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Rethinking Jurisdiction and Notice in Kentucky

BY JOHN R. LEATHERS

INTRODUCTION

When most of the attorneys now practicing in Kentucky were law students, the subject of jurisdiction, much like Caesar's Gaul, was divided into three parts—actions were either in personam, in rem or quasi in rem. The current jurisdictional and notice provisions found in Kentucky statutes and procedural rules also date from that era of tripartite jurisdiction. However, recent United States Supreme Court decisions revising jurisdictional thinking have greatly changed the jurisdictional landscape. Current jurisdictional theories bear as much resemblance to the traditional divisions as modern day France bears to Caesar's Gaul—the outer dimensions are familiar, but internally they are entirely different.

This Article will examine the impact of the recent jurisdictional developments on Kentucky jurisdictional and notice provisions. It is hoped that this examination will alert practitioners to the effect of modern developments on existing law, serve as a guide to avoid pitfalls and be a catalyst for a comprehensive reform of this area. Although it is not within the scope of this Article to treat the jurisdictional theories as comprehensively as in law school, a review of relevant concepts and cases will be undertaken to enable a better understanding of recent case law developments.

I. RETHINKING JURISDICTION

A. Jurisdiction Today

The focal point of any jurisdictional problem is the nonresident of the forum, whether that nonresident be a natural person or a corporate entity. Nonresidents rather than residents are the focus because states were allowed to exercise in personam jurisdiction-
tion over their residents even in the days when a forum’s jurisdiction was strictly based on territorialism. States could exercise such jurisdiction over their residents even though the resident might be absent from the forum when the action began. Such jurisdiction over residents was approved in *Pennoyer v. Neff*¹ and jurisdiction over an absent resident was upheld by the United States Supreme Court in *Milliken v. Meyer*.² For a long period of our history, it was difficult to develop a theory of forum jurisdiction over nonresidents which would accommodate our traditional perceptions of the sovereignty of the nonresident’s home state as well as the forum state. Allowing a forum to assert jurisdiction over a sister state’s resident arguably intruded on the sister state’s sovereignty; yet, refusing jurisdiction over claims related to the forum similarly intrudes on the forum’s sovereignty. Given these conflicting claims of sovereignty, and the status of the conflicting states as equals in a union, it is not at all surprising that the difficulties have found their solution in federal law, primarily in the form of Supreme Court cases.

The starting place in analyzing the current status of jurisdiction over nonresidents must always be the centerpiece of the topic—the case of *Pennoyer v. Neff*.³ For those who may have feared for the vitality of the old casebook favorite, tales of its demise, like those of the death of Mark Twain, have been greatly exaggerated. *Pennoyer* is as valid today for the point on which it is seminal as it was more than a hundred years ago. That seminal point was its conclusion that the due process clause of the federal constitution⁴ applies to state court assertions of jurisdiction; thus, a state’s exercise of jurisdiction in excess of the permissible limits results in a judgment which is void in the rendering state.⁵

Prior to *Pennoyer*, the Supreme Court’s position had been that state judgments rendered in excess of permissible jurisdictional limits were not entitled to enforcement in sister states under the full faith and credit clause.⁶ In holding to that effect as early as

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¹ 95 U.S. 714 (1878).
² 311 U.S. 457 (1940).
³ 95 U.S. at 714.
⁴ U.S. Const. amend. XIV.
⁵ 95 U.S. at 733.
⁶ U.S. Const. art. IV, § 1.
In 1850, the Supreme Court stated that such refusal to enforce judgments rendered without jurisdiction had been a well-settled matter under international law when the Constitution was adopted.\(^7\) Adopting its reasoning from the full faith and credit cases decided after the adoption of the fourteenth amendment, the Court in *Pennoyer* held that such judgments, in addition to not being enforceable in sister states, violated the due process clause and were void in the rendering state.

*Pennoyer’s* facts clearly illustrate the type of connection with the nonresident required for a proper assertion of jurisdiction: the defendant had to 1) be a resident; 2) be personally served within the state; or 3) voluntarily appear.\(^8\) While our notions of the contacts necessary for assertion of jurisdiction over nonresidents have changed greatly since *Pennoyer*,\(^9\) the basic premise of *Pennoyer* is still good law—an attempt by a state to adjudicate in excess of permissible standards is violative of due process.\(^10\) As a result, a state’s power to adjudicate is federally determined under the due process clause. Any state not wanting to have its judgments subject to attack as violative of due process obviously must conform its jurisdictional assertions to federally-determined standards.

The traditional tripartite jurisdictional philosophy divided adjudications into three classes. An *in personam* adjudication created an obligation personal to the defendant; such obligation followed the defendant and was enforceable in sister states under the full faith and credit clause.\(^11\) Adjudications *in rem* and *quasi in rem* were similar in that both bound the interests of persons in property. The nature of the property involved was not important; both adjudications could affect real or intangible property. The distinc-

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\(^7\) D’Arcy v. Ketchum, 52 U.S. 165 (1850).

\(^8\) 95 U.S. at 719-20.

\(^9\) Permissible state jurisdictional power has steadily expanded through the years in response to changes in the basic nature of our society. For a discussion of this expansion, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241.

\(^10\) It is quite significant in this regard that the two most recent Supreme Court jurisdictional cases involving nonresidents have struck state assertions of jurisdiction as violative of due process. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978). In so doing, the Court is showing a preference for the pro-defendant line of reasoning which originated in *Hanson v. Denckla*, 357 U.S. 235 (1968).

\(^11\) *Restatement of Judgments* § 1 (1942).
tion between the two was in the breadth of the binding effect of
the judgment. An action in rem was said to bind the interests of
the entire world in the thing; an action quasi in rem was said
to bind the interests of all named parties in the thing.

The tripartite jurisdictional theory offered the Supreme Court
an opportunity to come to philosophical grips with the conflict
between a potential forum and a nonresident's home state. If a
nonresident was not served with process in the forum and did not
voluntarily appear, a forum could nevertheless adjudicate his or
her interest in property within the forum either vis a vis the world
(in an in rem action) or vis a vis other parties (in a quasi in rem
action). This power derived from the forum's inherent authority
over property within its territory and did not intrude on the
sovereignty of the nonresident's home state since the nonresident's
interests were affected only "indirectly."

After Pennoyer, the fiction that such assertions of jurisdiction
are permissible because they only affect the nonresident indirect-
ly became ripe for repudiation. Generations of law students learned
from the famous facts of Harris v. Balk that a defendant's loss
of money is no more palatable when taken by garnishment from
his debtor than from the defendant directly—either way Balk was
out some $300. Whatever may have been the historical reasons
for the theory, courts began to realize that "an adverse judgment
in rem directly affects the property owner by divesting him of his
rights in the property before the court."

After a long history, the fiction that an in rem judgment only
affected the defendant indirectly has now been overturned because
"[t]he fiction that an assertion of jurisdiction over property is any-
thing but an assertion of jurisdiction over the owner of the prop-
erty supports an ancient form without substantial modern justifi-
cation." In the 1977 landmark decision of Shaffer v. Heitner, the
Supreme Court laid to rest the tripartite jurisdictional theory.

12 Id. § 2.
13 Id. § 3.
17 Id. at 212.
18 Id. at 186.
The Court held that all assertions of jurisdiction, both in personam and in rem, must be judged by the due process standards previously developed in such in personam cases as International Shoe Co. v. Washington.

The demise of the "presence" oriented jurisdictional system cannot be said to have come as a surprise. One can find concessions even during the heyday of territorialism that the direct-indirect distinction was simply a fiction. Further, for more than thirty years the Court has required the standard of notice previously applicable to in personam cases to be followed in proceedings in rem as well. Shaffer brought into a parallel position the constitutional requirements of jurisdiction and of notice.

The debate over the meaning and effects of Shaffer began swiftly and still continues. However, one thing is clear: in all cases, jurisdiction will be measured by a unified standard, with such standard coming from the interpretations of jurisdictional due process found in previous in personam cases. Additionally, in rejecting the direct-indirect dichotomy, Shaffer apparently recognizes that all judgments are in personam because all judgments affect persons: either the person or a property interest.

This recognition of the personal nature of all judgments does not necessarily make a significant alteration of previous state assertions of power through in rem jurisdiction. In Shaffer, the Court was careful to note that prior assertions of in rem jurisdiction fell into two categories: Type I, in which the asserted claim arose from

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19 The Court included the concepts of both in rem and quasi in rem in the terminology "in rem." Id. at 199 n.17. This Article will similarly incorporate both concepts within the single term.
20 Id. at 212.
21 326 U.S. 310 (1945).
22 "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected." Tyler v. Judges of the Court of Registration, 55 N.E. 812, 814, appeal dismissed, 179 U.S. 405 (1900).
the thing which was the jurisdictional focus; and Type II, in which the asserted claim was unrelated to the res which was the jurisdictional focus.\textsuperscript{25} As to Type I, the Court noted that existing state assertions would not be restricted since the presence in the forum state of the property from which the claim arose would normally satisfy the minimum contacts standard of \textit{International Shoe}.\textsuperscript{26} The more significant impact of \textit{Shaffer} on existing jurisdictional schemes is to disallow jurisdiction based on the presence of property when the claim asserted is unrelated to the property.\textsuperscript{27} Although most jurisdictional claims based on the presence of property will be constitutionally permissible, \textit{Shaffer} suggests that assertions like that in \textit{Harris v. Balk}\textsuperscript{28} are no longer constitutional. This conclusion is bolstered by the decision of the Court in \textit{Rush v. Savchuk}.\textsuperscript{29}

Although \textit{Shaffer} apparently leaves unchanged the outer limits of state adjudicatory authority, the effect of such a unified jurisdictional theory on a particular state is more difficult to assess. Due process simply serves as an outer limit on state jurisdictional power; the breadth of the permissible jurisdiction utilized by any particular state depends on the state legislature's judgment of how much jurisdictional potential ought to be implemented.\textsuperscript{30} Although the typical means of implementing jurisdictional power is through a long-arm statute,\textsuperscript{31} there is no reason why legislative authority must be completely contained in one statute. Any statute which authorizes the assertion of jurisdiction over nonresidents would operate, in effect, as a long-arm provision as to the type

\textsuperscript{25} \textit{Shaffer v. Heitner}, 433 U.S. at 208. For further discussion of Type I and Type II categories of \textit{in rem} jurisdiction, see \textit{Leathers, Substantive Due Process Control of Quasi in Rem Jurisdiction, supra} note 24.

\textsuperscript{26} 433 U.S. at 207-08.

\textsuperscript{27} \textit{Id.} at 208-09.

\textsuperscript{28} 198 U.S. at 215. No evidence could be found that such usages were ever in vogue in Kentucky, although Pendleton v. Pendleton, 112 S.W. 674 (Ky. 1908), is similar.

\textsuperscript{29} 444 U.S. 320, 329 (1980). Kentucky was not one of the few jurisdictions to use \textit{in rem} jurisdiction over nonresident tort-feasors through attachment of their liability insurance policies.


\textsuperscript{31} Kentucky has had such a statute since 1968. \textit{See KY. REV. STAT. § 454.210} (Bobbs-Merrill Cum. Supp. 1982) [hereinafter cited as KRS].
of claim the statute authorizes. Thus, it seems that pre-Shaffer statutory authority, though originally based on the tripartite jurisdictional theory, may now serve as statutory authority to implement a unified jurisdictional theory. Although the continued validity of a state's jurisdictional statutes, such as Kentucky's, can be generally justified, a shift in the underlying jurisdictional theory may require some adjustments of the statutory particulars to make the entire scheme fit together consistently. In any attempt to devise a unified jurisdictional scheme for Kentucky, one important goal is to minimize the number of changes. To the best of this author's knowledge, there is no comprehensive view of Kentucky jurisdiction available. Hence, the following discussion illustrates where we have been in addition to where we are and where we need to make changes.

B. Jurisdiction in Kentucky

1. Kentucky's Long-Arm Statute

The primary statute authorizing the Kentucky judiciary to exercise jurisdiction over nonresidents is the Kentucky long-arm statute, Kentucky Revised Statutes (KRS) section 454.210. The statute is adequate to give the state jurisdiction over most claims which are sufficiently related to the state to satisfy due process. It is derived almost verbatim from the model act, which was designed to implement broad state adjudicatory authority, and has been interpreted broadly by the Kentucky courts. Since the statute

32 The Kentucky long-arm statute is discussed in Phillips, The Kentucky Long Arm Statute: How 'Long' Is It?, 4 N. Ky. L. Rev. 65 (1977). Additional observations on the statute will be made in this Article which will expand treatment of jurisdiction over nonresidents into other jurisdictional areas not previously covered in Kentucky.


34 For cases in which broad coverage has been extended, see Poyner v. Erma Werke Gmbh, 618 F.2d 1186 (6th Cir.), cert. denied, 449 U.S. 841 (1980); Volvo of Am. v. Wells, 551 S.W.2d 826 (Ky. Ct. App. 1977). This is not to say that the statute covers every case arguably connected with Kentucky. For a case finding no jurisdiction under the statute,
has been discussed at length elsewhere, only some observations about two particular inadequacies in the statute are discussed here.

One restriction placed upon the jurisdiction of Kentucky courts by the long-arm statute is that it only creates jurisdiction over a "claim arising from the person's" commission of the various acts specified in the statute. Thus, if a nonresident conducts a sufficient amount of business in Kentucky to activate the transacting business provision of the act, Kentucky courts have jurisdiction only if the claim asserted arose from the business done in Kentucky. The fact that the claim arises from the contact is significant but it is by no means dispositive of the due process sufficiency of the contact. The United States Supreme Court has approved, in at least one case, jurisdiction over a nonresident when the claim did not arise from the nonresident's contact with the forum.

However, this limitation on Kentucky jurisdiction may in fact be a strength. Preventing Kentucky courts from exercising jurisdiction to the full extent allowed by due process may be a wise policy choice. Our trial courts are already overburdened. When one looks at priorities in allocating judicial resources, it seems sensible to give court attention to those claims which arise from the particular contact with Kentucky. This prevents Kentucky courts from being burdened with claims which arise from dealings elsewhere. The latter suits are best brought in the state where they arise. The limitation unfortunately does bar some claims by Kentucky plaintiffs, but they can proceed elsewhere. Also, such cases are probably insignificant when compared with the number of claims which could be brought here by nonresident plaintiffs in the

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36 Id. § 454.210(2)(a)(1).

37 See Perkins v. Benguet Consol. Mining Co., 342 U.S. at 437. The defendant in Benguet Mining was a corporation which held gold and silver mines in the Phillipines. Its operations there were halted when the Japanese occupied the Phillipines during World War II. The president of Benguet Mining returned to his home in Ohio and carried on some of the routine business of the corporation. While there, the corporation was sued in an Ohio court by a stockholder seeking payment of dividends and damages. The Supreme Court recognized that the cause of action did not arise from the corporate activities conducted in Ohio. See id. at 438. Nonetheless, the Court held that Ohio's exercise of jurisdiction over the corporation did not violate the due process clause. Id. at 448.
absence of such a restriction. On balance, then, the restriction is not constitutionally required but is a sound policy choice.

The more significant limitation present in the Kentucky long-arm statute is the restriction that, in claims arising from interests in property, the relationship between the nonresident and the property must have been voluntarily created by the nonresident and the nonresident must have knowingly performed or failed to perform the act on which jurisdiction is predicated. The model act does not contain the qualifying provisions about knowing creation and knowing performance. Since this provision offers the state an opportunity to assert in personam jurisdiction in cases which might otherwise have fallen within in rem jurisdiction, this restriction seems especially unfortunate after the developments brought about by Shaffer v. Heitner. Taken literally, the statute will not support jurisdiction over a claim against a property owner who inherited property in Kentucky, since inheritance is not a voluntary creation of the relationship. This anomaly could possibly be avoided by saying that a failure to renounce the inheritance amounts to a voluntary creation. That argument has an existential quality to it but as a legal argument will not go far. Rather than have courts resort to such sophistry, and in order to correct an unfortunate gap in the statute, the statute should be amended so that a court has jurisdiction over a claim arising from a person's "having an interest in, using, or possessing real property in this Commonwealth." All language in the statute after that phrase should be deleted.

2. Other Statutory Grants of Jurisdiction Over Nonresidents

Although the major source of nonresident jurisdiction in Kentucky is the long-arm statute, Kentucky has many other statutory provisions which allow adjudication of claims involving nonresident interested parties. After Shaffer, these statutes function in

39 See UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(5). 13 U.L.A. at 466 (simply allows jurisdiction as to a claim arising from a nonresident's "[having an interest in, using, or possessing real property in this state.")
effect as specialized long-arm statutes for particular types of claims. In pre-
Shaffer
days, these assertions of jurisdiction were based on the relationship which the state had with property having its situs in the state. During that era, the United States Supreme Court indicated that states possessed such adjudicatory authority based on the situs of either real\textsuperscript{41} or intangible\textsuperscript{42} property. \textit{Shaffer} should not affect these various statutory provisions, since invariably the sort of claim allowed by the statute does arise from the property itself and such a claim plus a presence connection should be sufficient to satisfy the minimum contacts test. This is not to say, however, that \textit{Shaffer} does not pose other problems for these statutory schemes, but that is a point best discussed after a survey of the existing jurisdictional statutes.

a. \textit{Divorce Jurisdiction}

Kentucky courts are currently authorized to exercise divorce jurisdiction if "[t]he court finds that one of the parties, at the time the action was commenced, resided in this state . . . and that the residence . . . has been maintained for 180 days next preceding the filing of the petition."\textsuperscript{43} This statutory provision affects nonresidents in that it allows "\textit{ex parte}" divorces, in which the petitioner is a resident of Kentucky and the respondent a nonresident. The United States Supreme Court has upheld such \textit{ex parte} proceedings as constitutionally valid.\textsuperscript{44} Kentucky has upheld such jurisdiction under the Kentucky statute based solely on the residence of the petitioner.\textsuperscript{45} The traditional explanation of the jurisdictional basis in Kentucky was that the procedure was \textit{in rem}.\textsuperscript{46} The decision in \textit{Shaffer} should not affect the ability of the state to grant such divorces, so long as the scope of the adjudication is limited solely to dissolution of the marriage. Determina-

\begin{itemize}
\item \textsuperscript{41} Hamilton v. Brown, 161 U.S. 256 (1896); Arndt v. Griggs, 134 U.S. 316 (1890);
Freeman v. Alderson, 119 U.S. 185 (1886).
\item \textsuperscript{42} Green v. Van Buskirk, 74 U.S. 139 (1868).
\item \textsuperscript{43} KRS § 403.140(1)(a) (Cum. Supp. 1982).
\item \textsuperscript{44} Williams v. North Carolina, 317 U.S. 287 (1942).
\item \textsuperscript{45} Kenmont Coal Co. v. Fisher, 259 S.W.2d 480 (Ky. 1953).
\item \textsuperscript{46} Gayle v. Gayle, 192 S.W.2d 821 (Ky. 1946); Downs v. Downs' Adm'r, 96 S.W. 536 (Ky. 1906).
\end{itemize}
tions of such matters as property division, child custody, support and maintenance still would require personal jurisdiction over the respondent.47 However, *Shaffer* does require a recognition that the divorce decree, although limited, does affect the absent spouse personally and thus is an *in personam* judgment against that absent spouse. "[W]hen the court assumes to pronounce the decree destroying the married status of one of the consorts, it must necessarily destroy that status as to the other . . . ."48

Divorce illustrates the classification of jurisdiction after *Shaffer*. Such an adjudication is *personal*, in that it has a direct effect on the nonresident, but is *limited* in scope by the fact that Kentucky is using *specific jurisdiction*—a species of jurisdiction related to the specific nature of the claim asserted.49 This is the form of jurisdiction authorized by Kentucky’s long-arm statute and by specialized statutes such as the divorce statute. The only place in which Kentucky exercises *unlimited general jurisdiction* is over Kentucky residents. The limited nature of the decree should not, however, make us lose sight of the basic facts that 1) such jurisdiction survives *Shaffer*, but 2) the decree operates as a personal judgment against the nonresident spouse.

**b. Eminent Domain**

Procedures for the condemnation of property for public use are created in Kentucky today by the Eminent Domain Act,50 with compensation for such taking required by Kentucky’s constitution.51 The statutes vest the authority for such proceedings in the “circuit court of the county in which . . . the property sought to be condemned is located . . . .”52 While this localizing provision is in part a venue limitation, it also implies that the state’s eminent domain power extends only over property subject to its

47 See Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948). These decisions would prevent the cutting off of alimony rights upheld in Kentucky in Hughes v. Hughes, 278 S.W. 121 (Ky. 1925).

48 278 S.W. at 123.

49 For a discussion of these jurisdictional concepts, see VonMehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).


51 Ky. Const. § 242.

territorial authority. Obviously, an eminent domain proceeding must bind even nonresidents who have some interest in the property, and the statutes require the joinder of nonresident interested parties.\textsuperscript{53} Even the earliest Kentucky case law in the area indicates that nonresidents are bound by such proceedings.\textsuperscript{54} By no stretch of the imagination should \textit{Shaffer} destroy the power of the state to condemn property for public use; such power by necessity must include the ability to bind the interests of nonresident interested parties. The effect which \textit{Shaffer} should have on the proceedings is to require courts to recognize that the resulting judgment foreclosing the property interest of the nonresident is \textit{personal}. As in other such cases, the scope of the judgment is \textit{limited}, but is nonetheless personal.

\textbf{c. Escheat}

Like most states, Kentucky has statutory procedures by which the state can succeed to ownership of property which has been lost or abandoned. Escheat is authorized as to such property "having a situs in this state."\textsuperscript{55} In Kentucky, the escheat of property is not done by judicial proceeding, but rather by administrative act of the Department of Revenue.\textsuperscript{56} Following such action, any person claiming an interest in the escheated property has five years in which to begin an action questioning the escheat.\textsuperscript{57} If the contestant is not satisfied with the administrative disposition of the claim, he or she may question the decision in Franklin Circuit Court.\textsuperscript{58} In that proceeding, "all . . . persons required by law to be made parties in actions in rem or quasi in rem" must be joined.\textsuperscript{59} This joinder directive reveals that the traditional juris-

\begin{footnotes}
\item[53] KRS § 416.590 (Cum. Supp. 1982) provides in part that "[t]he clerk shall make such orders as to nonresidents and persons under disability as are required by the statutes and Rules of Civil Procedure in actions against them in circuit courts."
\item[54] Cowan v. Glover, 10 Ky. (3 A.K. Marsh.) 356 (1821), so holds as to a nonresident of the county where condemnation is sought. For cases with similar effect concerning all nonresidents, both of the county and of Kentucky, see Louisville & N. Ry. v. Powers, 105 S.W.2d 591 (Ky. 1937); Tracey v. Elizabethtown, L. & B.S.R.R., 80 Ky. 259 (1882).
\item[55] KRS § 393.020 (1972).
\item[56] Id. § 393.110 (Cum. Supp. 1982).
\item[57] Id. § 393.140(1) (1972).
\item[58] Id. § 393.140.
\item[59] Id.
\end{footnotes}
dictional basis was in rem, based on the situs of the property being within the state's territorial jurisdiction.

In a leading United States Supreme Court decision, both the in rem basis of jurisdiction and the administrative procedure for implementing the Kentucky law were upheld as constitutionally valid. The jurisdictional claim arises from feudal tenures in land, and is "an indisputable . . . right in the Commonwealth" based "upon the right and power of the government to possess property within its jurisdiction for which there seems to be no owner." This power is present both as to personalty and realty having a situs in Kentucky. Again, Shaffer does not preclude jurisdiction in such cases, although the judgment which results is limited to the value of the property escheated. However, such adjudication is personal but limited since it is an adjudication which affects the interest of the nonresident in the escheated property.

d. Probate Proceedings

Probate proceedings in Kentucky are jurisdictionally assigned to the district court of the county of the testator's residence. In the event the testator had no Kentucky residence, the appropriate district court is in the county in which the testator left land or, should there be no land, where the testator died or left a debt or demand as part of the estate. In such cases, the propounder of the will may have interested parties summoned to the proceeding, or the court may order interested parties summoned. In either instance the statute contemplates an ability to summon non-

61 For an excellent account of the history of the practice, see Commonwealth v. Chicago, St. L. & N.O. R.R., 99 S.W. 596 (Ky. 1907).
62 Commonwealth v. Blanton's Ex'rs, 41 Ky. (2 B. Mon.) 393, 400 (1842).
64 Commonwealth v. Thomas' Adm'r, 131 S.W. 797, 800 (Ky. 1910).
66 Id.
67 Id. § 394.170.
68 Id. § 394.180 (1972).
resident interested parties. The statutes even authorize the proceeding in district court to go forward without the summoning of any interested party, a procedure which has been upheld as valid.

Any person aggrieved by a probate decision of the district court has two years after probate to challenge that decision in circuit court. In such a proceeding in the circuit court, the statute directs the joinder of "all necessary parties." This clause has been interpreted to compel joinder of those persons in whose favor probate concluded, all devisees under the will and any other party necessary "to settle finally and conclusively, all litigation as to a contested will." Such adjudication in circuit court is final and preclusive, except for appeal, against those who were parties. Parties who were only constructively served or who were interested but not joined have a three-year grace period in which to seek modification of the circuit court judgment to the extent necessary to relieve them from the effects of such judgment. There is some authority that the probate of a will in the wrong county is void and thus may be questioned at any time, notwithstanding these time limits. However, a will probated in the correct county will finally result in a judgment which is fully dispositive of the issues and can only be challenged within these time periods.

Following the time periods discussed, the probate proceeding has the effect of binding all interested persons. Thus, nonresidents may be bound by probate proceedings after the expiration of the three-year grace period, even though they had only constructive

60 Id. § 394.190 (Cum. Supp. 1982) provides for service by warning order upon such persons.
70 Id. § 394.220.
71 See Crain v. Crain, 104 S.W.2d 992, 994 (Ky. 1937).
73 Id. § 394.260.
74 Security Trust Co. v. Swope, 118 S.W.2d 200, 203 (Ky. 1938).
75 Vanceleave v. Beam, 32 Ky. (2 Dana) 155, 155 (1834).
76 Rogers v. Thomas, 40 Ky. (1 B. Mon.) 390, 398 (1841).
78 Id. § 394.280(1) (1972).
79 See § 394.280(2).
80 See Miller v. Swan, 14 S.W. 964 (Ky. 1890).
service.\textsuperscript{81} \textit{Shaffer} does not impair the ability of the state to provide a proceeding which will finally wind up the decedent's affairs; because the jurisdiction of the court is based on either the residence of the testator or the situs of the testator's property, these are sufficient connections to bind the nonresidents \textit{personally} to the limited extent of the property involved in the probate. Again, however, it is significant to note that the judgment binding the nonresident in regard to this property is one which does affect his personal interests.

e. \textit{Quiet Title Actions}

Kentucky by statute authorizes any person claiming legal title to land to seek a judicial decision in the county where the land is located.\textsuperscript{82} Although this quiet title action is available only to a person in possession of the land,\textsuperscript{83} the defendant's failure to assert a lack of possession by the plaintiff waives this requirement.\textsuperscript{84} For persons not in possession, an action in ejectment is the proper way to assert their title.\textsuperscript{85} The traditional justification for the state's jurisdiction in such cases was its \textit{in rem} powers based on the presence of the land.\textsuperscript{86} The United States Supreme Court has always showed great deference to the need for a state to have exclusive power over land located within the state\textsuperscript{87} and has directly affirmed the power of the state to quiet title to real property within its borders.\textsuperscript{88} This jurisdiction over land within a state includes the ability to bind nonresidents by such determinations because

\[\text{[If a state has no power to bring a non-resident into its courts for [such ] purposes by publication, it is impotent to perfect the}\]

\begin{itemize}
\item \textsuperscript{81} Miller v. Hill, 168 S.W.2d 769 (Ky. 1943).
\item \textsuperscript{82} KRS § 411.120 (1972).
\item \textsuperscript{83} This requirement is consistent not only with the plain statutory language but also with more than two dozen cases beginning with Harris v. Smith, 32 Ky. (2 Dana) 10 (1834) and continuing through Noland v. Wise, 259 S.W.2d 46 (Ky. 1953).
\item \textsuperscript{84} Waiver has been upheld in a dozen cases from Johnson v. Farris, 131 S.W. 183 (Ky. 1910) through Waller v. Parsley, 229 S.W.2d 741 (Ky. 1950).
\item \textsuperscript{85} See Wood v. Corman, 211 S.W.2d 424, 426 (Ky. 1948).
\item \textsuperscript{86} See Myers v. Pedigo, 73 S.W. 734 (Ky. 1903).
\item \textsuperscript{87} See Fall v. Estin, 215 U.S. 1 (1909).
\item \textsuperscript{88} See Hamilton v. Brown, 161 U.S. at 274-75.
\end{itemize}
titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud. 89

In view of the special relationship between a state and the land located within its boundaries, Kentucky has no jurisdiction to quiet title to land located in other states. 90 By the same token, only Kentucky has jurisdiction to quiet title to land located in Kentucky. Because the action was traditionally classified as \textit{in rem}, such adjudications could bind the interests of nonresidents in the property located in Kentucky. Without such power to bind nonresidents, it would not have been possible "to make all adverse claimants defendants," 91 and thus quiet the title.

Nothing in \textit{Shaffer} suggests that its holding will restrict the essential sovereign authority of the state over land within its borders. Indeed, quite apart from the majority's observations concerning claims arising from the thing, 92 concurring opinions by Justice Powell 93 and Justice Stevens 94 indicate that jurisdiction over real property in such cases as quiet title will still be within the states' jurisdictional power. The only change necessitated by \textit{Shaffer} is a recognition that a quiet title judgment affects a nonresident \textit{personally} in that it determines the rights of the nonresident in the land. Although that is the extent of its effect on the nonresident, it nevertheless is personal, as are all judgments after \textit{Shaffer}.

\textbf{f. Trusts}

Kentucky statutorily gives a court personal jurisdiction over the trustee of a trust which has been registered in that court as required by law. 95 In the event the required registration has not taken place, any court in which the trust could have been registered

89 Arndt v. Griggs, 134 U.S. at 320.
91 Kincaid v. McGowan, 4 S.W. 802, 806 (Ky. 1887).
93 See id. at 217 (Powell, J., concurring).
94 See \textit{id.} at 217 (Stevens, J., concurring).
95 See KRS § 386.655 (Cum. Supp. 1982). The circumstances under which a trustee is required to register a trust with the appropriate district or circuit court are spelled out in § 386.655.
has personal jurisdiction over the trustees.\textsuperscript{96} The registration in effect makes Kentucky the situs of the trust, and judicial proceedings concerning the trust are authorized in this state.\textsuperscript{97} Such proceedings can bind all beneficiaries of the trust, whether they are residents or nonresidents of Kentucky, provided proper notice is given.\textsuperscript{98} Historically, such proceedings at the situs have been approved upon the theory that the court's "proceedings are . . . quasi in rem, and the jurisdiction acquired . . . is exclusive."\textsuperscript{99} Thus, jurisdiction has been upheld in a court of the county which is the situs of the trust even though a portion of the trust corpus may consist of realty located in another state.\textsuperscript{100}

Kentucky courts have been cautious when exercising jurisdiction over a trust having its situs elsewhere,\textsuperscript{101} even in the face of a compelling Kentucky interest in exercising such jurisdiction. Historically, the courts also have been careful to restrict their jurisdiction over trusts to only the county of registration,\textsuperscript{102} a position which may have been relaxed by the statutory creation of concurrent jurisdiction rather than exclusive.\textsuperscript{103} The Kentucky Supreme Court has held that a proceeding to determine the interest of a person in a trust is an action in rem,\textsuperscript{104} with such an adjudication being conclusive upon the rights of nonresidents as well as residents.\textsuperscript{105} \textit{Shaffer} should not alter the ability of Kentucky to adjudicate the rights of persons in a trust which has its situs in Kentucky; such power can easily be justified upon a minimum contact analysis of the relationship of nonresidents to the trust. In a more difficult case relating to the situs of a trust, Justice Traynor upheld California's jurisdiction over a nonresident interested party even though the situs of the trust was not in California, on the theory that the trust itself had minimum contacts with Cali-

\textsuperscript{96}Id. § 386.670.
\textsuperscript{97}Id. § 386.675.
\textsuperscript{98}See id. § 386.665(2).
\textsuperscript{99}Princess Lida v. Thompson, 305 U.S. 456, 467 (1939).
\textsuperscript{100}See Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810).
\textsuperscript{101}See Wilder v. United Mine Workers, 346 S.W.2d 27, 29 (Ky. 1961).
\textsuperscript{102}See Cunningham v. Fraize, 2 S.W. 551 (Ky. 1887).
\textsuperscript{103}See KRS § 386.690 (Cum. Supp. 1982).
\textsuperscript{104}Minary v. Minary, 395 S.W.2d 588, 589 (Ky. 1965).
\textsuperscript{105}Id.; Tyler v. Smith, 272 S.W.2d 454, 455 (Ky. 1954).
In the more usual case in Kentucky, no jurisdictional problem is presented by Shaffer. Again, though, it must be recognized that the resulting judgment is personal, although limited in its extent to the value of the res.

g. **Summary**

Current Kentucky statutes present no great difficulty regarding constitutional authority to adjudicate after Shaffer. Kentucky's long-arm statute as it relates to claims arising from real property should be extended. The other statutes authorizing specialized exercises of jurisdiction are not restricted by Shaffer, although some have constitutional difficulties with their notice provisions.

*Shaffer* thus leaves the state with an ability to exercise jurisdiction, but it must be recognized that the resulting judgments are simply limited personal judgments. The state has the constitutional authority to proceed, but such ability is hamstrung by deficiencies in Kentucky law stemming from statutes written for a different jurisdictional era. Our current difficulties come, not from federal requirements, but from our own statutes. These problems must be solved before the state can fully exercise its adjudicatory authority.

C. **Statutory Restraints on Jurisdiction in Kentucky**

Despite the fact that Kentucky is left with much the same potential jurisdiction after Shaffer as it had before, the basic scheme of how that jurisdiction is exercised must come from state law. An adjustment in thinking away from the tripartite jurisdictional scheme in favor of a strictly personal jurisdictional scheme requires no adjustments in the jurisdiction statutes previously discussed. Other statutes and procedural rules, however, will require changes before a unified jurisdictional theory is workable.

KRS section 454.165 forbids Kentucky courts from entering a personal judgment against a defendant who has been served with process constructively, except as allowed under our long-arm statute. What constitutes constructive service may be identified in

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107 KRS § 454.165 (1975).
part from the caption to Kentucky Rule of Civil Procedure (CR) 4.05—"Parties Who May Be Constructively Served." Since this is the procedural rule authorizing service by warning order attorney, it follows that warning order service is constructive service. Warning order is the service used in those actions traditionally characterized as in rem, and has been so used in Kentucky for actions against nonresidents involving divorce, probate, quiet title and trust. Warning order service also should be available to bind the interests of nonresidents in eminent domain cases. Given the administrative scheme for escheats, warning order service seems useless in that area except to join interested nonresidents in a judicial contest of the administrative decision.

If we consider the basic theory of tripartite jurisdiction that judgments in rem did not bind nonresidents personally, the statutory directive of KRS section 454.165 is nothing more than a truism. A directive not to enter personal judgments in such cases was not significant since Kentucky's courts lacked jurisdiction to do so.

In addition to the statutory prohibition against personal judgments in cases involving constructive service, Kentucky courts also are forbidden by CR 4.04(8) to enter a personal judgment against an individual served out of state either in person or by certified mail. This procedural rule, when coupled with the directive of KRS section 454.165, means that the only way in which a personal judgment could be entered against a nonresident would be by service within the physical boundaries of the state, a voluntary appearance by the defendant or by service through the long-arm statute.

This jurisdictional restriction which results from combining KRS section 454.165 and CR 4.04(8) tracks the restrictions of due process and full faith in the prior tripartite jurisdictional philo-

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108 KY. R. CV. P. 4.05 [hereinafter cited as CR].
109 See Bushong v. Bushong, 114 S.W.2d 735 (Ky. 1938).
110 Miller v. Hill, 168 S.W.2d at 772.
111 See Myers v. Pedigo, 72 S.W. at 735.
112 See Minary v. Minary, 395 S.W.2d at 589.
113 CR 4.04(8).
114 CR 4.09.
115 See KRS § 454.165 (1975).
116 See id.
ophy. Because it reaches the then-existing constitutional boundaries, this jurisdictional requirement has been strictly followed by Kentucky courts. Kentucky courts have held that the alimony rights of a wife could not be affected by constructive service in a divorce case, a conclusion mirroring the federal requirement of personal jurisdiction for the adjudication of such rights. By the same token, an absent husband has been held unavailable to a Kentucky court for the awarding of child support except to the extent of property which he had in Kentucky. Similar restrictions of judgments to the value of property in the state have been applied in probate and personal judgments generally. Further, it has been held that in cases of jurisdiction by constructive service, no award of costs could be made against the defendant. In all of these cases, Kentucky was following "the universal rule that a personal judgment cannot be rendered on constructive service alone, which is employed only in proceedings in rem."

After the rejection of the direct-indirect effects dichotomy in Shaffer, courts have jurisdiction to enter only one form of judgment. All judgments are personal in nature, but may be limited in scope. Since all judgments against nonresidents in the areas of ex parte divorce, eminent domain, escheat, probate, quiet title and trusts are personal, it follows that the entry of such judgments is forbidden by KRS section 454.165 and CR 4.04(8). Even though no federal restriction prevents the entry of such judgments, these provisions constitute a bar under state law.

One way to avoid this dilemma is to say that there is only personal jurisdiction for federal constitutional purposes but the tripartite jurisdictional theory remains valid internally in Kentucky. So long as our judgments do not exceed constitutional restraints, there is no reason why such internal classifications are not permissible. The difficulty with such an approach is that we are left with a

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117 Murphy v. Murphy, 464 S.W.2d 231 (Ky. 1971). This would overrule the prior decision in Hughes v. Hughes, 278 S.W. at 121.
118 Vanderbilt v. Vanderbilt, 354 U.S. at 416; Estin v. Estin, 334 U.S. at 541.
119 Pendleton v. Pendleton, 112 S.W. at 674.
120 See Young's Trustee v. Bullen, 43 S.W. 687 (Ky. 1897).
121 See Dean v. Stillwell, 145 S.W.2d 830 (Ky. 1940).
122 Harp v. Stamper, 217 S.W.2d 968, 969 (Ky. 1949).
123 Bond v. Wheeler, 247 S.W. 708, 710 (Ky. 1923).
bifurcated system: in assessing jurisdiction for federal purposes, we must weigh against one test; for state purposes, we apply a different test. Posing even more difficulty is the fact that the internal test we would be left with is badly outdated and destined to become even more so. Such an approach would become increasingly outmoded as jurisdiction, both federal and that of other states, develops along the lines of Shaffer. Such a dual system is contrary to the desire to avoid "the creation of a trap for the unwary lawyer who attempts to practice in both the state and federal courts in Kentucky."\textsuperscript{124} Law schools have already ceased the teaching of \textit{in rem} jurisdiction except insofar as necessary to comprehend Shaffer. For Kentucky to retain the tripartite jurisdictional theory would place our courts in the position of retaining a theory which is vestigial in nature.

The obvious solution to the problem is for Kentucky to reject the tripartite jurisdictional theory, as did the United States Supreme Court in Shaffer. In so doing, all adjudications would thereafter be personal in nature, and the restraints of KRS section 454.165 and CR 4.04(8) would have to be dealt with. The rule can be changed easily since the Kentucky Supreme Court makes its own procedural rules\textsuperscript{125} and can quickly do away with the offensive portion of CR 4.04(8). Changing the restriction of KRS section 454.165 is considerably more difficult, because legislative action is required, and the General Assembly meets only once every two years. In addition, the Legislature has shown little interest in such mundane matters, having more important work always before it.

If the choice was simply between updating its jurisdictional philosophy on the one hand, and losing \textit{ex parte} divorce, eminent domain, escheat, probate, quiet title and trust jurisdiction as to nonresidents until the Legislature might repeal KRS section 454.165 on the other, the course to choose would be clear. The Kentucky Supreme Court is not likely to allow such a jurisdictional gap to occur; if adhering to the old theories is the only way to prevent such an event, the old theory should prevail in order to prevent a great mischief. However, the Court should be able to

\textsuperscript{124} Pearman v. Schlaak, 575 S.W.2d 462, 466 (Ky. 1978) (Reed, J., dissenting).

\textsuperscript{125} See Ky. Const. § 116.
simultaneously update its procedural theory and yet also negate the effect of KRS section 454.165.

First, it must be recalled that KRS section 454.165 is nothing more than a truism relating to the tripartite jurisdictional theory; it did not restrain the courts any more than they were already constitutionally restrained. It follows, therefore, that the Legislature did not intend to forbid the courts to exercise authority up to the level of constitutional validity. Indeed, such a statutory restraint would be the converse of state long-arm statutes directing courts to exercise jurisdiction to the full limits of constitutional authority. Not being intended to bar constitutionally valid adjudications, the statute should not be applied to restrain the courts from exercising jurisdiction under the new jurisdictional theory. Thus, in choosing between the legislative directive to exercise jurisdiction in such cases as divorce, eminent domain, escheat, probate, quiet title and trusts and the legislative restraint on jurisdiction in KRS section 454.165, the Court should find the directive to exercise jurisdiction is controlling.

As an alternative to this statutory construction approach, it can be argued that KRS section 454.165 is an unconstitutional restriction on the Kentucky judiciary. The Kentucky Constitution directs that the circuit courts be vested with jurisdiction of "all justiciable causes not vested in some other court." The General Assembly has similarly directed that the circuit court shall be a "court of general jurisdiction." Purely as a matter of statutory construction, KRS section 454.165 might fall to the later-enacted directive of KRS section 24A.010(1) concerning general jurisdiction. Kentucky's courts have been jealous in protecting the prerogatives of the judiciary, and a legislative directive which so greatly infringes on the judicial power may be considered uncon-

126 See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); R.I. GEN. LAWS § 9-5-33 (1970). Note that if a statute directs such broad jurisdiction, its converse would be a directive not to exercise jurisdiction in excess of constitutional limits, exactly the directive of the Kentucky statute.

127 KY. CONST. § 112(5).

128 KRS § 23A.010(1) (1980).

129 See, e.g., Ex parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980); McCoy v. Western Baptist Hosp., 628 S.W.2d 634 (Ky. Ct. App. 1981); Travis v. Landrum, 607 S.W.2d 124 (Ky. Ct. App. 1980).
stitutional. Such a legislative directive could be fairly said to im-
pede the administration of justice and hence be an unconstitutional
infringement on the judiciary. That could not be said when
the statute was merely declaratory of existing constitutional law.

The better approach in resolving this problem is for Kentucky
courts to avoid KRS section 454.165 as a matter of statutory con-
struction and hope that the General Assembly would confirm that
result. The problem posed by the statute does not necessitate the
sort of foundation-shaking finding of infringement called for in
cases of confrontation among the branches of government. The
provisions of KRS section 454.165 are merely from another era
and hence can be dispatched by a resort to a process of reasoning
which accommodates the best interests of all branches of
government.

If the problems caused by conceptualizing all judgments as
being personal in nature can be solved, Kentucky jurisdictional
law will move into the mainstream of modern authority. However,
a constitutionally valid jurisdictional scheme requires more than
a jurisdictional basis; it must also provide for a constitutionally
valid notice scheme. Any comprehensive overhaul of our law must
address the notice problem as well.

II. Rethinking Notice

A. Constitutional Notice Standards

One idea inherent in the idea of due process is that a defen-
dant must be provided with reasonable notice of the proceeding.
Adjudications in the absence of sufficient notice violate due pro-
cess in the rendering state and are not entitled to full faith and
credit in sister states. In the heyday of tripartite jurisdiction, the
notice standards required in *in personam* cases were not applied
in *in rem* cases, because

> [t]he law assumes that property is always in the possession of its
owner, in person or by agent; and it proceeds upon the theory

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130 See Burton v. Mayer, 118 S.W.2d 547 (Ky. 1938).
131 See generally Leathers, *Civil Procedure*, 71 Ky. L.J. 395 (1982-83) (criticizing the
trend in Kentucky toward assumption of the judiciary of a place as first among equals).
132 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 306; McDonald v.
Mabee, 243 U.S. 90 (1917); *Restatement (Second) of Conflict of Laws* § 25 (1969).
that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.\textsuperscript{133}

The extreme illustration of this distinction during that period was the statement that no notice other than seizure need be given in regard to an \textit{in rem} proceeding.\textsuperscript{134} As to an intangible like a debt, there was some doubt in practice about whether seizure constituted adequate notice. But that approach was upheld in \textit{Harris v. Balk},\textsuperscript{135} although the Court indicated that the debtor in that case might lose the defense of the judgment if he did not notify his creditor that the debt had been garnished by a third party.\textsuperscript{136}

The view that seizure constitutes notice met an insurmountable fact pattern in \textit{Mullane v. Central Bank & Trust Co.}\textsuperscript{137} when the plaintiff was the party entrusted with the care of the res; the trustee's knowledge of the proceeding did not protect the defendant owners, who in that fact pattern were adverse to the custodian. Under those peculiar circumstances, a proceeding with aspects of both \textit{in personam} and \textit{in rem} jurisdiction, the Court held that the notice standards previously applied in \textit{in personam} cases would apply to all actions, regardless of their jurisdictional bases.\textsuperscript{138} Although some doubted its application to cases purely \textit{in rem}, such an application was subsequently confirmed by the Court in an eminent domain action.\textsuperscript{139}

The current constitutional notice standard is derived from \textit{Mullane} and the \textit{in personam} notice cases which preceded it. Defendants must be provided "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."\textsuperscript{140} In arriving at a notice scheme reasonably calculated

\textsuperscript{133} Pennoyer v. Neff, 95 U.S. at 727.
\textsuperscript{134} See Tyler v. Judges of the Court of Registration, 55 N.E. at 813. This opinion was authored by Oliver Holmes before his appointment to the United States Supreme Court.
\textsuperscript{135} 198 U.S. at 215.
\textsuperscript{136} Id. at 227.
\textsuperscript{137} 339 U.S. at 306.
\textsuperscript{138} Id. at 312-13.
\textsuperscript{139} Walker v. City of Hutchinson, 352 U.S. at 115.
\textsuperscript{140} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314.
to actually inform, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."\textsuperscript{141} This requires plaintiffs to proceed as if they really wanted the defendant to receive actual notice of the suit. This may not seem remarkable, but compared with assertions that seizure alone was sufficient\textsuperscript{142} or that adequate notice was given by posting notice on the door of a courthouse in a state in which the defendant did not reside\textsuperscript{143} or by publishing notice instead of mailing it when the whereabouts of the defendant were known,\textsuperscript{144} the doctrine is revolutionary indeed.

The statutory notice scheme requirements are further refined by \textit{Wuchter v. Pizzutti},\textsuperscript{145} in which it was held that the notice scheme must be contained in the law itself, not simply provided by some \textit{ad hoc} procedure.\textsuperscript{146} Although some might argue that the strength of the \textit{Wuchter} requirement is diminished by \textit{National Equipment Rental, Ltd. v. Szukhent},\textsuperscript{147} this requirement has been applied recently to invalidate a portion of the Oklahoma long-arm statute.\textsuperscript{148} Taken at face value, \textit{Wuchter} indicates that any statute not providing on its face for a sufficient notice procedure is unconstitutional. Upon closer inspection, however, what \textit{Wuchter} sought to achieve was a system of notice \textit{required by law}, rather than created by some \textit{ad hoc} adoption on a case by case basis. It seems that such an end is equally accomplished when the notice provisions come from legal sources other than the face of a particular statute. If this assumption is correct, it would not be necessary for every individual jurisdictional statute to have a built-

\begin{thebibliography}{99}
\bibitem{141} Id. at 315.
\bibitem{142} See Pennoyer v. Neff, 95 U.S. at 720.
\bibitem{143} See Harris v. Balk, 198 U.S. at 216.
\bibitem{144} See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 309.
\bibitem{145} 276 U.S. 13 (1928).
\bibitem{146} Id. at 18-24. This requirement seems especially serious in view of the fact that the notice procedure used in \textit{Wuchter} had been found constitutionally sufficient in \textit{Hess v. Pawloski}, \textit{274 U.S. 352} (1927). Despite actual notice having been received by the defendant, the state procedure was struck in \textit{Wuchter}. "Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." \textit{276 U.S.} at 24 (emphasis added).
\bibitem{147} 375 U.S. 311 (1964). This opinion actually has no bearing on \textit{Wuchter}. The issue in \textit{Szukhent} was the sufficiency of notice under a \textit{contractually} provided notice term. This is a fundamentally different problem than notice provided under \textit{law}.
\bibitem{148} See Rose v. Masutoku Toy Factory Co., \textit{597 F.2d} 215, 219 (10th Cir. 1979).
\end{thebibliography}
in notice provision; such provisions could be supplied equally by procedural rules.

As a final matter, one should remember that, although actual notice to the defendant is the goal of the procedure, the securing of such notice is not the test of constitutional sufficiency. In Wuchter, the procedure was struck despite having resulted in actual notice. Likewise, cases must be able to proceed even though actual notice is not accomplished. All that is constitutionally required is the devising of a notice scheme in law which is reasonably calculated to inform; actual notice is not required, nor will actual notice save an invalid legal system.

B. Kentucky Notice Provisions

Kentucky notice procedures have not been revamped since the United States Supreme Court decision in Mullane. As to the various in rem actions identified previously (ex parte divorce, eminent domain, escheat, probate, quiet title and trusts), Kentucky's highest court has held that "due process of law does not demand that actual notice of the suit should be served upon the defendant personally, if he be a nonresident. The law presumes that he keeps in touch with his property, and that he will be straightway informed if any peril threatens it." The Court also has said: "In such proceedings it is not the law that actual notice to the parties whose interests are to be affected by the judgment is essential ...." This sort of thinking about notice obviously cannot survive Mullane. The inquiry here is whether the various provisions of Kentucky law satisfy Mullane, regardless of the outdated philosophy of the Kentucky courts.

The normal mode of giving notice is through the warning order attorney provisions of CR 4.05-.11. Service by warning order is expressly called for in eminent domain proceedings and in judicial challenges to escheatment. Such service is authorized in district court probate and seems required in circuit court pro-

149 Hughes v. Hughes, 278 S.W. at 123.
150 Miller v. Hill, 168 S.W.2d at 771.
152 See id. § 393.160 (1972).
bate proceedings.\textsuperscript{154} Although not called for in the statutes authorizing divorce and trust actions; case law indicates warning order service is authorized in divorce,\textsuperscript{155} and it may be used to supplement the elaborate notice provisions of the trust statutes.\textsuperscript{156} Although not called for in the statute, quiet title cases authorize service by warning order.\textsuperscript{157}

For these statutes, most of which lack any built-in notice provisions, service by warning order is the only notice required. If \textit{Wuchter} requires jurisdictional statutes to have their own built-in notice provisions, the trust statute with its elaborate provisions\textsuperscript{158} would be the only Kentucky statute to pass constitutional muster.\textsuperscript{159} Assuming that constitutional validity can be supplied by procedural rules, the other statutes depend either expressly or by interpretation on the warning order practice for their validity. The question is whether that procedure can survive the constitutional notice standards of \textit{Mullane}.

A warning order attorney is obligated to "make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him."\textsuperscript{160} There is no obligation upon the warning order attorney to use certified mail, however.

\textsuperscript{155} See Gayle v. Gayle, 192 S.W.2d at 822; Bushong v. Bushong, 114 S.W.2d at 736.
\textsuperscript{156} See Minary v. Minary, 395 S.W.2d at 588.
\textsuperscript{157} See Savin v. Delaney, 16 S.W.2d 1039 (Ky. 1929).
\textsuperscript{158} KRS § 386.665(3) (Cum. Supp. 1982) provides:

The petitioner shall cause notice of the time and place of the hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be given to his attorney. Notice shall be given: (a) by mailing a copy thereof in accordance with the Rules of Civil Procedure by certified, registered or ordinary first-class mail addressed to the person being notified at the post-office address given in his demand for notice, if any, or at his office or place of residence, if known; (b) by delivering a copy thereof to the person being notified personally in accordance with the Rules of Civil Procedure; or (c) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three (3) consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least ten (10) days before the time set for the hearing.

\textsuperscript{159} The escheat statute has satisfactory notice provisions regarding the administrative proceeding, KRS § 393.110(1), (2) (Cum. Supp. 1982), but has no such provisions in judicial proceedings to set aside the administrative proceeding. \textit{See id.} § 393.160 (1972).
\textsuperscript{160} CR 4.07(1).
In view of the holding in *Wuchter*, the validity of warning order service must be determined upon its requirement of ordinary mail, rather than on a procedure using certified mail which might be followed *ad hoc* in a particular case. Purely as a matter of Kentucky law, it is difficult to justify the dichotomy between ordinary mail service in warning order procedure and the *requirement* of certified mail which is otherwise authorized by CR 4 for service on persons in Kentucky and outside Kentucky. If certified mail service is what Kentucky regards as being reasonably calculated to actually inform in other instances, why is there a lesser standard for warning order? Does the disparity suggest that Kentucky actually prefers that persons proceeded against by warning order not learn of the action? If the answer to the latter is affirmative, the warning order scheme would fail under the *Mullane* test. It is true that the Supreme Court in *Mullane* did allow service by ordinary mail rather than by registered mail. One might distinguish that fact from practice today by comparing the quality of ordinary mail service today with that in 1950. A more sensible distinction comes from the peculiar facts in *Mullane*: the Court noted that ordinary mail notice would probably reach most of the beneficiaries and that any defense made by those with notice would be identical to that of the non-notified defendants—in effect viewing the action as akin to a class action. In the more ordinary case of warning order notice, though, service by certified mail apparently would be required to meet the *Mullane* standard.

In addition to requiring notice by certified mail, a notice scheme should provide for notice in cases in which the mail is returned unclaimed or in which no address for the defendant is known. In those cases, the rule should require publication. Currently, such publication is only required in trust cases and escheat cases. In the other actions for *ex parte* divorce, eminent

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161 For a discussion of the *Wuchter* case and its holding, see notes 145-48, *supra* and accompanying text.
162 CR 4.01(1)(a).
163 CR 4.04(8).
164 See 339 U.S. at 319.
165 *Id.*
167 *Id.* § 393.110(1)(d). This publication requirement attaches to the administrative proceeding, not to judicial contests of the administrative decision and hence does not save
domain, probate and quiet title, it seems reasonable to provide for published notice directed to the absent party in a newspaper in the county where the litigation is pending. Rather than amending each of the statutory schemes, the Kentucky Supreme Court could amend CR 4.04(8) and CR 4.07(1) to accomplish this new notice scheme.

The above modifications in the existing provisions of CR 4.04(8) and CR 4.07 would make needed corrections within the existing framework of the civil rules. Some thought should be given to a more significant change. The purpose in retaining the warning order practice at all is to provide a notice scheme. For that function the warning order rule seems redundant with CR 4.04(8). Indeed, given the application of CR 4.04(8) to service on persons outside Kentucky, the exact circumstances in which one may proceed under that rule rather than under the warning order rule are questionable. Although it may be argued that the warning order rule serves a dual function, with the warning order attorney being required to make any possible defense to the action following an unsuccessful notice attempt, in practice this function is rarely fulfilled. In view of the practical working of the rule simply as a notice provision, the warning order rule should be abolished. If it was thought to be desirable to keep the requirement that the court retain control of the property or proceeds of an absent party for one year after judgment, that feature of the rule could simply be added to CR 4.04(8).

This saving clause feature of CR 4.11 is similar to the savings provisions in regard to escheats and wills. These provisions all establish a grace period during which absent parties may reopen judgments and have their rights adjudicated. Following the expiration of the grace period, it has been held that the judgments are binding even on parties who had no notice of the proceeding both as to wills and escheats. In actuality, these grace

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footnotes:

168 CR 4.07(2).
169 CR 4.11.
170 KRS § 393.140(1), (2) (1972).
171 Id. § 394.280(1).
172 Crain v. Crain, 104 S.W.2d at 992.
periods need not be retained and in fact should be abolished. Adjudications in all cases are constitutionally valid and final provided they have been rendered with jurisdiction and with a sufficient notice scheme. Following Kentucky's adoption of a sufficient notice scheme for all such proceedings, these adjudications should be treated by statute and rule like any other decision. They may be attacked in accordance with the existing provisions of the rules relating to all judgments but should not be singled out for any special treatment.

III. SUMMARY OF RECOMMENDATIONS

Kentucky needs a comprehensive restructuring of its judicial philosophy regarding jurisdiction and notice in order to bring it into the mainstream of current legal thinking. In particular, Kentucky needs to adjust existing statutory provisions and procedural rules relating to jurisdiction and notice to comply with existing due process interpretations of the United States Supreme Court. The following steps are recommended:

(1) Decisional recognition that courts exercise only one form of jurisdiction—personal jurisdiction. Of course, adjudications may be limited in scope as appropriate circumstances dictate.

(2) Deletion from CR 4.04(8) of the following: "Such service without an appearance shall not authorize a personal judgment, but for all other purposes the individual summoned shall be before the court as in other cases of personal service."

(3) Circumvention of the restrictions of KRS section 454.165 either by statutory construction or by constitutional invalidation. In the alternative, the statute should be repealed.

(4) Amendment of CR 4.07(1) to provide that notice mailed by warning order attorney be by certified mail.

(5) As an alternative to (4), abolition of the warning order practice by striking CR 4.05-.10. Subject to (6), the provisions of CR 4.11 may be transferred and renumbered as CR 4.04(10).

(6) Deletion of the grace period features of Kentucky law by repeal of KRS sections 393.140(1) and 394.280(1) and judicial amendment to strike CR 4.11.

174 The ordinary method of attack of all judgments at the trial level is through the provisions of CR 60.01 & 60.02.
(7) Addition to CR 4.04(8) and to CR 4.07(1) of a requirement of notice by publication for cases of failed notice attempts, in the event warning order practice is not completely abolished.

(8) Amendment of Kentucky's long-arm statute, KRS section 454.210(6), to delete all restrictive language following the phrase "in this Commonwealth."

Until such a comprehensive restructuring is undertaken, practice in Kentucky will be tied to a procedural system which has outlived its usefulness. Our system has been, and is, much more progressive than that. All that is needed is an opportunity to think these matters through comprehensively.