimant was not the decedent's surviving spouse.

*F Relationship of the Personalty Exemption to Dower/Curtesy and Other Rights of the Surviving Spouse*

If the decedent dies intestate as to some or all of her or his personal property, the surviving spouse may claim the personalty exemption.<sup>339</sup> The exemption is in addition to any other rights the survivor may have in the decedent's intestate estate. Therefore, the surviving spouse may receive both the exemption and dower.<sup>340</sup> No inconsistency exists between KRS section 391.030(1)(c), which grants a personalty exemption to the surviving spouse, and KRS section 392.020, which gives the surviving spouse one-half of the decedent's surplus personalty as part of the survivor's dower share in the decedent's estate.<sup>341</sup> The "surplus" personalty mentioned in KRS section 392.020 is the personalty remaining after the personalty exemption, funeral expenses and debts have been deducted from the gross personalty the decedent possessed at the time of death.

If the decedent left a gift to the surviving spouse in a will which does not dispose of all of the decedent's personalty, the survivor may claim the personalty exemption in the undisposed intestate personalty in addition to the will gift.<sup>342</sup> However, if the deceased spouse died totally testate as to her or his personal property, the surviving spouse is not entitled to the personalty exemption.<sup>343</sup> Since 1982, a surviving spouse who renounces the will and takes a renounced share pursuant to KRS section 392.080 may not claim the personalty exemption.<sup>344</sup>

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<sup>338</sup> 95 S.W.2d 785 (Ky. 1936).

<sup>339</sup> KRS § 391.030(1).

<sup>340</sup> *Blades*, 159 S.W.2d at 408.

<sup>341</sup> *Talbott's Ex'r v. Goetz*, 151 S.W.2d 369, 372 (Ky. 1941).

<sup>342</sup> *Weddington*, 54 S.W.2d at 332.

<sup>343</sup> *Shaw v. Grimes*, 218 S.W. 447, 450 (Ky. 1919).

<sup>344</sup> 1982 Ky. Acts 277, § 7.

A tax exemption similar to the personalty exemption is available to a surviving spouse, or if there is no surviving spouse, to the decedent's children who take pursuant to the terms of the decedent's will. KRS section 140.064 provides that when a person dies testate as to her or his personal estate, the surviving spouse, or surviving children if there is no spouse, may apply to the district court for an order exempting from inheritance or estate tax up to \$7,500 of testator's personal property. This exemption has no significance to a surviving spouse. Since 1985, the total inheritable interest of the surviving spouse has been exempted from the payment of any inheritance and estate tax.<sup>345</sup> However, the decedent's children are taxed on any inheritance they receive in excess of \$5,000.<sup>346</sup> Thus, if there is no surviving spouse, the \$7,500 personalty exemption that KRS section 140.064 confers on the decedent's children coupled with the \$5,000 exemption in KRS section 140.080(2)-(4) shelters \$12,500 of personalty from taxation.

#### *G. Children's Rights to the Personalty Exemption*

Before 1974, the decedent's surviving spouse and infant children shared the personalty exemption.<sup>347</sup> If the decedent's infant children lived with the surviving spouse, the exempt property was treated as vesting in the surviving spouse for the benefit of the surviving spouse and the decedent's infant children.<sup>348</sup> If the surviving spouse remarried and thereafter died without having disposed of the exempt property, the infant children, not the new spouse, took the remaining exempt property.<sup>349</sup> Similarly, when only the decedent's infant children took the exempt property because there was no surviving spouse, if one child died then that child's share passed to the other children. It did not pass to the deceased child's administrator.<sup>350</sup> The exempt property was divided between the surviving spouse and infant children

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<sup>345</sup> 1985 Ky. Acts 6, § 12 (excerpts from Special Session).

<sup>346</sup> KRS § 140.080(1)(c), (2)-(4) (Supp. 1986).

<sup>347</sup> 1974 Ky. Acts 299, § 2.

<sup>348</sup> *Price v. Nichols*, 12 Ky. L. Rptr. 421 (1890).

<sup>349</sup> *Id.* at 421-22.

<sup>350</sup> *Wilson*, 50 S.W. at 684.



only if the infant children did not live with the surviving spouse.<sup>351</sup>

Today, the problem of when and how to divide the personalty exemption between the decedent's surviving spouse and infant children has been eliminated because the decedent's children may share in the exemption only if there is no surviving spouse.<sup>352</sup> As the children no longer have any claim to the exemption if a spouse survives the decedent, the subsequent death of the surviving spouse does not give the children any claim to the exempt property that the survivor died owning.

In *Wilson v. Parson's Administrator*,<sup>353</sup> an infant's estate consisting solely of the infant's share of the proceeds of the personalty exemption and of rent from the homestead passed to the decedent's surviving infant child. It did not go to the administrator of the deceased child's estate. The *Wilson* court based its decision on the idea that the legislature wanted infant children to consume the exempt property for their support. The legislative purpose of the personalty exemption is no longer one of support of infant children because the exemption is now conferred upon both the decedent's adult and infant children.<sup>354</sup> Therefore, if one of the decedent's children later dies, the surviving children should have no claim to the deceased child's share of the personalty exemption.

The effect of the surviving spouse's waiver or relinquishment of the personalty exemption in an antenuptial or postnuptial contract on the children's right to claim the exemption remains unclear. If a waiving spouse is treated as if she or he had predeceased the decedent, the children could claim the exemption. In *Brown v Brown's Administrator*,<sup>355</sup> Kentucky's highest

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<sup>351</sup> *Allen v. Allen's Adm'r*, 91 S.W.2d 55, 56 (Ky. 1936) (division ordered because surviving spouse returned to live with parents, and the infant children by the decedent's first spouse went to live with their grandparents); *Wheeldon's Adm'r v. Barrett's Guardian*, 70 S.W.2d 11, 13 (Ky. 1934) (division ordered because both the infant child and surviving spouse married prior to settlement of the decedent's estate); *Landrum v. Landrum*, 218 S.W. 717, 718 (Ky. 1920) (division ordered because surviving spouse moved to boarding house and stored exempt property while the infant children lived elsewhere); *Eversole v. Eversole*, 185 S.W. 487, 489 (Ky. 1916) (division ordered because surviving spouse was in prison).

<sup>352</sup> KRS § 391.030(1)(c).

<sup>353</sup> 50 S.W. 684 (Ky. 1899).

<sup>354</sup> 1982 Ky. Acts 51, § 1.

<sup>355</sup> 80 S.W. 470 (Ky. 1904).

court held that an antenuptial contract waiving the personalty exemption was binding on the surviving spouse, but it did not interfere with, or defeat, the rights of the infant children to the exemption. However, that case does not dispose of the issue because the court decided the case under the exemption statute when it exempted the property for the "widow or infant children."<sup>356</sup> Under a literal interpretation of the contemporary statute, the children are not entitled to claim the exemption unless the decedent dies without a surviving spouse.

Even if the courts decide to follow the decision in the *Brown* case concerning the effect of an antenuptial or postnuptial contract on the children's right to the personalty exemption, the decedent's children should not be entitled to claim the exemption when the surviving spouse relinquishes any claim to the personalty exemption in a settlement agreement after the decedent's death. Conceptually, an antenuptial or postnuptial waiver prevents the exempt property from ever vesting in the surviving spouse. However, when the surviving spouse enters into a settlement agreement after the decedent's death, the spouse relinquishes a presently existing property interest in exchange for something else of value. This relinquishment is no different than if the surviving spouse were to choose to sell the exempt property after the decedent's death. In either case, the children would have no claim to the exemption.

The problem of the right of the decedent's children to claim the exemption also arises if the surviving spouse is barred from claiming the exemption because of misconduct such as adultery,<sup>357</sup> bigamy,<sup>358</sup> or murder.<sup>359</sup> If the surviving spouse is convicted of murdering the decedent, KRS section 381.280, the forfeiture statute, specifically provides that the property interest forfeited descends to the decedent's other heirs-at-law. Consequently, the children may claim the personalty exemption as if the spouse had not survived the decedent. The statutes imposing forfeiture penalties on adulterous or bigamous spouses do not direct expressly the distribution of the forfeited rights. Logically,

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<sup>356</sup> 1869 Ky. Acts 785, § 2.

<sup>357</sup> KRS § 392.090(2).

<sup>358</sup> *Id.* at § 392.100 (1984).

<sup>359</sup> *Id.* at § 381.280.

and for the sake of consistency, a surviving spouse who suffers a statutorily imposed forfeiture of inheritance rights because of misconduct should be treated as having predeceased the decedent. In such cases, the children could claim the personalty exemption in addition to their share as the decedent's primary intestate takers.

The children are entitled to the exemption if the decedent received an absolute divorce from her or his spouse prior to death. KRS section 392.090(1) mandates this result. It expressly states that an absolute divorce bars all claims of either wife or husband to the real and personal property of the other after her or his death. As an absolute divorce completely severs the marital relationship, a divorced decedent has no surviving spouse.

#### *H. Family Allowance*

No statutory provisions exist in Kentucky for granting a family, or living allowance to the decedent's surviving spouse or minor children during the period of estate administration.<sup>360</sup> However, as other states do provide such living allowances, the Kentucky courts have had to determine how to administer the estate of a Kentucky domiciliary whose spouse may claim a family allowance under the laws of another state.

In *Mann v Peoples-Liberty Bank & Trust Co.*,<sup>361</sup> the surviving spouse of a Kentucky domiciliary was entitled to a living allowance under an Ohio statute. Ohio law authorized its probate court to grant a living allowance to a nonresident surviving spouse chargeable against real property located in Ohio. In distributing the decedent's real property located in Kentucky and all of the decedent's personalty, the Kentucky court did not offset the amount the surviving spouse received as a living allowance under Ohio law against the amounts the spouse was entitled to under Kentucky law

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<sup>360</sup> See, e.g., UPC § 2-403 (1982). In addition to a homestead allowance and personalty exemption, the UPC provides for the payment from the estate of a reasonable monetary allowance for the benefit of the surviving spouse and certain minor and dependent children.

<sup>361</sup> 256 S.W.2d 489 (Ky. 1953).

In *Short v Galway*,<sup>362</sup> the decedent was an Ohio domiciliary with land in Kentucky. The surviving spouse obtained a lien against the decedent's land in Kentucky from an Ohio court. The lien was to secure payment of a family allowance to the surviving spouse equal to one year's support. The Kentucky courts refused to treat the lien as an enforceable encumbrance against the decedent's land in Kentucky. The encumbrance was not created by contract, but by a statute which evidenced Ohio's, not Kentucky's, public policy of securing a living allowance to a decedent's surviving spouse. Kentucky does not subject a decedent's real property to any encumbrance in favor of the surviving spouse except the homestead allowance.<sup>363</sup> If the Kentucky courts had enforced the Ohio lien against the decedent's real property located in Kentucky, Ohio law, not Kentucky law, would control the descent of real property. This result would offend the universally recognized choice of law principle that the law of the situs of "immovables" determines every question concerning those assets of the decedent.<sup>364</sup>

### III. A PROPOSAL FOR REFORM

The preceding discussions demonstrate that both the homestead and personalty exemptions currently available in Kentucky are inadequate to protect the decedent's family from the economic hardships caused by the death of a spouse or parent. The exemptions do not adequately address the immediate needs of the decedent's family during the period of estate administration. Nor do the current exemptions assure that the decedent's family will enter the post-probate period with sufficient assets to start a new life without the decedent's economic contribution.

The following statutes are proposed as a solution to the problems currently associated with Kentucky's family protection devices. The interim family allowance statute is modeled on the family allowance provisions in the Uniform Probate Code<sup>365</sup> but

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<sup>362</sup> 83 Ky. 501 (1886).

<sup>363</sup> See KRS § 427.060-.100 (1970 & Supp. 1986).

<sup>364</sup> See *Gaskins v. Gaskins*, 223 S.W.2d 374, 375 (Ky. 1949) (intestate realty located in Kentucky is not subject to a surviving spouse's lien acquired in the state of the decedent's domicile).

<sup>365</sup> UPC § 2-403.

with significant modifications to insure that the family's immediate support needs are adequately addressed. A single post-probate allowance combining features of the Uniform Probate Code's homestead allowance<sup>366</sup> and personalty exemption<sup>367</sup> is proposed to replace Kentucky's current homestead and personalty exemptions.

1. *Interim Family Allowance*

1. *The surviving spouse, minor children and dependent children of a decedent who was domiciled in Kentucky are entitled to a reasonable allowance in money out of the estate of the decedent for their maintenance during the period of administration. The allowance may not be paid for longer than one year if the estate is inadequate to discharge all allowed claims.*

2. *The allowance is exempt from and has priority over all claims, including the post-probate allowance and the expenses of administration, against the estate except the claims of secured creditors in their collateral.*

3. *The interim family allowance is not chargeable against any share passing to the surviving spouse or minor or dependent child by the will of the decedent, by right of dower under KRS. § 392.020, by renunciation under KRS § 392.080, or by intestate succession.*

4. *The personal representative may determine, without prior court approval, a family allowance in a lump sum not exceeding the annual minimum federal poverty guideline for the same size family [including minor or dependent children not living with the surviving spouse], or periodic monthly installments not exceeding one-twelfth of that amount. Prior court approval is required for the payment of any family allowance in excess of this amount or for any term of payment in excess of one year*

5. *The allowance may be paid to the surviving spouse for the use of the surviving spouse and minor and dependent children living with the surviving spouse. Part of the allowance may be paid to any minor or dependent children not living with the surviving spouse, to the guardian of such children, or to the person having the care and custody of such children as the children's needs may appear. If there is no surviving spouse,*

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<sup>366</sup> *Id.* at § 2-401.

<sup>367</sup> *Id.* at § 2-402.

*the allowance is payable to the minor and dependent children or to the persons having their care and custody*

6. *The personal representative or the court must take into account the following factors in determining the amount of the interim family allowance:*

a. *the claimant's previous standard of living;*

b. *the amount and nature of other resources available to meet the claimant's current living expenses including, but not limited to, income of the claimant; insurance proceeds payable immediately to the claimant; assets transferred in-  
ter vivos by decedent to the claimant or to the use of the claimant; and the claimant's capital assets.*

7 *The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the district court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.*

8. *The death of any person entitled to the family allowance terminates that person's right to allowances not yet paid.*

The purpose of the interim family allowance is to provide for the immediate needs of the decedent's family which cannot otherwise be met during the period of estate administration. Need is a relative concept which must be determined in light of the particular claimant's circumstances. Therefore, the allowance is expressed in terms of a "reasonable" allowance rather than a fixed, dollar amount.

In addition to the surviving spouse, the decedent's minor and dependent children also may share in the interim family allowance. The inclusion of "dependent" children extends the protection of the interim family allowance to adult children who actually suffer immediate adverse economic consequences because of their actual dependence upon the decedent; nondependent adult children's claims are eliminated. All of the decedent's minor children are included within the class of claimants without regard to actual dependency to provide a needed continuation of the parental obligation of support and education for all of the decedent's minor children.

The money payable to the claimants pursuant to the interim family allowance has priority over all claims against the decedent's estate except secured creditors who have a lien or mortgage against some of the decedent's real or personal property

However, if the secured creditor's collateral is not sufficient to satisfy the indebtedness, the interim family allowance has priority over any deficiency claim of the secured creditor against the decedent's estate. The claims of unsecured creditors, will beneficiaries, and intestate takers are also junior to the interim family allowance. The statute specifically makes the interim allowance superior to the expenses of administration because traditionally administration costs are given priority over all other claims against the decedent's estate.<sup>368</sup> There is no justification for treating unsecured claims arising out of the period of estate administration any differently than unsecured claims which arose before the debtor's death. In either case, creditors' valid claims are made secondary to the decedent's family's more compelling claim for assistance during the estate administration period.

The term "claims" as used in the statute is intended to include all liabilities whether they arose in tort, contract, or otherwise before or after the decedent's death. Estate or inheritance taxes, however, are not included within the term. The priority granted to the interim family allowance may adversely affect the ability of unsecured creditors to obtain satisfaction of their debts from the decedent's estate. Therefore, if the estate is inadequate to discharge all the allowed claims, a maximum allowance period of one year is imposed.

As the purpose of the interim family allowance is to guarantee that the claimant's day-to-day needs are met immediately after the decedent's death, the personal representative, without a court order, has the power to award funds to the claimants. However, a monetary cap is placed upon the personal representative's discretionary award. The maximum permissible amount of a non-court approved interim family allowance award equals a lump-sum award which does not exceed the annual minimum federal poverty guideline for the same size family<sup>369</sup> or periodic

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<sup>368</sup> *Talbott's Ex'r v. Goetz*, 151 S.W.2d 369, 372 (Ky. 1941); *Towery v. McGraw*, 56 S.W. 727, 728 (Ky. 1900), *overruled*, *Palmer v. Turner*, 43 S.W.2d 1017, 1020 (Ky. 1931).

<sup>369</sup> The Social Security Administration originated the poverty index in 1964. The poverty thresholds are updated every year and reflect changes in the Consumer Price Index. The poverty thresholds reflect the different needs of families based on differences in family size and composition. For example, in 1985 the poverty threshold for a family of three persons was \$8,573, whereas the threshold for a family of four persons was

monthly installments not exceeding one-twelfth of that amount. If the personal representative chooses to pay the amount in monthly installments, the maximum permissible duration of such payments without court approval is one year even if the estate is large enough to meet all the allowed claims. In computing the minimum federal poverty guideline amount, all of the claimants, regardless of whether they live together, are counted to determine the size of the family.

The use of a fixed cap on the amount that the personal representative can pay as an interim family allowance is rejected.<sup>370</sup> A fixed cap expressed as an absolute dollar amount guarantees that the allowance will eventually become obsolete. Expressing the cap in relationship to the federally established poverty guidelines permits the cap to change without any further legislative action if the cost of living changes. The federally established poverty guideline was adopted as the measure of this flexible cap because it provides the same floor as that thought necessary for the subsistence of any family in the United States.

The allowance is in addition to any share passing to the claimants by right of intestate succession, by virtue of the surviving spouse's dower rights under KRS section 392.020, or by way of the surviving spouse's renounced share under KRS section 392.080. The only way the allowance can fulfill its purpose of addressing the immediate needs of the decedent's family during the period of estate administration is if it is awarded without reference to the amount the claimants will receive in the administration of the decedent's estate. Regardless of whether the claimant will receive a significant or insignificant inheritance as a surviving spouse, will beneficiary, or intestate taker of the decedent, the immediate needs of day-to-day living must still be met.

The Uniform Probate Code provision for a family allowance permits the testator to make a will gift to a potential claimant in lieu of any or all the family allowance the will beneficiary would receive under the family allowance provision.<sup>371</sup> However,

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\$10,989. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1987 415-16 (107th ed. 1987).

<sup>370</sup> The Uniform Probate Code establishes a fixed cap of \$6,000. UPC § 2-404.

<sup>371</sup> *Id.* at § 2-403.



the decedent cannot use a will gift in lieu of the family allowance to limit the beneficiary to an amount below the statutory minimum to which she or he would be entitled under the family allowance provision of the Code.

The Code's drafters use the family allowance to address not only the needs of the decedent's family immediately after the decedent's death, but also to preclude total, intentional disinheritance of the claimants. Family protection devices should serve only one function—cushioning the adverse economic consequences of the decedent's death on those who were financially dependent on the decedent. If the legislature wants to protect a testator's children from intentional disinheritance by will, that problem should be addressed directly by a statute drafted to guarantee a minimum forced share for the decedent's children. It should not be dealt with under the guise of a family allowance.

The interim family allowance statute proposed in this Article has only one purpose to fulfill—guaranteeing a minimum level of economic well-being pending the administration of the decedent's estate. That goal is accomplished by guaranteeing that if the claimants need an interim family allowance award to see them through the probate period, it is available to them on the basis of this need regardless of whether, or how, they might take from the decedent's estate after the administration period.

If the decedent dies with a surviving spouse and children eligible to claim the family allowance and those children live with the surviving spouse, the interim family allowance is payable to the surviving spouse for the use of all the claimants. In such a case, the surviving spouse knows best the needs of the family members involved. However, as the decedent's family may not be organized in the traditional family constellation of a surviving spouse who is the parent and custodian of all the decedent's minor and dependent children, the personal administrator may divide the allowance among the claimants. If a minor or dependent child does not live with the surviving spouse, the personal representative or the court may apportion the allowance between the surviving spouse and those children according to the claimants' respective needs. If there is no surviving spouse, but children exist who qualify for the interim family allowance, those children, or the persons having the care and custody of the children, may receive the allowance directly

The actual amount awarded under the interim family allowance statute must be determined in light of the facts and circumstances of the particular claimants. The allowance should cushion the immediate economic consequences of the decedent's death only if the claimants actually cannot meet their day-to-day living expenses. Consequently, claimants are not entitled to an interim family allowance if the decedent's death does not actually have an adverse effect on their ability to meet their day-to-day living expenses.

In determining whether the claimants are entitled to an allowance and, if so how much, the personal representative and the court must take into account the standard of living the claimants enjoyed prior to the decedent's death. This determination assures that the claimants do not experience extreme necessity before they qualify to receive a family allowance. They are eligible for an allowance during the period of estate administration if the decedent's death causes them to suffer a decline in their accustomed standard of living. The claimants' accustomed standard of living includes their need for food, shelter, clothing, and health care as well as the payment of regularly recurring expenses such as utility payments and debt service payments that arise during the administration period.

The personal representative and the court must take into account the claimants' ability to continue to enjoy their previous standard of living through the decedent's nonprobate assets and the claimants' own personal assets available to the family during the administration period. Thus, provisions made by the decedent to meet the immediate support needs of the family through life insurance payable to the claimants either in a lump sum or periodically during the period of estate administration may decrease, if not eliminate, any award of an interim family allowance. Similarly, the decedent may have anticipated that the disruption caused by her or his death might hamper the claimants' ability to continue to enjoy their previous standard of living and may have provided for them by way of *intervivos* transfers such as a trust. Such currently available assets must be taken into account in determining the appropriateness and size of a family allowance payment. If the claimants have sufficient available assets, such as income from their employment or sufficiently liquid capital, to maintain their day-to-day living stan-

dard, then they would not receive an interim family allowance.

The interim family allowance is not a claim of a right in the surviving spouse and children. The allowance is limited to claimants who actually need it because any amounts paid to the claimants may adversely affect valid claims of the decedent's general creditors. The state's interest in providing protection to needy claimants justifies overriding the legitimate claims of the decedent's creditors. No such justification exists, however, for defeating creditors' claims when the family actually does not need support. For that reason, the right to receive payments pursuant to the interim family allowance statute terminates upon the death of a claimant.

Any person aggrieved by any determination the personal representative makes concerning the award of an interim family allowance may petition the district court for relief from that determination. Thus, if the claimants are denied an allowance or awarded an allowance they believe is insufficient under the facts, they may petition the court to set a higher amount. Conversely, the decedent's creditors who will be adversely affected by an award of a family allowance may petition the court or intervene in the claimants' petition to object to the amount as "unreasonable" under the circumstances.

## 2. Post-Probate Allowance

1. *A surviving spouse of a decedent who was domiciled in Kentucky is entitled to a post-probate allowance of \$12,500. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a post-probate allowance amounting to \$12,500 divided by the number of minor and dependent children of the decedent. The post-probate allowance is exempt from and has priority over all claims against the estate except the interim family allowance and the claims of secured creditors in their collateral.*

2. *If the estate is otherwise sufficient, property specifically devised is not used to satisfy a right to a post-probate allowance. Subject to this restriction, the surviving spouse or the guardians of minor and dependent children may select property of the estate as the post-probate allowance. The personal representative may make these selections if the surviving spouse, or the guardians of the children are unable or fail to do so within a reasonable time or if there is no guardian of the minor children.*

*3. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as the post-administration allowance.*

The post-probate allowance would replace the homestead exemption and the personalty exemption with a single dollar allowance in fee for the surviving spouse or for the decedent's minor and dependent children if there is no surviving spouse. Currently, Kentucky's personalty exemption is expressed in terms of a single dollar amount.<sup>372</sup> The source of funding for the current exemption is limited to personal property the decedent died owning.<sup>373</sup> Thus, if the decedent died owning insufficient personal property to satisfy the personalty exemption, the claimant could not look to the decedent's real property to make up the deficiency. The proposed statute does not limit the funding for the post-probate allowance to any particular part of the decedent's estate.

Under Kentucky's current statutes, the homestead exemption is too small and too restrictive to accomplish its purpose of providing a home for the claimants after the decedent's death. Today, when the national average price for an existing single family home is in excess of \$85,000,<sup>374</sup> the lifetime use of \$5,000 can neither shelter the decedent's residence from claims of creditors nor secure another home for the claimants.

Because Kentucky's probate homestead exemption derives from the decedent's *intervivos* homestead exemption,<sup>375</sup> it is only available if the decedent's interest in the property she or he was occupying at death as a residence was an inheritable interest. Thus, if the decedent had only a life estate interest in the property occupied as a residence prior to death, the decedent's surviving spouse and infant children could not claim a probate homestead exemption. This result is anomolous because the surviving spouse and children of a life tenant have the same need

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<sup>372</sup> KRS § 391.030 (1984).

<sup>373</sup> *Id.* at § 391.030(1)(c).

<sup>374</sup> Information obtained from Kentucky Real Estate Education and Resource Center, 102 A Mathews Building, University of Kentucky, Lexington, Kentucky 40506-0471.

<sup>375</sup> *Runyon v. Runyon's Adm'x*, 95 S.W.2d 802, 803 (Ky. 1936); *Lear v. Lear*, 28 S.W.2d 32, 33 (Ky. 1930); *Little's Guardian v. Woodward*, 77 Ky. 585, 587 (1879).

for shelter after the life tenant's death as do the survivors of a fee owner.

The current homestead exemption is rarely used because it is an alternative to, and not in addition to, other rights the surviving spouse has in the estate of the decedent such as dower.<sup>376</sup> The dower share of the decedent's real property is a one-half fee interest in all the surplus real estate the decedent died owning and a life estate in one-third of the real property the decedent owned during coverture, but not at the time of death.<sup>377</sup> Thus, the dower share is almost always more generous to the surviving spouse than the probate homestead exemption.

Replacing the homestead and personalty exemptions with a single post-probate allowance recognizes that today a legislature will not grant a large enough homestead exemption to guarantee shelter for the claimants. Therefore, a post-probate allowance is proposed to provide the claimants with an amount of money in fee that the claimant may use in any manner to help start anew. Individual situations are so varied that it makes no sense to assume that all claimants have the same economic needs as they enter the post-administration period. The fixed-dollar, post-probate allowance provides needed flexibility while assuring that the claimant has at least a minimum amount at her or his disposal regardless of what the claimant received by way of inheritance from the decedent's estate.

The fixed-dollar amount of the post-probate allowance acts to establish a point below which the procedures for administration of a small estate are triggered. KRS section 395.455 provides that the court may dispense with the administration of the estate if the exemption and preferred claims exceed the amount of probatable assets. Thus, if the decedent died owning only \$12,500 worth of assets, no administration of the estate would be required and the court could order the estate transferred to the

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<sup>376</sup> The following cases indicate that the widow must elect. *Berger v. Berger*, 94 S.W.2d 618, 620 (Ky. 1936); *Thompson v. Thompson's Adm'r*, 105 S.W. 1185, 1188 (Ky. 1907); *Redmond's Adm'r v. Redmond*, 66 S.W. 745, 747 (Ky. 1902); *Freeman v. Mills*, 59 S.W. 3, 5 (Ky. 1900); *Funk v. Walters*, 12 Ky. Op. 618 (1877); *Donaldson v. Donaldson's Adm'r*, 9 Ky. Op. 618 (1877). The following cases indicate that the widower must elect. *Sams v. Sampson*, 255 S.W.2d 626, 629 (Ky. 1953); *Carpenter v. Hazelrigg*, 45 S.W. 666, 667 (Ky. 1898).

<sup>377</sup> KRS § 392.020 (1984).

surviving spouse or to the decedent's minor and dependent children if there is no surviving spouse.

The surviving spouse is the sole beneficiary of the post-probate allowance while the decedent's children only have a claim to it if there is no surviving spouse and the children are minors or dependent. This solution avoids all of the problems associated with forcing the surviving spouse to share an allowance with the children. Kentucky's current personalty exemption is similarly available to the decedent's children only if there is no surviving spouse.<sup>378</sup> The allowance claimants are patterned after the permissible claimants under Kentucky's current personalty exemption statute, but with two changes. Under the proposed statute, children who are actually dependent on the decedent, regardless of age, share with minor children who are legally dependents of the decedent if no surviving spouse exists, and non-dependent adult children may not share in the allowance.

The priority of the post-probate allowance is the same as that granted to the interim family allowance. As between the two allowances, however, the interim family allowance has priority over the post-probate allowance. In determining the priorities between these two allowances, guaranteeing the claimants an ability to meet their immediate needs upon the death of the decedent is more important than providing a small nest egg to permit the claimant to start anew after the administration of the decedent's estate.

Although the post-probate allowance is expressed in terms of a fixed dollar amount, the proposed statute provides for the claimant to take the allowance in kind out of the decedent's estate. Therefore, if the claimants neither need nor want \$12,500 in cash, they may choose to take items of personal property and real property in the same dollar amount as the cash allowance. The right to in-kind payment of this allowance is limited, however, because such an election could disrupt the distributive scheme of a testator who made specific bequests to beneficiaries under a will. When the decedent's estate has other assets sufficient to satisfy the right to a post-probate allowance, the claim-

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<sup>378</sup> KRS § 391.030.

ant may not select specifically devised property to satisfy the allowance. Because the claimant may take the allowance in the form of distribution in kind, the statute grants the personal representative the power to execute any instrument necessary to establish the claimant's ownership of the property by assigning, transferring, or releasing the asset to the claimant.

The post-probate allowance avoids the pitfalls associated with the homestead exemption currently available under Kentucky law by substituting an allowance in fee in place of a life estate in property not exceeding \$5,000 in value used as the decedent's residence. The proposed statute retains the form of the personalty exemption currently available in Kentucky but removes the limitations the current law imposes on the exemption.

The post-probate allowance is expressed as a single \$12,500 allowance because nothing is gained from the continued treatment of a homestead allowance and a personalty exemption payable in cash as separate claims against the decedent's estate. Once a homestead allowance is substituted for the traditional homestead exemption, it has the same purpose and effect as the personalty exemption. Both provide the claimant a small nest egg with which to begin rebuilding once the decedent's estate has been settled. The only question is what amount ought to be sheltered under the post-probate allowance. The figure of \$12,500 is proposed because if Kentucky's current homestead exemption were a fee interest in \$5,000, and if it were combined with the currently existing personalty exemption of \$7,500, the total amount exempted would be \$12,500. A higher figure certainly could be justified, today, but \$12,500 has been determined by the legislature to be an appropriate amount.

### CONCLUSION

Kentucky's statutorily created family protection devices, the homestead and personalty exemptions, do not protect the decedent's family from the economic hardships caused by the death of a spouse or parent. For example, the homestead exemption, a life use of \$5,000 awarded in lieu of the surviving spouse's dower claim, is too small in its amount and too restricted in its availability to provide shelter for the decedent's family Ken-

tucky's current personalty exemption functions more effectively than the homestead exemption in cushioning the economic impact of the decedent's death, but it too is burdened by restrictions that limit its usefulness as a family protection device. For example, if the decedent's estate does not contain sufficient personalty assets to pay the entire exemption, the decedent's real property is not available to fund the deficiency. Currently, no statutory provisions exist in Kentucky for granting a family or living allowance during the period of estate administration to the surviving spouse or to minor children of the decedent.

The interim family allowance proposed in this Article would provide assistance, if needed, to a decedent's family while the decedent's estate is being administered. The allowance is a flexible mechanism for addressing the immediate needs of the decedent's family that cannot be otherwise met. It is carefully tailored to fulfill just this protective function. The interim allowance is awarded without reference to any amount the claimants might receive from the decedent's estate because the ability of the claimants to meet their immediate day-to-day living expenses is not contingent upon the share the claimant will receive when the administration of the decedent's estate is finally completed. However, to insure that the allowance benefits only those claimants who have actually suffered immediate adverse effects on their ability to meet their day-to-day living expenses, the allowance is not a claim of right to a fixed amount in the surviving spouse or the decedent's children. The actual amount of the allowance is determined by reference to both the claimant's previous standard of living and assets actually available for the claimant's use during the period of estate administration. If there are no unmet needs, no allowance is awardable.

Kentucky's homestead and personalty exemptions are combined into a single \$12,500 post-probate allowance in this proposal for reform. A post-probate allowance avoids the possibility that exists with the current personalty exemption that the decedent's gross estate might be large enough to fund the exemption, but the exemption is not available to the claimant because the decedent's assets are in the form of real, not personal, property. The proposed allowance is payable from either the decedent's personal or real property. Unlike the current homestead exemption which is only available to those surviving spouses who



renounce their dower share, the post-probate allowance is in addition to any share to which the surviving spouse might otherwise be entitled.

Adoption of the reforms proposed in this Article will result in a real protection of the decedent's family during the period of estate administration. The reforms also will insure that every claimant who has suffered the loss of a spouse or parent will enter the post-probate period with a small amount of money with which to meet the claimant's particular needs. The state's legitimate concern in cushioning the economic impact of death on the survivors is more fairly and adequately addressed under these proposals than they are under Kentucky's current family protection devices.