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Domestic Relations

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INTRODUCTION

During the survey period, the Kentucky appellate courts faced a series of cases that involved not only the usual problems relating to property division, post divorce support obligations and child custody, but which also implicated a number of federal statutory attempts[1] to regulate areas long considered solely the province of state regulation.[2] The presence of new federal legislation in these areas represents Congressional attempts to solve some major difficulties in the domestic relations area. Few persons would argue, for example, that the battle for jurisdiction in child custody cases was either helpful or appropriate in resolving custody disputes in a manner best serving the interest of the child.[3] Without suggesting that such legislation is necessarily inappropriate, it is important to point out that the entry of federal legislation into this area provides new and substantial pitfalls for the practicing attorney and his or her client. For that reason, the cases faced by the courts this survey period are especially important.

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[1] Federal legislation now actively regulates the divisibility of private pension funds upon divorce. Under the Retirement Equity Act of 1984 Congress has set new standards for divorce treatment of pensions covered by the Employee Retirement Security Act of 1954. *See* 29 U.S.C. § 1056(d) (1982), *amended by* 29 U.S.C.A. § 1056(d)(3) (West Supp. 1984). Federal legislation also regulates certain areas of child support enforcement. *See* 42 U.S.C. §§ 651-665 (1982), *amended by* Child Support Enforcement Amendments of 1984, P.L. No. 98-378, 98 Stat. 1305 and 42 U.S.C.A. §§ 666-667. Finally, the Parental Kidnapping Prevention Act of 1980 affects jurisdiction in child custody cases. *See* 28 U.S.C. § 1738A (1982).

[2] The Supreme Court regularly resurrects the statement from *In re* Burris, 136 U.S. 586, 593-94 (1890), that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States," even when the Court is about to override the law of the state on the basis of preemptive federal legislation. *See, e.g.,* McCarty v. McCarty, 453 U.S. 210, 220 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

[3] *See* text accompanying notes 150-52 *infra*.

I. PROPERTY DIVISION

Kentucky courts have dealt with the divisibility upon divorce of pension benefits in several past cases. Under rules developed in these cases, vested pension benefits may be divided if they accrued during the marriage[4] and are not subject to federal legislation which prevents their treatment as divisible marital property.[5] Nonvested pension benefits are not subject to treatment as divisible marital property; however, they may be considered for purposes of awarding maintenance or child support.[6] During this survey period the Kentucky Court of Appeals addressed the problems of private pension plans which are regulated by the Employee Retirement Income Security Act (ERISA).[7]

James and Lynne Owens were divorced in 1983 after twenty-three years of marriage.[8] James, an attorney, was a member of a law firm that maintained two employee benefit plans subject to ERISA.[9] The trial court awarded Lynne a one-half interest in James' interest in the employee benefit plans.[10] James appealed, raising both state and federal issues with regard to his pension benefits. James first argued that the pension benefits were nonvested and therefore not subject to division under state law.[11] Second, he argued that the anti-attachment clause of ERISA restricted the Kentucky court's ability to treat his pension plan as divisible marital property.[12] The appellate court held that ERISA was not a bar to state court division of qualified retirement plans.[13] It also held that James' plan was vested rather than nonvested since he had a current right to plan proceeds.[14]

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[4] *See* Foster v. Foster, 589 S.W.2d 223, 224 (Ky. Ct. App. 1979).

[5] *See* Russell v. Russell, 605 S.W.2d 33, 35 (Ky. Ct. App. 1980), *cert. denied*, 453 U.S. 922 (1981); Frost v. Frost, 581 S.W.2d 582, 583 (Ky. Ct. App. 1979). The *Russell* result has now been affected by Congressional action. *See* Uniform Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1982). For a discussion of the changes see Graham, *Domestic Relations Survey*, 71 KY. L.J. 445, 466-69 (1982-83).

[6] Ratcliff v. Ratcliff, 586 S.W.2d 292, 293 (Ky. Ct. App. 1979).

[7] 29 U.S.C. §§ 1001-1381 (1976).

[8] Owens v. Owens, 672 S.W.2d 67 (Ky. Ct. App. 1984).

[9] *Id.* at 69.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See id.*

[14] *See id.*

In ruling that ERISA posed no bar to the divisibility of retirement benefits, the Kentucky court followed a Seventh Circuit Court of Appeals decision, *Savings and Profit Sharing Fund of Sears Employees v. Gago*.[15] The *Gago* court held that state property division statutes were not preempted by ERISA's general preemption section[16] and that the anti-attachment requirement of ERISA was not a bar to property division by a state court.[17] Although other circuits have reached conclusions similar to that reached by the Seventh Circuit,[18] the view that ERISA did not bar attachment has not been unanimous.[19] Moreover, this lack of unanimity might have signaled serious problems for spouses claiming interests in private retirement funds because of

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[15] 717 F.2d 1038, 1043 (7th Cir. 1983).

[16] *See id.* at 1040. Section 514(a) of ERISA states that it "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" described in other sections of the act. 29 U.S.C. § 1144(a). The Supreme Court has ruled that a New York statute prohibiting discrimination in employee benefits on the basis of pregnancy was superceded by ERISA rules that did not prohibit such discrimination. *See* Shaw v. Delta Airlines, 103 S. Ct. 2890 (1983). The *Shaw* decision implied that its broad reading of the words "relate to" in the statute might not encompass state marital property laws. *See* 103 S. Ct. at 2901-02 & n.21.

[17] *See* 717 F.2d at 1041-43. The anti-attachment clause in ERISA bars the assignment or alienation of benefits provided by a covered plan. *See* 29 U.S.C. § 1056(d)(1). The *Gago* court declined to read the clause as being in direct conflict with state marital property law. *See* 717 F.2d at 1041. The court also noted that Congressional intent to protect the pension holder was not intended to protect that holder from familial support obligations. *See id. See generally* Graham, *State Marital Property Laws and Federally Created Benefits: A Conflict of Laws Analysis*, 29 WAYNE L. REV. 1, 29-42 (1982).

[18] *See* Carpenters Pension Trust v. Kronschnabel, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981) (ERISA does not preempt state-court orders requiring pension plan to pay community property share of participant's monthly benefits to his former spouse); Operating Eng'rs' Local #428 Pension Trust Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981) (ERISA does not preclude garnishment of participant's pension benefits to satisfy court-ordered maintenance); AT&T v. Merry, 592 F.2d 118 (2d Cir. 1979) (garnishment of accrued pension benefits to satisfy state-court ordered family support obligations impliedly excepted from ERISA provision preempting state law); Cody v. Riecker, 594 F.2d 314 (2d Cir. 1979) (garnishment of pension benefits to satisfy state-court ordered judgment for arrearages in support obligations not preempted by ERISA). *See also* Weir v. Weir, 413 A.2d 638 (N.J. Super. Ct. Ch. Div. 1980) (husband's unmatured right to noncontributory pension fund subject to equitable distribution in matrimonial action); Kikkert v. Kikkert, 427 A.2d 76 (N.J. Super. Ct. App. Div. 1981), *aff'd*, 438 A.2d 317 (N.J. 1981) (husband's vested pension plan providing for future benefits to husband if he survived equitably distributable in divorce action).

[19] *See* Francis v. United Tech. Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978); Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Tex. 1976).

the Supreme Court's decisions in *Hisquierdo v. Hisquierdo*[20] and *McCarty v. McCarty*.[21] In each of these cases the Court had read federal legislation to protect the rights of the employee spouse, treating anti-attachment clauses and other legislation creating pension benefits as bars to state court division of those assets upon divorce.[22]

Issues with regard to divisibility of private pension plans have now been solved dispositively by amendments to ERISA. Those amendments are collectively known as the Retirement Equity Act of 1984.[23] Under the Retirement Equity Act, state courts are permitted to divide a spouse's interest in an employee benefit plan regulated by ERISA if that division is made by a "qualified domestic relations order."[24] To be a qualified order, a court's judgment, decree or order must meet several threshold requirements. First, the order must give an interest in the "participant" spouse's benefits to the nonemployee spouse, who is generally designated as an "alternate payee" by the Act.[25] Second, the order must provide the names of the participant and alternate payee and their addresses.[26] Third, the order must clearly specify the amount or percentage of the participant's benefits to be paid to the alternate payee and the number of

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[20] 439 U.S. 572, 590 (1978) (railroad retirement benefits).

[21] 453 U.S. 210, 235-36 (1981) (military retirement benefits).

[22] The *Hisquierdo* Court found that division of the benefits did "major damage" to a "clear and substantial" federal interest. *See* 439 U.S. at 581 (1978). *Hisquierdo* was particularly important because it concerned a retirement benefit system that had aspects of a private pension plan. *See id.* at 574-75. Further, the regulating legislation contained an anti-attachment clause similar to that of ERISA. *See* 45 U.S.C. § 231m. The *McCarty* opinion imperiled state court division because of its expansive interpretation of federal interests. *See* Graham, *supra* note 17, at 37-41.

[23] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[24] Retirement Equity Act of 1984, Pub. L. No. 98-397, § 104, 98 Stat. 1433 (amending 29 U.S.C. § 1056(d)).

[25] *Id.* The legislative interpretation of the bill states that the order may create or recognize the alternate payee's right or assign the participant's rights to the alternate payee. 1984 U.S. CODE CONG. & AD. NEWS 2566. This language was probably chosen to cover the rights of spouses in community property states as well as the rights of spouses whose interests arise in states using the deferred community concept. The difference was never material except for tax purposes. Since Congress has changed the tax rules, even that importance may no longer exist. *See generally id.* at 2569 (discussion of tax treatments under Retirement Equity act of 1984).

[26] Retirement Equity Act of 1984, Pub L. No. 98-397, § 104, 98 Stat. 1433, 1434 (amending 29 U.S.C. § 1056(d)).

payments or period for which payments are required.[27] Fourth, the order may provide neither for increased benefits nor for any type or form of benefits, including options, that are not otherwise provided for under the plan.[28] Finally, the order may not require that benefits payable to an alternate payee under a prior qualified domestic relations order be paid under it to a different alternate payee.[29] Given the serious concern with federal preemption under ERISA, the Retirement Equity Act demonstrates congressional willingness to forego federal preemption in a very limited area. Attorneys who wish to claim for their clients a portion of covered retirement plans must now take care to bring themselves within the boundaries delineated by Congress.

The *Owens* court also dealt with the divisibility of a vested but unmatured pension under state law.[30] The court's general definition of vesting was unremarkable and followed from prior cases.[31] A vested pension is one in which the employee's rights are not forfeitable,[32] except under limited statutory conditions.[33] As long as James' rights under the pension plan were vested, the benefits could clearly be treated as divisible marital property under current Kentucky law.[34] The appellate court also indicated

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[27] *Id.* For a discussion of the difficulties involved in drafting proper qualified domestic relations orders, see Troyan, *Pension Evaluation in Light of the Retirement Equity Act of 1984*, 11 FAM. L. REP. (BNA) 3005 (1985).

[28] *Id.*

[29] *Id.* These restrictions do not prevent trial courts from requiring payment to the alternate payee once the participant achieves his or her earliest retirement age without regard to whether the participant actually retires. *See* 1984 U.S. CODE CONG. & AD. NEWS 2566. Further, trial court orders may apparently require the payment of survivor's benefits. The act thus permits trial courts to assure that pension benefits will be received by the nonworker spouse in those cases in which delayed distribution is used.

Some courts had previously assumed the power to prevent an employee spouse from electing a benefit that significantly disadvantaged the nonemployee. *See, e.g., In re* Marriage of Gillmore, 629 P.2d 1 (Cal. 1981); *In re* Marriage of Lionberger, 158 Cal. Rptr. 535 (Cal. Ct. App. 1979), *cert. denied sub nom.*, Operating Eng'rs' Pension Trust v. Lionberger, 446 U.S. 951 (1980); McDermott v. McDermott, 10 FAM. L. REP. (BNA) 1187 (N.Y. Sup. Ct. 1984).

[30] Owens v. Owens, 672 S.W.2d at 69.

[31] *See* Foster v. Foster, 589 S.W.2d 223.

[32] *Id.* at 224.

[33] Prior to the enactment of the Retirement Equity Act, the preretirement death of the employee spouse could cause a forfeiture of even vested benefits. Under the new rules certain plans must provide retirement benefits to the survivors of participants with vested benefits. 1984 U.S. CODE CONG. & ADMIN. NEWS 2548-49.

[34] *See* 589 S.W.2d 223.

its strong disapproval of the current division of vested but unmatured pension benefits on the facts of *Owens*.[35] The appellate court relied upon the tax consequences[36] to both the participant spouse and other plan beneficiaries in determining that the division should become effective only when the benefits were actually received by the employee spouse.[37]

The appellate court's use of an "if and when received" distribution of the benefits raises some questions. First, to the extent that courts are willing to delay distribution of pension benefits until the employee's right is mature, there seems to be no logical reason to distinguish between vested and nonvested pensions. Nonvested pensions have been held nondivisible in Kentucky on the ground that they were too speculative for division.[38] In cases involving nonvested rights on the brink of vesting, a decision to terminate a marriage in one year rather than another may deprive a spouse of any property claim to a significant asset.[39] To the extent that nonvested rights are too speculative for division, this problem would be cured by delayed distribution. In the past, delayed distribution of pension benefits was of limited benefit to nonemployee spouses. However, under the Retirement Equity Act of 1984, a trial court may require that a former spouse receive the survivor's benefits now available under the Act.[40] The court may also require that these benefits be payable to an alternate payee even in those cases in which the participant elects to work past retirement age.[41]

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[35] 672 S.W.2d at 69. In earlier cases, however, the court had noted that delayed distribution is not preferable when it may be avoided by current offsets. *See* Combs v. Combs, 622 S.W.2d 679, 681 (Ky. Ct. App. 1981).

[36] For a discussion of the tax treatment of benefits under the Retirement Equity Act of 1984, see 1984 U.S. CONG. & ADMIN. NEWS 2569.

[37] *See* 672 S.W.2d at 69.

[38] *See* Ratcliff v. Ratcliff, 586 S.W.2d 292.

[39] This argument was accepted in one of the earliest reasoned decisions ruling that nonvested benefits could be divided. *See In re* Marriage of Brown, 544 P.2d 561, 566-67 (Cal. 1976). Because pensions represent deferred compensation for work done during marriage, they are clearly earned during marriage although they may be received later. *See* Van Loan v. Van Loan, 569 P.2d 214, 215-16 (Ariz. 1977); Pieper v. Pieper, 398 N.E.2d 868, 871-72 (Ill. App. Ct. 1979); Kikkert v. Kikkert, 427 A.2d 76, 78 (N.J. Super. Ct. App. Div. 1981); Farver v. Department of Retirement Sys., 629 P.2d 903, 904-05 (Wash. Ct. App. 1981), *aff'd*, 644 P.2d 1149 (Wash. 1982).

[40] *See* note 29 *supra*.

[41] *See id.*

Federal legislation thus permits a trial court to balance the interests of both spouses. Through a delayed distribution order, the court can protect the employee or participant spouse from being called to account for benefits that will never be received. Similarly, the court can protect the nonemployee spouse (the "alternate payee") by requiring in its order that the employee spouse not elect retirement benefits that disadvantage a former spouse. This legislation, however, does not make divisible benefits that are not otherwise divisible under state law.[42] It cannot be used to require Kentucky courts to divide nonvested pensions. Further, the federal legislation has no impact upon state statutes that exempt from division certain pensions not covered by ERISA.[43]

II. POST DIVORCE SUPPORT OBLIGATIONS

A. *Adult Support*

Post divorce support obligations generally provide courts with a number of difficult issues. The cases arising during this survey period have proved no exception. Appellate courts have again faced the problem of reimbursement for a spouse who aided in the acquisition of a professional degree. Additionally, the courts have contended with the effect of post divorce cohabitation upon a maintenance agreement and with the problem of child support for adult dependent children.

In *McGowan v. McGowan*,[44] the Kentucky Court of Appeals held that a lump sum maintenance award was permissible when one spouse had worked while the other spouse was in undergraduate and dental school and the couple had accumulated no significant marital property. Although the court acknowledged that Randy McGowan's degree was not marital property, it relied upon the maintenance statute and the cases interpreting that statute to permit an award to his former spouse.[45] The *McGowan*

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[42] *See generally* Graham, *supra* note 17, at 43-44.

[43] *See, e.g.*, KY. REV. STAT. ANN. §§ 427.120, .125 (Bobbs-Merrill 1972) [hereinafter cited as KRS].

[44] 663 S.W.2d 219 (Ky. Ct. App. 1983).

[45] *See id.* at 223. A second point at issue in *McGowan* was the trial court's jurisdiction over Randy McGowan. The McGowans had married in Kentucky and

opinion continues the struggle to balance the interests of the parties when one spouse has earned a professional degree or license during marriage. Despite its attempt to alleviate some of the confusion arising from the Supreme Court's dicta in *Inman v. Inman*,[46] the case raises interesting questions of its own.

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continued to reside in the state while Randy was an undergraduate at Kentucky Wesleyan and attended dental school in Louisville. In July 1979, they moved to New York state for Randy's residency in oral surgery. They separated in December 1979, and in April or early May Fredda returned to Kentucky with their child and a separation agreement signed by Randy consenting to jurisdiction in this state. Although the trial commissioner later ruled the separation agreement unconscionable, he retained jurisdiction over the case. The appellate court agreed upon two grounds. First, there was no specific showing that Randy failed to understand that signing the agreement submitted him to Kentucky's jurisdiction. Second, the 180-day residency requirements were not applicable when Kentucky residents were temporarily absent from the state. Thus, the court treated the jurisdictional aspect of the separation agreement as severable. It also demonstrated the ease with which a Kentucky domicile may be found for former Kentuckians. *See id.* at 222-23.

[46] 648 S.W.2d 847, 852 (Ky. 1982). The *Inman* litigation has been before both the court of appeals and the Kentucky Supreme Court. In the first *Inman* decision, the court of appeals ruled that an educational degree was sufficiently similar to other forms of property to permit an award to the nondegree holding spouse when the marriage terminated without acquisition of property. *See* 578 S.W.2d 266, 269 (Ky. Ct. App. 1979). The Supreme Court later indicated in dicta that the degree was not marital property but that both the nondegree holder spouse's contributions and the degree holder's increased earning capacity should be considered in any award formulated by a trial court. *See* 648 S.W.2d at 852. *See generally* Graham, *supra* note 5, at 452-57. Other jurisdictions have witnessed similar litigation. In the majority of those jurisdictions the advanced degree has not been treated as marital property. *See, e.g.*, Pyeatte v. Pyeatte, 661 P.2d 196, 201 (Ariz. Ct. App. 1982); *In re* Marriage of McVey, 641 P.2d 300, 301 (Colo. Ct. App. 1981); Zahler v. Zahler, 8 FAM. L. REP. (BNA) 2694, 2695 (Conn. Super. Ct. Aug. 5, 1982); Wright v. Wright, 469 A.2d 803, 805-06 (Del. Fam. Ct. 1983); Hughes v. Hughes, 438 SO. 2d 146, 147 (Fla. Dist. Ct. App. 1983); *In re* Marriage of McManama, 399 N.E.2d 371, 374 (Ind. 1980); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Mahoney v. Mahoney, 453 A.2d 527, 532 (N.J. 1982); Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983); Muckleroy v. Muckleroy, 498 P.2d 1357, 1358 (N.M. 1972); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980); *In re* Marriage of Lundberg, 318 N.W.2d 918, 921-22 (Wis. 1982); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984). Other jurisdictions permit some consideration of the degree in maintenance and property awards, although they do not treat it as property. *See, e.g., In re* Marriage of Weinstein, 11 FAM. L. REP. (BNA) 1015 (Ill. App. Ct. Nov. 13, 1984); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758-59 (Minn. 1981); Lowrey v. Lowrey, 633 S.W.2d 157, 160 (Mo. Ct. App. 1982); Lira v. Lira, 428 N.E.2d 445, 448 (Ohio Ct. App. 1980); Washburn v. Washburn, 677 P.2d 152, 159-60 (Wash. 1984). Michigan treats the degree as marital property when there are no other substantial assets. *See* Woodworth v. Woodworth, 337 N.W.2d 332, 334-35 (Mich. Ct. App. 1983). New York courts have disagreed over the

The *McGowan* opinion both expanded the kinds of spousal contribution that may now lead to compensation and retracted the importance of those types of contribution for future cases. First, the court noted that neither "the efforts" nor the "economic sacrifices" of one spouse who had put the other through school should go uncompensated.[47] Although past cases have considered the monetary contributions of the nondegree holding spouse,[48] they have not dealt with the more general notions of efforts and economic sacrifices.[49] Perhaps the court's language with regard to efforts and economic sacrifices was simply meant to indicate that, upon divorce, a homemaker spouse's contribution to the other spouse's acquisition of a degree may be considered. This interpretation accords with the treatment of homemaker spouses in other cases.[50] Alternatively, however, the economic sacrifices concept could raise other questions. For example, is the spouse who does not acquire a degree entitled to compensation for his or her own foregone income or the foregone income of the student spouse?[51]

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matter. *Compare* Lesman v. Lesman, 452 N.Y.S.2d 935, 938-39 (N.Y. App. Div. 1982) (not divisible) *with* O'Brien v. O'Brien, 452 N.Y.S.2d 801, 803 (N.Y. Sup. Ct. 1982) (divisible), *aff'd as modified*, 485 N.Y.S.2d 548 (N.Y. App. Div. 1985). Massachusetts treats degrees as marital property. *See* Reen v. Reen, 8 FAM. L. REP. (BNA) 1053 (Mass. P. and Fam. Ct. 1981).

[47] *See* 663 S.W.2d at 223.

[48] *See* Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982); Moss v. Moss, 639 S.W.2d 370, 374 (Ky. Ct. App. 1982).

[49] In at least two cases, courts have dealt with spouses who provided support but did not contribute to educational expenses. *See* Lesman v. Lesman, 452 N.Y.S.2d 935; Mahoney v. Mahoney, 442 A.2d 1062. The failure to provide educational expenses is relevant only if the court adopts a rigid reimbursement theory. *Cf.* note 46 *supra*. In *Moss v. Moss* the Kentucky Court of Appeals intimated that the supporting spouse's recovery should be reduced by amounts provided by the student spouse's family. *See* 639 S.W.2d 370.

[50] The contribution of a spouse as a homemaker is relevant to the distribution of marital property. That contribution does not, however, have the effect of converting nonmarital property into marital property. Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981). The *McGowan* court noted that two avenues were open to compensate the nondegree holder spouse. Where property had accumulated, an imbalanced award could be used. Absent such an accumulation, however, the court held that the maintenance statute permitted an award. *See* 663 S.W.2d at 223-24. Neither of these theories clashes with prior rules governing homemaker contribution. *See* KRS § 403.190 (1972).

[51] *See* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection*

If the court meant to recognize homemaker contributions, it later took away much of what it had given when it upheld the trial court's assertion that, although essential,[52] Fredda's contributions did not "greatly inure to Randy's direct financial enhancement."[53] The *McGowan* facts do indicate that the degree holding spouse did not greatly improve his financial position upon completing his education.[54] The court's language is disturbing, however, because it may have either of two undesirable effects. First, *McGowan* could signal to trial courts that it is permissible to place a relatively low value on homemaker services. Second, it may create a rule that permits a degreeholder to avoid realistic reimbursement by unilaterally devaluing the degree through deliberate under- or unemployment.

The court's decision also plainly demonstrates the confusion surrounding compensation in such cases. The court approved the award to Fredda remarking that she could not individually enjoy the same standard of living that she had enjoyed as Randy's wife.[55] As Judge Paxton pointed out, a student's standard of living is not likely to be a sumptuous one.[56] The court's theory, therefore, must have been that Fredda was entitled to what she would have enjoyed as Randy's wife had the marriage continued.[57] Two distinct difficulties arise from this analysis.

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for the Marital Investor in Human Capital, 28 KAN. L. REV. 380, 385 (1980) (discussing the concept of foregone income).

[52] *See* 663 S.W.2d at 225.

[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *Id.* at 226 (Paxton, J., concurring in part, dissenting in part).

[57] *Cf. id.* at 226-27. The court's citation of Casper v. Casper, 510 S.W.2d 253, 255 (Ky. 1974); Atwood v. Atwood, 643 S.W.2d 263, 266 (Ky. Ct. App. 1982); and Combs v. Combs, 622 S.W.2d 679, 680 (Ky. Ct. App. 1981) demonstrates this point. *Casper* is locally famous for Mr. Justice Palmore's statement that what is appropriate employment for a "duchess" is not the same as the employment appropriate for a "scullery maid." *See* 510 S.W.2d at 255. Read broadly, *Casper* indicates that one who marries well is entitled to preserve that status even though the marriage terminates. The notion of marriage as an avenue to social or economic status is probably offensive to a number of persons today. More recent thinking permits compensation based upon spousal contribution, including opportunities foregone, rather than upon preservation of status. Both *Atwood* and *Combs* support an emphasis on spousal contribution. Each case involved a long term marriage and a spouse whose absence from the marketplace had damaged her earning capacity while contributing to the family's enrichment. *See* 643 S.W.2d at 266; 622 S.W.2d at 680.

First and most importantly, the actual award given by the court bore no relation to its theory. Despite both the essential nature of her contribution and her entitlement under the court's theory, Fredda received only $10,000[58]—far less than she would have enjoyed as Randy's wife[59] and substantially less than she would have received had the court simply reimbursed her for one-half of her monetary contributions during the marriage.[60]

As Professor Krauskopf has pointed out, there are two primary justifications for the continued use of maintenance under present no-fault divorce laws with equitable property distribution schemes.[61] The first of these justifications is that maintenance will be necessary to compensate a homemaker spouse whose absence from the marketplace has enriched the family unit but also left that spouse with severely reduced opportunities for increased earning capacity.[62] The second justification, more relevant to *McGowan*, is that maintenance is appropriate to compensate a spouse for his or her contributions to the family economic unit when the equitable distribution of property cannot achieve that result.[63] Although Kentucky courts appear to be moving toward recognition of this second justification for maintenance,[64] they have not yet attempted to deal with the consequences of realistically measuring the nondegree holding spouse's contributions.[65]

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[58] 663 S.W.2d at 225.

[59] For a helpful discussion of the process of valuing the degree, see Krauskopf, *supra* note 51, at 382-84.

[60] The court rejected the formula it used in *Inman*, because it believed that the formula would have been required to return $44,000 to Fredda and leave Randy with significant educational debt. 663 S.W.2d at 225. If Fredda's salary paid for both of their living expenses, however, Randy should have been liable for an amount that would represent her contributions to *his* expenses rather than for her total earnings.

[61] *See* Krauskopf, *supra* note 51, at 397-98.

[62] *Id.*

[63] *Id.*

[64] The use of the maintenance statute rather than the property division statute avoids some of the problems with future earning capacity. The property division statute does not appear to sanction division of assets earned after the marriage. *See* Graham, *supra* note 5, at 455.

[65] Professor Krauskopf has argued that a share of future earning capacity should trigger a lump sum maintenance award unless the nondegree holder spouse fails to put on the evidence to justify such an award. *See* Krauskopf, *supra* note 51, at 400-02. However, future earning capacity is not all gained at one time and to some extent it depends upon incremental earning which occurs after the marriage terminates. *See*

In *Lydic v. Lydic*,[66] the Kentucky Court of Appeals considered the effect of post divorce cohabitation upon an obligation to pay maintenance. Jack and Dreana Lydic were divorced in 1974 after a thirteen year marriage.[67] Their divorce decree incorporated a separation agreement under which Jack agreed to pay Dreana $600 per month until she died or remarried.[68] The agreement also provided that it was final and nonmodifiable.[69] Sometime in 1981 Dreana purchased a home in New Jersey with Arthur L. Zepf, Jr., a single man.[70] Arthur and Dreana shared expenses and held the home as joint tenants with right of survivorship.[71]

When Jack moved to terminate his alimony obligations both the trial court and the appellate court agreed to a dismissal of his motion. The appellate court distinguished *Williams v. Williams*,[72] in which it had held that a lasting relationship with an affluent friend, coupled with the former husband's financial difficulties, were sufficient to terminate alimony. It noted that in the case before it there was no evidence that Arthur was contributing to Dreana's support; rather the evidence suggested

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Graham, *supra* note 5, at 455. If the compensation awarded is based upon the nondegree holder's contribution to the *opportunity* for such earnings, some theoretical difficulties will be avoided. The value of that opportunity might be the value of an entry level position multiplied by the expected work life of the degree holding spouse, less other costs such as educational loans. The other costs for obtaining the degree must be subtracted from its value under theories of "family firm" economics. *Cf.* Krauskopf, *supra* note 51, at 386-87.

[66] 664 S.W.2d 941 (Ky. Ct. App. 1983).

[67] *Id.* at 942.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] 554 S.W.2d 880, 882 (Ky. Ct. App. 1977). The court's comments on *Williams* suggest that Lydic asked primarily for termination rather than modification. *See* text accompanying notes 83-87 *infra*. The court also attempted to distinguish McCord v. McCord, 558 S.W.2d 624, 626 (Ky. Ct. App. 1977), in which it had denied the reinstatement of maintenance to a wife whose subsequent marriage had been annulled. The court's distinction of *McCord* is somewhat less than convincing. The question in cases such as *Lydic* is whether relationships other than marriage should be grounds for terminating maintenance or modifying an award. To insist that *McCord* is inapplicable because Dreana did not remarry begs the question.

that the parties shared expenses.[73] Additionally, the court noted that the separation agreement itself barred modification.[74]

No other issue concerning the economic aspects of divorce generates the strong emotional response that attends the circumstances of cases similar to *Lydic*. As the dissent noted, "[t]here is something distasteful in requiring one to subsidize a former spouse, in his or her subsequent cohabitation."[75] In part this difficulty arises from the various permissible uses of the maintenance statute.[76] As pointed out in the previous discussion of compensation for contribution to an advanced educational degree, the maintenance statute may be used to deal both with the homemaker spouse whose absence from the marketplace has left that spouse with reduced earning capacity and with the spouse making economic contributions to the family economic unit which will be not be adequately compensated by property distribution.[77] In the latter case the obligor spouse is not supporting the present needs of his or her former spouse but repaying that spouse for past contributions already received.[78] Courts considering the issue have not been careful to distinguish the reasons underlying the maintenance obligation.[79] Separating out different

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[73] *See* 664 S.W.2d 942-43.

[74] *See id.* at 943.

[75] *Id.* (Miller, J., dissenting). For a general discussion of the problem and proposed solutions, see Oldham, *The Effect of Unmarried Cohabitation By A Former Spouse Upon His or Her Right To Continue To Receive Alimony*, 17 J. FAM. L. 249, 251-53 (1978-79); Oldham, *Cohabitation By An Alimony Recipient Revisited*, 20 J. FAM. L. 615, 631-39 (1981-82).

[76] *See* KRS § 403.200 (1972).

[77] *See* text accompanying notes 61-63 *supra*.

[78] This rationale supports the maintenance awards in Atwood v. Atwood, 643 S.W.2d 263, 266 (Ky. Ct. App. 1982) and Combs v. Combs, 622 S.W.2d 679, 680 (Ky. Ct. App. 1981). *See also* Frost v. Frost, 581 S.W.2d 582, 585 (Ky. Ct. App. 1979). Each of the maintenance awards in those cases can be justified because a spouse in a long term marriage had enriched the family unit through her work within the home. Recent Kentucky case law provides few examples of support awards based on a pure "need" without offsetting contributions. However, in Carter v. Carter, 656 S.W.2d 257 (Ky. Ct. App. 1983), the appellate court indicated that even very short term marriages could give rise to support obligations and "status" entitlements based on the standard of living enjoyed during the marriage. *See id.* at 260. *Carter* demonstrates the danger posed by thinking of maintenance awards in terms of status. *Cf.* note 57 *supra*.

[79] To a large extent the use of maintenance awards rather than property division derives from the fact that many divorcing couples have little or no property. *See*

types of maintenance obligations should add some clarity to a previously clouded issue.

Some other facets of the problem may not be so simple to solve. Even those states that agree that other relationships short of remarriage should terminate the maintenance obligation have difficulty in determining which relationships should trigger termination.[80] Although the announced criteria is generally that the second relationship must be "stable and ongoing,"[81] case law demonstrates that in some instances the sexual nature of the relationship is the crucial aspect.[82] An example will highlight the problem with such a rule. If Alice and Bob share a $500 per month apartment and a sexual relationship, one might ask how Alice's economic needs are different from those she would have if she shared the apartment, but not the sexual relationship, with Chris. In each case Alice needs a sum of money for housing each month. If the maintenance obligation were set only with reference to Alice's support and if it provided for $500 per month for housing, Alice now needs one-half as much for her housing whether she lives in an intimate relationship with Bob or a nonintimate relationship with Chris.[83] The question should

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Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1188 (1981).

[80] *See In re* Marriage of Sappington, 10 FAM. L. REP. (BNA) 1445 (Ill. App. Ct. June 19, 1984); Roofe v. Roofe, 10 FAM. L. REP. (BNA) 1292 (Ill. App. Ct. April 3, 1984); *In re* Marriage of Clark, 444 N.E.2d 1369 (Ill. Ct. App. 1983). Illinois statues add to remarriage as a condition for terminating maintenance the instances in which the recipient cohabits on a "resident, continuing conjugal" basis. *See* ILL. REV. STAT. ch. 40, § 510(b) (Smith-Hurd 1984).

[81] *See* Roofe v. Roofe, 10 FAM. L. REP. (BNA) 1292.

[82] *See, e.g., In re* Sappington, 10 FAM. L. REP. (BNA) 1445; Brown v. Brown, 10 FAM. L. REP. (BNA) 1240 (N.Y. Sup. Ct. Mar. 6, 1984). In *Brown* the agreement provided that maintenance terminated if the recipient wife "lived with" another man. Mrs. Brown rented a part of her home to a man. The court ruled that they did not "live together" because there was no credible evidence of a sexual relationship, Mrs. Brown did not cook for her tenant, and she had no independent social relationship with him. *See id.*

[83] I do not mean to suggest that all relationships that Alice might have could give rise to such considerations. For example, if Alice asked her aged mother, Doris, to move in with her so that she could care for Doris, the result might be different. Doris may have no ability to support herself; she may be Alice's dependent. Further, the preexisting relationship of parent-child between them indicates that Alice has not taken on some *new* relationship at the expense of her former spouse. Thus, the Alice-Doris

be whether Alice's projected decreased need is substantial and continuing enough to revise the parties' support agreement.[84] In substituting the question of whether a relationship is sexual for the issue of whether it is one that involves an arrangement that should trigger modification just as any other change in circumstances, courts have resurrected the historic "sex, society and service" for "support" exchange.[85] That rationale rarely underlies modern maintenance awards[86] and it is an inappropriate framework for analyzing termination of maintenance.

Jack Lydic's loss in litigation, however, may be traced to another aspect of the case. Because the Lydics' agreement was not modifiable by its own terms,[87] the court of appeals was faced with an all or nothing situation. The court could either affirm the maintenance agreement or terminate maintenance entirely. If Lydic had argued that equity demanded setting aside the non-modification clause because of unforeseen circumstances, the court might have justifiably granted the modification, assuming that it was not related to Dreana's past contributions to the family economic unit. Lydic's lesson to future litigants is that the parties themselves may define the types of future relationships that will terminate maintenance. Absent that definition, additional litigation may be needed to adjudicate their respective rights.

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relationship is different from Alice-Bob or Alice-Chris, even if Bob or Chris is not self-supporting.

[84] This is the standard in a number of states. *See* Gertrude L.Q. v. Stephen P.Q., 466 A.2d 1213, 1216 (Del. 1983); Bentzoni v. Bentzoni, 442 So. 2d 235, 238 (Fla. Dist. Ct. App. 1983); Bisig v. Bisig, 469 A.2d 1348, 1350 (N.H. 1983); Gayet v. Gayet, 456 A.2d 102, 104 (N.J. 1983); Van Gorder v. Van Gorder, 327 N.W.2d 674, 678-79 (Wis. 1983). *But see* Bell v. Bell, 10 FAM. L. REP. (BNA) 1679, 1680 (Mass. Sept. 13, 1984). The use of substantial and continuing changed circumstances should not be interpreted to disadvantage a spouse who has sought to meet growing needs. If, for example, a spouse with a one year maintenance award of $500 per month finds that due to rent increases he or she must share an apartment, his or her needs have not been reduced by that arrangement.

[85] *See* H. CLARK, DOMESTIC RELATIONS 181 (1968).

[86] *See* authorities cited *supra* note 78.

[87] *See* 664 S.W.2d at 942. KRS § 403.250 provides that the death of either party or remarriage of the recipient terminates the maintenance obligation unless the parties otherwise expressly agree in writing or the decree so provides.

B. *Child Support*

Federal legislation enacted during the survey period will result in major changes in the enforcement of child support obligations. The Child Support Enforcement Amendments of 1984 require states to develop particular enforcement remedies in order to continue participating in federal Aid to Families with Dependent Children (AFDC) programs.[88] Further, these support collection procedures will be available to all persons who seek to collect support through state agencies, whether or not those persons are AFDC recipients.[89] Thus, many litigants will find it to their advantage to use the new procedures.

The federal legislation requires states to establish an expedited procedure for the collection of child support.[90] To meet this requirement the Kentucky legislature enacted the Kentucky Administrative Process for Child Support Act.[91] Under that act—unless child support is established by court order—the Cabinet for Human Resources (CHR) may determine support for a child whose parent has failed to provide support.[92] The cabinet may determine the amount of support owed based upon a scale developed pursuant to administrative regulation.[93] Because that scale provides significantly higher support for some income ranges than the child support guidelines currently used by many circuit courts,[94] participation in the administrative process is advantageous to a party seeking child support. Further, the administrative process places the burden upon the support obligor to request

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[88] *See* 42 U.S.C. §§ 626(a)-(b), 666 (1984). For a thorough discussion of the federal legislation, see Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 FAM. L. REP. (BNA) 3051 (Oct. 23, 1984).

[89] Dodson & Horowitz, *supra* note 88, at 3051. *See also* KRS § 205.721 (1984).

[90] *See* 42 U.S.C. § 666(a)(2).

[91] KRS §§ 405.400-.530 (1984).

[92] KRS § 405.430 (1984). Because parent is statutorily defined to exclude fathers whose paternity has not been established, the adminstrative process cannot be used to determine support obligations in these situations. *See* KRS § 405.420(5). Further, the adminstrative process appears to be available to set initial amounts of support but not to modify prior judicial determinations of support amounts. *See* KRS § 405.430(2).

[93] KRS § 405.430(l).

[94] Some Kentucky courts currently use as guidelines a support scale developed by the late Hon. Henry Pennington, which differs from the scale developed by the Cabinet for Human Resources.

a hearing to dispute the minimum monthly support obligation under the cabinet's guidelines.[95] If the obligor does not request such a hearing, the first payment on the support obligation becomes due in twenty days. The obligor may be excused from payment only if a hearing officer later determines that the obligor had good cause for failing to request the hearing.[96]

In addition to the administrative process, Kentucky has adopted new legislation to comply with a federal mandate for wage withholding procedures.[97] Courts are now required to use wage withholding when the full amount of a support obligation is thirty-two days delinquent.[98] Both the federal act and the language of the Kentucky statute indicate that this requirement is not subject to judicial discretion and that it applies in all judicial enforcement proceedings.[99]

State legislation also gives the CHR Secretary the ability to issue an order to withhold and deliver earnings or property which the Secretary has reason to believe belong, or are owed, to the delinquent parent.[100] An order to withhold and deliver may be a powerful tool because it has priority over all other debts of the obligor parent.[101]

Although no cases have as yet arisen under the statute, it

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[95] *See* KRS § 405.440.

[96] *Id.*

[97] *See* KRS §§ 405.460, .465.

[98] *Id.* This process raises some of the due process problems underlying Mitchell v. W.T. Grant Co., 416 U.S. 600, 603-20 (1974) (Louisiana law allowing issuance of writ of sequestration without prior notice involves due process issues); Fuentes v. Shevin, 407 U.S. 67, 80-93 (1972) (prejudgment replevin laws allowing seizure of property without hearing violates the due process clause); or Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-42 (1969) (garnishment of wages without prior hearing or notice violative of employee's right to due process).

[99] *See* 42 U.S.C. § 446(a)(8); KRS § 405.465. The Kentucky statute states that "in any proceeding" in which "a court" has ordered payment, automatic withholding may be used upon a showing of the required delinquency. *See* Dodson & Horowitz, *supra* note 88, at 3053.

[100] *See* KRS § 405.470 (1984).

[101] *Id.* Further, that priority is not subject to court discretion as are the priorities for wage assignments under KRS § 405.465. However, orders to withhold and deliver are subject to the exemptions for debtor's tools under KRS § 427.030 (1980); professional libraries and vehicles under KRS § 427.040 (1980); and homestead and burial plot exemptions under KRS § 427.060 (1980). Other attachments and executions for child support are subject only to the last of these three exemptions. KRS § 427.045 (1980).

will undoubtedly generate both increased collection of child support obligations and litigation to interpret its meaning.

Child support obligations owed by a nonresident have historically been difficult to collect.[102] A Kentucky Court of Appeals case, *Abbott v. Abbott*,[103] however, demonstrates the increased vigor with which such obligations are currently being pursued. The *Abbott* litigation involved two problems: Child support for a dependent adult child and a foreign jurisdiction's power to modify a support order.

Brenda Abbott brought suit to remove a lien which had been imposed upon the marital home to preserve Carl Abbott's marital share of the home.[104] Brenda argued that the lien should be removed because of Carl's delinquent support obligations.[105] Brenda and Carl's older son was severely mentally retarded, and Brenda claimed that the delinquency included amounts due for the older, retarded child after his eighteenth birthday.[106] Carl argued that a child's eighteenth birthday terminates a parent's support obligations.[107] The appellate court held that statutory provisions terminating child support at emancipation,[108] and setting that age at eighteen,[109] were not relevant to the support of wholly dependent children over the age of eighteen.[110]

In spite of its simple and appropriate answer to the question of support for dependent adult children, *Abbott* raises other serious questions regarding the adjudication of support obligations for an absent parent. The problems stem from the court's

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[102] *See generally* D. CHAMBERS, MAKING FATHERS PAY (1979).

[103] 673 S.W.2d 723 (Ky. Ct. App. 1983).

[104] *Id.* at 725.

[105] *Id.*

[106] *Id.* at 724-25.

[107] *Id.*

[108] *See* KRS § 403.250(3) (1984).

[109] *See* KRS § 2.015 (1980).

[110] 673 S.W.2d at 725. The court relied upon KRS § 405.020(2) (1984) which awards to both parents the joint custody, care and support of children over the age of eighteen who are wholly dependent because of permanent physical or mental disability. It did not discuss difficulties with that statute's requirement that the father be primarily liable for such support. Support responsibilties that have been allocated or denied on the basis of gender have been subject to equal protection challenges. *See* Orr v. Orr, 440 U.S. 268 (1979) (equal protection clause violated by Alabama law imposing alimony only on husbands).

interpretation of the Uniform Reciprocal Enforcement of Support Act (URESA)[111] and from its failure to adequately explain the grounds for its decision.[112]

Although the appellate court did not so state, Carl Abbott's extended absence from Kentucky must be presumed. Carl was described by the court as a Pennsylvania resident.[113] Further, Brenda's use of URESA[114] to enforce her support claims indicates that personal jurisdiction over Carl was not available in Kentucky.[115] When Brenda's action was heard in Pennsylvania, that state's courts purported to reduce Carl's support obligation because the parties' younger child resided with Carl.[116] Carl raised that reduction as a defense to Brenda's action to have his lien on the marital home removed.[117] The court of appeals held first that the Pennsylvania court's reduction was ineffective because Brenda did not receive notice of the proceeding and was not subject to that court's jurisdiction.[118] The court treated the Pennsylvania order as a judgment but refused to award it full faith and credit since it was rendered without personal jurisdiction over the respondent.[119]

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[111] *See* 673 S.W.2d at 727.

[112] *See* notes 131-34 *infra* and accompanying text.

[113] *See* 673 S.W.2d at 726.

[114] *See* KRS § 407.010 (1984). Both Kentucky and Pennsylvania have adopted the act. For Pennsylvania's version of the act, see 42 PA. CONS. STAT. ANN. §§ 6741-6780 (Purdon 1978).

[115] Personal jurisdiction was necessary to establish the original support order. *See* Kulko v. California Super, Ct., 436 U.S. 84,87 (1978). Further, personal jurisdiction was necessary for modification of a prior order. *See id* at 91-101. In prior decisions, the Kentucky Supreme Court has ruled that Kentucky will not assert jurisdiction over child support modification when a Kentucky court would decline jurisdiction under the Uniform Child Custody Jurisdiction Act. *See* McCormick v. McCormick, 623 S.W.2d 909, 910 (Ky. 1981). *McCormick* is distinguishable from *Abbott* because both the child and one parent continued to live in Kentucky in the latter case.

[116] 673 S.W.2d at 726.

[117] *Id.* at 726-27.

[118] *Id.* at 727.

[119] *Id.* It is unclear whether a responding state court order is a judgment that supercedes the prior support order. *See, e.g.,* Murphy v. Murphy, 395 So. 2d 1047, 1049 (Ala. Civ. App. 1981) (sister state's child support judgments given full faith and credit, but court may specifically modify its application as to future installments); Campbell v. Jenne, 563 P.2d 574, 577 (Mont. 1977) (Montana court may only modify sister state's prior child support judgment by specifically referring to it); Foster v. Marshman, 611 P.2d 197, 199 (Nev. 1980) (subsequent Nevada judgment did not modify an earlier California order that required greater support payments).

As a constitutional matter, courts of a state without personal jurisdiction over the recipient of a support obligation may not alter or cut off that obligation.[120] Outside of URESA, when a litigant appears in a foreign state to request enforcement of a support obligation, the litigant will have sufficiently purposefully availed himself or herself of the benefits of the forum to be subject to the forum's jurisdiction.[121] Under those circumstances, a court in a second state may constitutionally modify the support award to the same extent as the state rendering the initial award.[122] URESA provides, however, that a party who participates in a proceeding does not subject himself or herself to jurisdiction in "any other proceeding."[123] The Kentucky Court of Appeals interpreted that section of the statute to bar Carl Abbott's action for modification of support with regard to the child who resided with him.[124] The court treated support orders for the children as two separate and independent actions.[125] While the apparent absence of notice to the Kentucky parent seeking enforcement of the support order clouds the issue, the court of appeals' reading of the statute does not correspond with the general interpretation of the statute by other state courts. The section is typically interpreted as barring an obligor from raising child custody or visitation rights in a support enforcement proceeding.[126] The section would not appear to bar a modification request similar to that made in *Abbott*.[127] Even more egregiously, the Kentucky court determined Abbott's duty toward his retarded,

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[120] *See* Estin v. Estin, 334 U.S. 541, 548-49 (1948).

[121] *See* Kulko v.California Super. Ct., 436 U.S. at 84.

[122] New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 612 (1947).

[123] UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 32, 9A U.L.A. 643 (1979). *See also* 42 PA. CONS. STAT. ANN. § 6772.

[124] *See* 673 S.W.2d at 727.

[125] *See id.*

[126] *See* Leland v. Fricke, 376 So. 2d 432, 433 (Fla. Dist. Ct. App. 1979) (while URESA does give the court the power to establish support payments, it does not give the right to establish visitation rights); Brown v. Turnbloom, 280 N.W.2d 473, 474 (Mich. Ct. App. 1979) (judge may not look to fulfillment of visitation rights as factor in determining compliance with support obligations); Pifer v. Pifer, 229 S.E.2d 700, 703 (N.C. Ct. App. 1976) (defendant husband's cessation of support payments in response to wife's refusal to allow visitation not within the parameters of the URESA).

[127] The real question, aside from the notice problem, is how the Pennsylvania court would interpret § 32. If Brenda Abbott had been given notice of the proceedings and Pennsylvania had modified Carl's support duty, would that modified order have superceded the Kentucky judgment in a Pennsylvania court? There is some evidence that

dependent child under Kentucky law.[128] Both the Kentucky and the Pennsylvania versions of URESA call for the determination to be made under Pennsylvania law.[129] Indeed, it is possible that application of Kentucky's law to determine Carl Abbott's duty of support was unconstitutional.[130]

The muddled opinion in *Abbott* is unfortunate because the court did reach a correct result. Pennsylvania permits modification of a prior court order in a URESA proceeding.[131] However, Pennsylvania courts recognize that the URESA order does not alter the obligation under the original judgment.[132] Thus, an obligor ordered to pay $50 per month in an original divorce proceeding might succeed in having that obligation lowered to $40 in a URESA proceeding. Amounts paid under that order are credited to the obligor, and the difference becomes an arrearage under the initial judgment.[133] If Carl Abbott's arrearages had been so analyzed the court would have had jurisdiction over Abbott to remove the lien from the marital home in spite of his continued absence from Kentucky. Due process does not require minimum contacts with the obligor for postjudgment attachment.[134] Thus, Carl's personal connection with Kentucky would have been relevant only if the court wished to assess against him an amount greater than the lien on the home.

III. CHILD CUSTODY

A. *Jurisdiction*

In *Toth v. Monzingo*,[135] the Kentucky Court of Appeals faced the recurrent problem of an interstate custody dispute. Elizabeth

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it would not. *See* Silverstein v. Silverstein, 371 A.2d 948, 949-50 (Pa. Super. Ct. 1977).

[128] *See* 273 S.W.2d at 725-26.

[129] *See* KRS § 407.120 (1984); 42 PA. CONS. STAT. ANN. § 6747.

[130] *Cf.* Home Ins. Co. v. Dick, 281 U.S. 397, 409 (1930) (court may not apply a state statute to an agreement made outside the state which would allow a shorter term within which to bring suit than that agreed to by the parties).

[131] 371 A.2d at 949.

[132] *See id.* at 950.

[133] *Id.* at 951-52.

[134] Shaffer v. Heitner, 433 U.S. 186, 201 n.18 (1977) (in a stockholder's derivative suit, due process requires that all assertions of state jurisdiction meet the "minimum contacts" requirements).

[135] No. 83-CA-2560-MR (Ky. Ct. App. June 29, 1984).

Toth was awarded custody of the parties' minor children when she was divorced from Reginald Monzingo in Texas in 1979.[136] Without notice to Monzingo, Toth moved the children to Lexington, Kentucky in December 1982.[137] In February 1983, Monzingo filed a petition for modification of the original Texas custody decree in a Texas court.[138] Some three months later Toth filed a petition to modify the Texas decree in Fayette County, Kentucky circuit court.[139] Monzingo moved to dismiss the Kentucky proceeding on the ground that Kentucky lacked personal jurisdiction over him.[140] Additionally, he asserted that Kentucky statutes did not permit adjudication of the modification when another proceeding was already pending before the Texas court.[141] The Fayette circuit court agreed with Monzingo and dismissed Toth's petition for modification.

On appeal the Kentucky Court of Appeals rejected arguments by both parties because it recognized that the case was controlled by the Parental Kidnapping Prevention Act of 1980 (PKPA).[142] Judge Clayton's carefully reasoned opinion first noted that the PKPA forbids modification of prior custody decrees except upon

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[136] *Id.* slip op. at 1.

[137] *Id.* slip op. at 2.

[138] *Id.*

[139] *Id.* slip op. at 2-3.

[140] The Kentucky version of the Uniform Child Custody Jurisdiction Act [hereinafter cited as UCCJA] purports to bind all parties who have been notified under the act's provisions. *See* KRS § 403.510 (1984). That section of the act may be unconstitutional when applied to a parent in Monzingo's position. In May v. Anderson, 345 U.S. 528 (1953), the Supreme Court, in a plurality opinion, ruled that a state could not constitutionally deprive a parent, over whom it had no personal jurisdiction, of custody. In a concurring opinion, Mr. Justice Frankfurter opined that due process would not be offended if a state cut off the absent parent's custody rights although nothing in the full faith and credit clause required a second forum to treat that determination as conclusive. *See id.* at 535 (Frankfurter, J., concurring). That concurrence is in part the basis for UCCJA § 12, 9 U.L.A. 149 Commissioner's comments (1979). The facts of *May* are, however, different from those in the *Toth* litigation. The mother in *May* had maintained a marital domicile in Wisconsin prior to her departure for Ohio. Monzingo, on the other hand, had no prior connection with the state of Kentucky. Whether Kentucky litigation could have constitutionally determined his custody rights in his absence is unsettled. *Cf.* Schaeffer v. Heitner, 433 U.S. at 208 n.30.

[141] *See* KRS § 403.450 (1984).

[142] No. 83-CA-2560-MR, slip op. at 5. The Parental Prevention of Kidnapping Act is codified at 28 U.S.C. § 1738A.

terms dictated by the act.[143] Although the requirements of the PKPA are similar to those of the Uniform Child Custody Jurisdiction Act (UCCJA), they differ in important respects.[144] Unlike the UCCJA, the PKPA adopts the notion of continuing jurisdiction.[145] Thus, a state may not modify a prior custody determination that was rendered consistent with the PKPA if the rendering state (in this case, Texas) both recognizes the concept of continuing jurisdiction and remains the residence of one of the contestants.[146] Further, at the time that Monzingo filed his motion to modify the original Texas decree, the children had been absent from the state of Texas for less than six months.[147] Under the provisions of the PKPA, Texas continued to be the children's home state[148] and no other state had jurisdiction to modify a custody decree rendered by Texas courts.[149]

Despite the inconvenience to Toth, the custodial parent, the result of the litigation is fair. Since a Texas court rendered the custody decree, it is preferable to have a Texas court determine whether the decree allowed Toth to choose the children's residence without reference to Monzingo's visitation rights.[150] At best a Kentucky court would have to speculate over the meaning of unfamiliar Texas cases in order to reach the meaning of the Texas decree. The PKPA's recognition of continuing jurisdiction and its refusal to permit the assumption of "significant connec-

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[143] *See* 28 U.S.C. § 1738A(a).

[144] *See generally* Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981) (analysis and comparison of UCCJA and PKPA).

[145] *See* U.S.C. § 1738A(d).

[146] *See id.* The Texas court erroneously purported to continue jurisdiction in the case. *See* Pettiette v. Morrow, 661 S.W.2d 241, 242-43 (Tex. Civ. App. 1983) (continuing jurisdiction lapses after Texas is no longer the home state).

[147] No. 83-CA-2560-MR, slip op. at 8.

[148] *See* 28 U.S.C. § 1738A(b)(4).

[149] *See* 28 U.S.C. § 1738A(a), (c)(2).

[150] Toth had been appointed "managing conservator" of the children under the Texas Family Code. *See* TEX. FAM. CODE ANN. § 14.02 (Vernon 1983). Monzingo, however, had significant rights under Texas law. *See id.* at § 14.03 (1983). To suggest that Toth's custodial rights removed the case from the purview of the federal statute, as did the dissenting justice, is to ignore the act's broad purpose as well as the significance of those rights. *See* Peterson v. Peterson, 464 A.2d 202, 204 (Me. 1983) (one purpose of Act is to prevent jurisdictional conflict); Belosky v. Belosky, 640 P.2d 471, 474 (N.M. 1982) (Act intended to prevent both interstate abductions and forum shopping).

tion" jurisdiction by a new home state represent an attempt to eliminate multiple state concurrent jurisdiction and the problem of conflicting orders resulting from such jurisdiction.[151] Congress chose to place jurisdiction in the original forum for as long as it remained the home state or for as long as that state cared to assume continuing jurisdiction and remained the residence of one litigant.[152] While this choice may burden mobile parents like Toth, that inconvenience will generally be outweighed by the benefits of a single forum rule.

B. Standards for Custody Adjudication

The acknowledged standard for child custody determinations in Kentucky is the "best interest of the child."[153] Although determination of that interest ordinarily permits consideration of a wide range of factors, some limits are placed upon the courts.[154] Some of those limitations derive from the custody statute itself.[155] For example, the custody statute requires that both parents be given equal consideration.[156] Parental gender, therefore, may not be the basis for a presumption that a parent should be given custody of the child.[157]

In its last term, the United States Supreme Court in *Palmore v. Sidoti*[158] ruled that the race of a stepparent could not provide

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[151] *See* Foster, *supra* note 144, at 331-35.

[152] Flannery v. Stephenson, 416 So. 2d 1034-38 (Ala. Civ. App. 1982) (the state's 'retention of continuing jurisdiction to modify a child custody order precludes sister state from making such modification); Walsh v. Walsh, 458 N.Y.S.2d 835, 838 (N.Y. Sup. Ct. 1983) (the forum of original jurisdiction may continue its jurisdiction over a party who remains a resident in that state); Bahr v. Bahr, 442 N.Y.S.2d 687, 688-89 (N.Y. Fam. Ct. 1981) (the court must defer to the decree of a sister state who has continuing jurisdiction over the matter). Nothing in the federal act requires states to adopt the notion of continuing jurisdiction. In Kentucky, the courts have declined to assert jurisdicton when the children have been absent for a significant period of time. *See, e.g.,* Honigsberg v. Goad, 550 S.W.2d 471, 472 (Ky. 1976).

[153] *See* KRS § 403.270 (1984).

[154] *See id.*

[155] *See, e.g., id.* ("The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.").

[156] *See id.*

[157] *See* Jones v. Jones, 477 S.W.2d 43, 45 (Ky. Ct. App. 1979) (parent best suited to raise child should receive custody regardless of sex).

[158] 10 FAM. L. REP. (BNA) 2009 (U.S. Apr. 25, 1984) (No. 82-1734).

a basis for a custody determination that a child's best interest lay in having his or her custody awarded to the other parent.[159] In *Powell v. Powell*,[160] a case decided while *Palmore* was under consideration, the Kentucky Supreme Court held that a trial court's factual findings that the custodial mother was involved with a minority ethnic group did not render its opinion defective.[161] In *Powell*, the court refused to assume that trial court findings that the mother's new husband and many of her friends were Puerto Rican were the basis for the trial court's decision.[162]

Powell provided the court with a difficult case because of allegations of sexual misconduct on the part of the custodial mother.[163] Under current Kentucky case law, such behavior may be considered if it is "likely to adversely affect the child."[164] Although *Palmore* is distinguishable because racial factors were found to be a determinative factor in that case,[165] the *Powell* trial court's reference to the ethnic background of the mother's companions is disturbing. If *Powell* does not violate the letter of the equal protection clause, it violates its spirit. The Court's opinion in *Palmore* also noted that the equal protection clause barred "consideration" of the "potential injury" to a child because of "racial bias."[166] It is unfortunate that the Kentucky Supreme Court chose to downgrade the invidious infection of racial bias. Even the potential for such bias in a state court should be carefully guarded against.

IV. ADOPTION

In two cases before the Kentucky courts this survey period, foster parents have sought to bypass adoption placement regu-

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[159] *See id.* at 2010.

[160] 665 S.W.2d 312, 313 (Ky. 1984).

[161] *See id.* at 314.

[162] *See id.*

[163] *See id.* at 313.

[164] *See* Krug v. Krug, 647 S.W.2d 790, 793 (Ky. 1983) (standard for admission of evidence of sexual misconduct is the likelihood that the behavior will adversely affect the child); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (proof of future harm allowed in determining the best interest of child).

[165] *See* 10 FAM. L. REP. (BNA) at 2010.

[166] *See id.*

lations in order to retain custody of children placed with them by the Cabinet for Human Resources. In *Cabinet for Human Resources v. McKeehan*,[167] the Cabinet assumed custody of a child found to be abused and neglected while in the state of Kentucky.[168] The child had been brought to Kentucky by its mother; its father remained in Michigan, the state in which the parties had lived.[169] Some time after the child had been placed in foster care, the Cabinet and the natural father agreed that the child should be returned to the father in Michigan.[170] The foster parents sought and received injunctive relief from the Whitley Circuit Court, preventing the child's return to its father.[171] On appeal the Kentucky Court of Appeals held that the circuit court lacked jurisdiction to restrain the child's delivery to its father.[172] The foster parents' claim could not stand as an adoption petition since the child had not been placed for adoption.[173] Further, the child was not available for adoption since the father's parental rights had never been terminated.[174]

In another case, *L.S.J. v. E.B.*,[175] the appellate court demonstrated even more dramatically that the ability of foster parents to provide a more advantageous lifestyle for a child does not permit them to avoid the adoption statutes of the state. The child in *L.S.J.* was born while the mother was in jail on felony charges.[176] Consequently the child was placed in foster care. When the Cabinet for Human Resources sought to remove the child from the foster parents' home, the foster parents filed a petition in Morgan Circuit Court to terminate the mother's parental rights.[177] Although the foster parents later conceded that they lacked standing to bring this petition, they insisted that

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[167] 672 S.W.2d 934 (Ky. Ct. App. 1984).
[168] *Id.* at 935.
[169] *Id.*
[170] *Id.* at 935-36.
[171] *Id.* at 936.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] 672 S.W.2d 937 (Ky. Ct. App. 1984).
[176] *Id.* at 937.
[177] *Id.* at 938.

they had a right to bring an adoption petition.[178] During protracted litigation the foster parents continued to claim the child and successfully blocked the natural mother's requests for visitation with the child.[179] The trial court eventually terminated the mother's parental rights. On appeal the court of appeals held that the foster parents had no standing to move for termination of parental rights, that the circuit court's treatment of the petition as a petition for adoption was impermissible because the child had not been placed for adoption, and that the natural mother's counterclaim for interference with the parent-child relationship and alienation of affection should not have been dismissed.[180] Both *McKeehan* and *L.S.J.* indicate the court's strong commitment to statutory adoption procedure and warn against action which attempts to circumvent that procedure.

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[178] *Id.*

[179] The court of appeals distinguished the case from Van Wey v. O'Neal, 656 S.W.2d 731 (Ky. 1983). Unlike the parent in *Van Wey*, L.S.J. had never consented to a voluntary termination or to placement of her child for adoption. 672 S.W.2d at 940.

[180] 672 S.W.2d at 939-40.