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Dower, Principal and Income, Perpetuities, and Intestate Succession

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Comments on Selected Acts of the 1956 Kentucky Legislature

Dower, Principal and Income, Perpetuities, and Intestate Succession

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THE 1956 GENERAL Assembly of Kentucky re-defined dower, adopted the Uniform Principal and Income Act, clarified "administration contingencies" under the Rule Against Perpetuities, and moved a surviving spouse up in the statutory list of intestate heirs. Less important property law developments include acts enlarging the fiscal authority of soil and water conservation districts[1] and authorizing punitive damages for unlawful cutting of timber.[2]

Before discussing the four principal changes separately, attention should be directed to the continued low incidence of statutory change in this branch of private law. .Comparatively infrequent amendment of property statutes probably reflects legislative approval of traditional values underlying legal doctrine in this realm as well as a feeling that existing case and statutory authority are adequate for solution of most property law problems. It results in major part, however, because no organized group in Kentucky regularly studies the need for comprehensive improvement in these statutes. The bar should remedy this condition because some of the statutes need modernizing badly, and also to safeguard against sporadic enactment of unsatisfactory amendments. Haphazard statutory change in property and trust law is very risky, and sound revision must be based on thorough analysis of the whole system of legal precedent involved. This kind of legislative research requires sustained, concentrated effort by those members of the bar who have special knowledge and interest in the field. A standing committee of the Kentucky State Bar Associa-

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1 Kentucky Acts (1956), Chapter 203, p. 385 (Senate Bill 95).
2 Kentucky Acts (1956), Chapter 26, p. 44 (House Bill 97).

tion might be an appropriate group to exercise initiative in meeting this need, but that is beyond the scope of this introductory comment.

The Dower Statute[3]

Prior to revision the Kentucky dower statute combined common law dower in land with a statutory share in personalty.[4] At commonlaw the surviving wife was not an heir as to her husband's realty and had no claim to his personal property. She had only an inchoate right to a life estate in one-third of the land owned in fee during coverture that became possessory if and when she survived her husband.[5] Many states have abolished common-law dower entirely and substituted therefor a statutory share in the realty and the personalty. These statutes usually give the spouse a specified fractional share of the intestate property in fee. The size of the fraction sometimes depends on whether there are surviving children, and the right to have the share is not inchoate since it extends only to property owned by the decedent at his death.[6] Also, the surviving spouse universally has a statutory right to renounce the decedent's will if he dies testate and to elect to take dower or a statutory share as the case may be.[7]

The 1956 revision moves Kentucky much nearer to the pure statutory share approach. It leaves the statutory share in personalty, consisting of one-half in fee, unchanged; and, in effect, provides for an identical statutory share in decedent's surplus realty if he still owns the land at death and if he dies intestate. This restricts common-law dower to the land he may have owned during coverture but conveyed away without release of dower. The new statute also provides for common-law dower in case decedent dies testate and the surviving spouse renounces the will. The new statutory share in decedent's intestate realty is one-half in fee regardless of whether there are surviving children.

[3] KRS Sections 392.010, 392.020, 392.050, and 392.080. The various amendments appear in Kentucky Acts (1956), Chapter 117, p. 238 (House Bill 7).

[4] The best recent summary of Kentucky dower law is in a Kentucky Law Journal student note by James C. Blair: 39 Ky. L.J. 120 (1950).

[5] I American Law of Property, Sec. 5.1 and following sections (1952).

[6] *Id.*, Sec. 5.42. See generally Sayre, Husband and Wife as Statutory Heirs, 42 Harv. L. Rev. 330 (1929).

[7] I American Law of Property, Sec. 5.41 (1952). As the section cited points out, the states vary as to whether a testamentary provision forces the wife to elect.

The full text of the revised statutory sections is too long to reproduce, but here briefly is how the changes were accomplished. In KRS 392.020 the single word "intestate" was inserted to modify the word "death" at the end of the opening clause, making the section applicable only where decedent leaves no will. In the next clause defining the extent of right, the following was substituted:

> . . . the survivor shall have *an estate in fee of one-half* of the surplus real estate of which the other spouse . . . was seized of an estate in fee simple at the time of death. . . .[8]

The balance of KRS 392.020 was re-worded to provide for unreleased common-law dower in real property owned during coverture but not owned at time of death.[9] Finally, a new sentence was added to the section to eliminate all historical differences between the terms *dower* and *curtesy*. Either word now refers to the surviving spouse's interest created by this section. This has been the common understanding of the Kentucky bar for some time, but the new sentence is a helpful clarification.

To retain common-law dower where decedent's will is renounced, it was necessary to amend KRS 392.080. Before revision this section empowered the widow to "relinquish" any devise or bequest and to receive her "dowable and distributable share" as if no will had been made. It charged the value of the devise or bequest against the share unless testator expressed an intention otherwise, and required relinquishment within twelve months after probate or disposition of probate appeal. The revised section re-words the last two provisions, but makes no substantive change in them. The basic clause of the section was amended materially, however, to read as follows:

> When a husband or wife dies *testate*, (the survivor) may release what is given to him or her by will, *if any*, and receive his or her share under KRS 392.020 as if no will had been made, *except that in such case the share in any real estate . . . which (decedent owned) at the time of death shall be only an estate for the surviving spouse's life in one-third of such real estate.*[10]

[8] Emphasis supplied.
[9] Kentucky Acts (1956), Chapter 117, p. 239.
[10] Emphasis supplied.

In spite of awkward syntax, the revised section accomplishes the purpose for which it was enacted, provided the words "if any", inserted after the opening clause, refer only to such devise or bequest as may exist. If they were construed to mean that the survivor can renounce only if he is a devisee or legatee, the clearly intended purpose of the section would be destroyed.

Since the assets in every estate are different it is not easy to predict the impact of the new dower provisions on disposition of Kentucky estates. The survivor's position is substantially improved where decedent leaves land as his principal intestate asset, especially a survivor of advanced age without the life expectancy to make a life estate valuable. Kentuckians of means may be encouraged slightly to die intestate for federal estate tax purposes since intestate dower now more nearly approaches the maximum allowable marital deduction if land is the main asset, but this effect will be mitigated considerably by retention of common-law dower in case of renunciation. The disposition of estates already planned around this factor will not be unsettled.

The Kentucky attorney must now orient his dower advice around three classes of real property: (1) owned during coverture but not at death, (2) owned at death where decedent dies intestate, and (3) owned during coverture where decedent's will is renounced. Since dower ordinarily will be released upon *inter vivos* conveyance, class 1 is largely theoretical, but it and class 3 will require continued releasing of the inchoate right in commercial land transactions. The attorney's task would be simpler if all remnants of common-law dower were abolished. Apart from this professional criterion, there is much to be said for the pure statutory share approach in the modern world. Historically the inchoate character of dower was vital to married women who had no legal status. Now they have equality, and release of dower seldom is a decisive factor in management of family land. The need for the spouse's protection is greatest perhaps at decedent's death and this points to a substantial claim against all of his property in the form of a statutory share. Moreover, legal life estates in real property have become archaic. Fee ownership by the survivor, whatever his fractional statutory share, eliminates most of the difficulties incident to assignment of common-law dower by simplifying joint management of the land with the children, by reducing partition problems and by doing away with the artificial valuation of the interest according to the mortality tables.

The Uniform Principal and Income Act[11]

A fiduciary for successive beneficiaries is under equal duty of loyalty to the life tenant and the remainderman. Proper allocation of receipts and expenditures between principal and income often creates a problem because settlor's intention is not expressed clearly and because the case law in this area of fiduciary administration frequently is unclear and inconsistent. Much of the confusion centers on allocation of extraordinary expenses, extraordinary dividends, stock-dividends, gain or loss in premium and discount bonds, and net proceeds derived from sale of unproductive property or wasting assets. The Uniform Principal and Income Act is designed to simplify and make uniform the law governing such questions in the various states. It was first prepared in 1931 by the National Conference of Commissioners on Uniform State Laws, and Kentucky is the twentieth state to adopt it in one form or the other during the intervening twenty-five years.[12]

As passed by our General Assembly, the Act is unchanged from the official form originally recommended by the Conference. The Act is comparatively short as uniform statutes go (seventeen numbered sections), but time and space limitations will not permit full discussion and analysis of each section here. I hope this can be done in a separate article before too many questions requiring local interpretation of the statute have arisen. Perhaps some general comment about the scope and effect of the more important sections will be useful in the meantime.

Section 1 defines the terms used in the statute; and the last four sections relate to uniformity of interpretation, short title, repeal of inconsistent statutory sections, and the time of taking effect of the Act. It became law on May 18, 1956, and applies to all estates

[11] Kentucky Acts (1956), Chapter 176, p. 350 (House Bill 493). This Act will of course appear as a new KRS section.

[12] An up-to-date compilation of the form the Act has taken in the twenty adopting states may be found in Prentice-Hall, Wills, Estates and Trust Service, Sec. 3945 (1956). These states are Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Kansas, Kentucky, Louisiana, Maryland, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia and West Virginia. In addition, four other states, Maine, Minnesota, New Jersey and Washington, have enacted a few sections from the Act or provisions very similar to those found in it.

of tenants and remaindermen that become *legally effective* after that date. The scope of the Act is defined in Section 2 to include all cases where a principal is established, with or without the interposition of a trust, and it clearly governs allocation of expenses as well as the ascertainment of income and principal. Under Section 2, the creator of the estate or trust is permitted to specify the manner of ascertaining principal and income, or to grant discretion on this to the fiduciary. The wording of the section emphasizes that instrument provisions of this sort shall prevail over the rule of the Act only where they are not otherwise contrary to law. As suggested elsewhere,[13] the rule of *Dumaine* v. *Dumaine*,[14] to the effect that the authorized determination of the trustee shall be conclusive in the absence of bad faith or arbitrary action, might be a clearer safeguard against violating the creator's intent; but there is nothing in the Act to prevent the Kentucky Court from interpreting Section 2 in keeping with this view.

Section 3 expressly allocates to *income* the following receipts: rent of realty, payments for hire of personalty, corporate dividends payable other than in shares of the corporation itself, interest (on money loaned, or on the rental or use value of property wrongfully withheld or tortiously damaged), and any other receipts received in return "for the use of principal." It expressly classifies as *principal:* receipts paid as consideration for sale or other transfer (excluding leasing or letting) of principal, repayment of loans, receipts paid in liquidation of corporate assets, eminent domain damages (where separate awards to tenant and remainderman are not made), property insurance proceeds (except where policy is issued for benefit of either tenant or remainderman alone), and payments otherwise received as refund, replacement or change in form of principal. The section also allocates any profit or loss resulting upon change in form of principal to principal, and provides that the income paid to the tenant or accumulated for his benefit shall be net income.

Section 3 is generally consistent with the provisions of the Restatement of Trusts,[15] and except as it relates indirectly to stock-

[13] Nossaman, The Uniform Principal and Income Act, 28 Calif. L. Rev. 34, 36 (1939).

[14] 301 Mass. 214, 16 N.E. 2d 625 (1938).

[15] Sec. 233, Comments a and b. See also Bogert, The Illinois Principal and Income Act of 1941, 9 U. Chicago L. Rev. 30, 34 (1941).

dividends, should create no special problems for Kentucky fiduciaries. Allocation of stock-dividends is covered more fully in Section 5, but one effect of Section 3 should be mentioned here. Historically those courts following the "Massachusetts rule" on stock-dividends had recognized no major departures from the view that they are principal if paid in shares of the corporation itself. This idea is expressed negatively in Section 3. Since the Uniform Act was first prepared, however, the Supreme Court of the United States, although firmly committed to the general Massachusetts rule, has held that a dividend paid out of earnings, even though payable in the corporation's own shares, may be income if the new shares give the stockholder an interest different in character from that represented by his previous holdings.[16] This exception does not upset the practical operation of Section 3, a section designed to create a simple and workable rule, but tends to alleviate its necessary harshness in a given case.

In estates or trusts for successive beneficiaries receipts in the form of periodic payments, such as rents, interest and annuities, are classified as income; but the income beneficiary may not be entitled to the full receipt because his estate has arisen or terminated during the period. Section 4 of the Act requires apportionment of these periodic payments both at the beginning and the end of the tenant's estate. The section expressly excludes corporate dividends from apportionment, however. Under the Act, the tenant is entitled to that portion of the periodic payment represented by the percentage of time elapsed from the last due date to and including the day of the determination of his right. He or the trustee can bring no action to recover this apportioned income until after the day on which it would have become due to the tenant but for the determination of his right. The balance of the payment goes to the next income beneficiary entitled to it, if there is one, or to the principal beneficiary.

Section 4 apportionment is more liberal to the tenant than that provided in the Restatement of Trusts which follows the common-law rule that all receipts *except rents, annuities and dividends* are apportionable.[17] Refusal to apportion rent in the older cases rests

[16] Koshland v. Helvering, 298 U.S. 441 (1936); Helvering v. Gowran, 302 U.S. 238 (1937).
[17] Secs. 235 and 238.

on the notion that it does not accrue from day to day, a view that the Act properly changes. With respect to annuities, Section 4 follows the better view that they are apportionable. This was the statutory rule in Kentucky before adoption of the Act.[18]

As already mentioned, Section 5 of the Uniform Act follows the Massachusetts rule for allocation of corporate dividends. It gives all dividends payable in the shares of the corporation to principal, and gives to income all other dividends, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation. When this section was first written the so-called Pennsylvania rule was followed in many states. This rule gave ordinary dividends to income and extraordinary dividends (including stock-dividends) to income only to the extend that the unusual dividend reflected corporate earnings during the trust's holding of the stock. The Restatement of Trusts first adopted the Pennsylvania rule, but changed to the Massachusetts rule in 1947.[19] Pennsylvania abandoned its own rule in the same year by enacting the Uniform Act,[20] and in the past few years the case and statutory trend has been toward the less complicated Massachusetts rule as expressed in Section 5.

Until 1954, the Kentucky Court applied a "Kentucky rule" that treated a stock-dividend as an extraordinary dividend, but allocated it entirely to the life tenant. The Kentucky view was severely criticized in *Laurent* v. *Randolph*,[21] and was finally abandoned for the Massachusetts rule in *Bowles* v. *Stilley's Ex'r*.[22] In the *Bowles* case the Court described the Massachusetts rule as one which awards the dividend to the remainderman if essentially a stock dividend and to the life tenant if essentially a cash dividend. This may be true in the sense that no inquiry is made as to the time covered by the earnings, but the Massachusetts rule as expressed in Section 5 leaves no doubt as to what is "essentially a stock-dividend." It makes the form of payment conclusive and

[18] KRS 391.130, which provided in effect that the heirs or personal representative of any annuitant could recover the amount he would have been entitled to at his death during the year and before the annuity was fully earned.

[19] Restatements of Trusts (1948 Supp.) Sec. 236.

[20] 2 Scott, Law of Trusts (1952 Pocket Supp.) Sec. 236.3.

[21] 306 Ky. 134, 138, 206 S.W. 2d 480, 482 (1947).

[22] Commented on, 43 Ky. L.J. 447 (1955); also discussed at length in Matthews, Kentucky Developments in 1954; Personal and Real Property, Future Interests and Trusts, 44 Ky. L.J. 37 at 50 (1955).

explicitly provides that the dividend shall be deemed principal if "payable in the shares of the corporation."

The opinion in the *Bowles* case also created uncertainty in Kentucky law because it purported to adopt the Massachusetts rule without mention of or regard for the statutory formula governing stock-dividends adopted in 1950 as an amendment to our corporation statutes.[23] This amendment, KRS 386.020 (4), allocated to principal those stock-dividends payable in shares of the same class *at a rate of ten per cent or more* of such shares, and allocated to income those payable at less than this rate. Section 5 clearly supersedes KRS 386.020 (4) and resolves the confusion between it and the *Bowles* case. Subsections 2, 3, 4, and 5 of Section 5 deal with subscription rights; liquidation assets; shares issued through merger, consolidation or reorganization; and the date when a dividend accrues—matters that must await later discussion in the separate article already referred to.

Section 6 governs premium and discount bonds and classifies these obligations as principal at their inventory value or in default thereof at their market value when the trust was established or at their cost where purchased later, regardless of any par or maturity value. Upon their maturity, surrender or sale, any loss or gain falls to principal. This simple provision eliminates amortization of either the premium or the discount, a fiduciary practice that has been a source of trouble in the cases.[24] The federal government has popularized the discount bond in the years since the Uniform Act was written, and since some argument can be made that the accretion in such obligations is really interest, proposals have been made that Section 6 should be changed to give the accretion to income rather than principal.[25] There are also a good deal of logic and some authority in favor of amortizing discount, especially where (in absence of controlling statute) amortization of premium is required.[26] On the whole, however, Section 6 is not too harsh on the income beneficiary because it gives him the actual interest paid and only denies him an accretion that may not be realized.

Sections 7, 8, 9 and 10 establish special rules for principal used

[23] *Ibid.*
[24] As to premium bonds, see 2 Scott, Sec. 239.2, and as to discount bonds see Sec. 240.2.
[25] Nossaman, *op. cit., supra* note 13, at 44.
[26] 2 Scott, Sec. 240.2.

in business, principal comprising animals, disposition of natural resources, and principal subject to depletion. The first two of these sections are generally supported either by the Restatement of Trusts or the common-law decisions.[27] Section 10 relating to principal subject to depletion adopts the general view that the returns from wasting assets are principal if the fiduciary is under a duty to convert, but in absence of such duty, they are income. Section 9, on the other hand, does not apply this test to disposition of natural resources. This section expressly applies only where "the trustee or tenant is authorized . . . to sell, lease or otherwise develop such natural resources . . . ," and gives the net proceeds to income if received as rent on a lease. If received as consideration for permanent severance, whether as royalties or otherwise, they go to principal. The full effect of this rule in Kentucky must be explored later, but the emphasis on form of the transaction suggests possible conflict between the tenant and remainderman as to the true nature of the transaction.

Probably the most perplexing problem in principal and income determination is whether to apportion net proceeds from sale of unproductive principal. The basic approach in the Restatement and the better reasoned cases is to assume that sale of unproductive property produces net proceeds (amount received less expenses of sale and carrying charges) that should be distributed partly to principal and partly to income. The theory is that the settlor intends for the life tenant to receive part of the proceeds because he has been deprived of actual income from the time the duty to sell arose. His delayed income is computed by finding that amount of principal which if invested at the regular rate of trust return for the time held, together with the return, would equal the net proceeds. This formula was worked out after a considerable struggle in the authorities;[28] and, although it may not be as mathematically refined as it could be, has proved to be a sound and useful method for dealing fairly with successive beneficiaries where settlor fails to anticipate unproductive and wasting assets.

Section 11 of the Uniform Act differs materially from the approach just described. Under the traditional rule there is ap-

[27] Bogert, *op. cit., supra* note 15, at 44-48.

[28] Restatement of Trusts, Sec. 241. For full discussion of the theory and precedent supporting this approach see 2 Scott, Secs. 241 and 241A.

portionment if the property produces no income or an income substantially less than the current rate of return on trust investments, but under Section 11 there is no apportionment unless the property has produced an income of less than one per cent of its inventory value or market value at the time the principal was established, or its cost when purchased later. The traditional rule gives the life tenant delayed income for the whole time during which the property was unproductive in the hands of the fiduciary, but under the Act he receives no income in the first year during which the property is held. Section 11 provides that conversion shall be taken to have been delayed from the time when the duty to make it first arose, and this is *presumed* to be one year after the trustee first received the property if then unproductive, otherwise one year after it becomes unproductive. The two provisions mentioned are easy to apply but rather arbitrary and may not reconcile at all with what the settlor would have intended had he foreseen the problem. In the Restatement formula delayed income is computed at the usual rate of return on trust investments, but the Act arbitrarily fixes the rate at five per cent. Again, simplicity and certainty are achieved but probably at the expense of unfairness to both beneficiaries. There is no assurance at all that five per cent will approach the return experience of the particular trust at the particular time or of similar trust investments generally, and there is no logical reason for using legislative judgment on this point as against the decision of the trustee or the court.

The feature of Section 11 hardest to rationalize is the provision denying apportionment unless the unproductive property is sold at a profit. The effect of this provision is at complete odds with the theory underlying the common-law and Restatement approach, and from a practical viewpoint it virtually nullifies the principle of apportionment. In the great majority of cases, unproductive property is a wasting asset and its sale amounts to a salvage operation resulting in loss. This is just the situation the concept of apportionment is designed to meet on behalf of both beneficiaries on the basis that settlor did not foresee unproductivity of corpus. The rule of Section 11 could work primarily to the detriment of the principal beneficiary if it encouraged the trustee to hold the wasting asset in a falling market on the hope for a profitable sale that will permit distribution of some of the net proceeds to the life tenant.

The last two substantive sections of the Act, Sections 12 and 13, relate to expenses. The first governs trust estate expenses and the second governs non-trust estate expenses. The former requires amortization of income to pay the cost of, or special taxes or assessments for, improvements representing an addition of value to property held as principal. The latter provides for the legal life tenant to bear all such expense so long as the improvement reasonably cannot be expected to outlast the tenant's estate. In all other cases Section 13 requires improvement expense to be borne by the tenant and the remainderman. The formula to determine the tenant's share is the percentage of the total cost to be found by dividing "the present value of the tenant's estate by the present value of an estate of the same form . . . except that it is limited for a period corresponding to the reasonably expected duration of the improvement." The section also establishes the American Experience Table of Mortality as the only evidence of duration or expectancy.

Section 12 charges all *ordinary* expenses connected with the estate or its management to the income account, including regularly recurring taxes assessed against principal, water rates, premiums on insurance taken on both interests, interest on principal mortgages, ordinary repairs, trustees' compensation (except commissions computed on principal), compensation of assistants, and court costs and attorneys' and other fees on regular accountings. All other expenses are charged to the principal account, including trustees' commissions against principal, investment or reinvestment costs, attorneys' fees and other costs incurred in legal action to protect the trust or assure title, and the cost of or assessment for improvements to principal. The section expressly charges to principal *any* tax upon profit or gain defined as principal in the Act, even though the taxing authority defines the gain as income in the tax statute. The section also says that regularly recurring expense chargeable to income shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expense.

The Perpetuities Amendment[29]

Description of this change requires background comment because the amendment on its face ignores the effect of certain Court of Appeals decisions on the Kentucky statutory Rule Against Perpetuities. The Rule is expressed in KRS 381.220, a section that purports to prohibit *suspension of the absolute power of alienation* for longer than lives in being at creation of the estate and twenty-one years and ten months thereafter. In spite of the explicit wording of the statute, the Kentucky Court has held repeatedly that it is merely declarative of the common-law Rule Against Perpetuities and has nothing to do with the validity or invalidity of restraints on alienation, or with the suspension of the power of alienation other than through the creation of a contingent future interest.[30] Thus the Court has developed a unique doctrine sustaining direct restraints on alienation of legal interests where reasonable as to time, has not applied the required vesting time as a twenty-one year and ten months period in gross, and, as far as I know, has not required that a private, vested, indestructible trust must terminate within a time analogous to the Rule Against Perpetuities.[31]

The 1956 amendment was enacted to protect employee-benefits trusts and to correct application of the common-law Rule to what are known as "administration contingencies."[32] Unfortunately the legislation was cast in the form of a proviso to KRS 381.220 without regard for the judicial interpretation of the section. This raises the question whether the obsolete part of the

[29] KRS 381.220. The revised text is given in Kentucky Acts (1956), Chapter 175, p. 350 (House Bill 492).

[30] The leading case is Cammack v. Allen, 199 Ky. 268, 250 S.W. 963 (1923). Other cases in accord are: Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W. 2d 984 (1946); Maddox v. Keeler, 296 Ky. 440, 177 S.W. 2d 568 (1944); Fidelity and Columbia Trust Co. v. Tiffany, 202 Ky. 618, 260 S.W. 357 (1924); Clay v. Anderson, 203 Ky. 384, 262 S.W. 604 (1924); compare: Chenoweth v. Bullitt, 224 Ky. 698, 6 S.W. 2d 1061 (1928); *cf.* Perry v. Metcalf, 216 Ky. 755, 288 S.W. 694 (1926) and Saulsberry v. Saulsberry, 140 Ky. 608, 131 S.W. 491 (1910).

[31] See generally Gromley, Direct Restraints on Alienation, 40 Ky. L.J. 337 (1952); Roberts, Kentucky's Statute Against Perpetuities, 16 Ky. L.J. 97 (1928); Simes and Smith, Law of Future Interests (2d Ed.), Sec. 1414 (1956). The clearest recent statement of the Kentucky Court concerning the effect of the statute on restraints is in Gray v. Gray, 300 Ky. 265, 188 S.W. 2d 440 (1945). As to the effect of the statute on the duration of private, indestructible trusts, see Liggett v. Fidelity and Columbia Trust Co., 274 Ky. 387, 118 S.W. 2d 720 (1938). On this point see also: 4 Restatement of Property (1944), Appendix B, Sec. 48.

[32] The reason for this phrase to describe the special problem is probably best explained in Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938).

statute has been revitalized through reenactment and amendment. There is no sound reason in policy or doctrine why the Court's view of the statute should be changed and it would be well advised to restrict this potential effect of the new amendment at the first opportunity. This would not prevent the proviso from having the precise effect the General Assembly must have intended.

The proviso is in two parts that are completely unrelated.[33] Part 2 is a much needed change and will be discussed first. It is a word-for-word enactment of a statute suggested by the Committee on Probate Courts of the American Bar Association.[34] Illinois was the first state to adopt it in 1951,[35] and the Illinois Act is thoroughly analyzed in the 1953-54 volume of Current Trends in State Legislation.[36] The legislation is intended to correct strict application of the common-law Rule in a limited class of cases where a devise or bequest is invalidated if created to take effect upon completion of some step in administration of the estate. The classical examples are limitations to "my executor," or to "A upon probate of my will." When construed strictly and literally these phrases raise the possibility that the stated event is a condition precedent to vesting of the gift. Thus it is a contingent interest and the common-law Rule requires absolute certainty that the contingency will occur within lives in being at creation of the interest and twenty-one years. Events in administration are *probably* going to happen very soon following testator's death, but in their zeal to apply the Rule with historical strictness, American courts have rather consistently held that steps in administration will not of certainty occur within the prescribed period.

A court can avoid this senseless application of the Rule by interpreting such phrases as not creating a condition precedent that postpones vesting. They are merely directions as to when the interest shall be enjoyed. Or it can recognize as a matter of logical certainty that administration steps will occur within the prescribed

[33] Kentucky Acts (1956), Chapter 175, p. 350.

[34] Edmonds, Hints on Marital Deduction Problems, 89 Trusts and Estates 669, 672 (1950)

[35] Ill. Ann. Stat., C. 30, Sec. 153 (a).

[36] This most useful and complete analysis should be consulted at length concerning all phases of the statute and the problems its enactment will create. It was written by William H. Yager while he was Legislative Analyst at the Legislative Research Center, University of Michigan Law School, Ann Arbor. The monograph appears at p. 199 of the 1953-54 volume and is styled: Legislative Modification in Illinois of the Rule against Perpetuities.

time, and that this should satisfy the Rule. The legislative mandate in the new amendment is a quicker remedy than could have been obtained by decision, but it fails to reach all phases of the problem. Part 2 of the proviso refers to only four specific administration contingencies and makes no general or implied reference to any others. These are limitations to (1) the estate of a person, (2) a personal representative, (3) a trustee under a will, and (4) to take effect upon the probate of a will. As documented elsewhere,[37] the first two may be used in instruments to take advantage of the marital deduction law and regulations. Thus it is important that dispositions and phrases encouraged by federal tax policy not be invalid under the Rule Against Perpetuities, and this was a prime factor leading to adoption of the statute in Illinois even though the problem can be avoided through careful drafting.[38] The last two have no relation to marital deduction and their inclusion in the statute must reflect an attempt to deal with administration contingencies generally. It is regrettable therefore that the proviso was not written to include other administration contingencies, such as "payment of debts," "settlement of the estate," and "payment of legacies." Finally, the operative effect of Part 2 is very simple. It preserves the Rule and saves the specific limitations listed in the statute by providing that their vesting shall not be regarded as "deferred" for purposes of the Rule.

Part 1 of the new proviso in KRS 381.220 is intended to make certain that trusts created as part of a stock-bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan for employees will not be invalid under the statute. The amendment asserts that such trusts may continue until their purpose is accomplished, but the wording of the statute fails to take into account that it is declarative of the common-law Rule Against Perpetuities only. The common-law Rule has no application to vested interests, present or future, and does not require that a vested interest must terminate within a prescribed time just because it is held in trust. Admittedly some states seem to have held that a private, indestructible trust cannot continue for an indefinite time, and have used the prescribed period under the Rule as an analogous cri-

[37] Casner, Estate Planning—Marital Deduction Provisions of Trusts, 64 Harv. L. Rev. 582, 606 (1951).
[38] Yager, *op. cit., supra* note 36, at p. 208.

terion for determining by judicial decision how long such trusts may last. There is little or no precedent committing Kentucky to this view,[39] and even if there were, it would be better legislative policy to provide a new statute that would save many types of trusts generally, and not just those enumerated in the statute.

On the whole, the perpetuities amendment does some good, but it is an excellent example of the kind of legislative improvement that creates new problems by failing to account for prevailing legal doctrine based on careful analysis of judicial decisions.

Descent of Real Estate[40]

The Kentucky statute governing descent of real estate has always worked to the disadvantage of the surviving spouse because he was included as one of the descendants only if there were no paternal or maternal kindred.[41] And the list of descendants to real estate is incorporated by reference in the statute governing descent of personal property.[42] Thus, except in the rarest possible case, the surviving husband or wife was completely dependent on dower for a claim against the property.

Through the years there has been suggestion from various quarters for correction of the statute on the theory that the law should prefer the surviving spouse ahead of decedent's more remote kin.[43] The 1956 amendment does this by moving him up the list to a position after an intestate decedent's immediate family but before the paternal or maternal kindred. The order now runs: (1) to his children and their descendants, (2) to his father and mother, (3) to his brothers and sisters and their descendants, (4) *to the husband or wife,* and then (5) to the paternal and maternal kindred as follows: (a) grandfather and grandmother, (b) uncles and aunts and their descendants, (c) great-grandfathers and great-grandmothers, (d) brothers and sisters of the grandfathers and grandmothers, and their descendants, and (e) so on without end to the nearest lineal ancestors and their descendants. The statute

39 Simes and Smith, *op. cit., supra* note 31, Sec. 1414.

40 KRS 391.010. The revised text is given in Kentucky Acts (1956), Chapter 132, p. 266.

41 KRS 391.010.

42 KRS 391.030.

43 See Recommendations of Committee on Probate Practice and Procedure, 7 Ky. State Bar J. 4 (7) (1943).

continues to provide that if there is no husband or wife and no paternal or maternal kindred, the property shall go to the kindred of the husband or wife, as if he or she had survived the intestate and died entitled to the estate.