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In the majority of cases where a decedent dies intestate, those who are entitled to participate in the estate are able to agree among themselves as to who will administer the estate. In such cases statutes granting preferences to certain persons are of little or no concern. However, there are cases where, for any number of reasons, the interested parties are not able to agree. When this situation arises the preference statutes acquire a practical importance.

Most states have some sort of preference statute and in nearly all cases the first preference in the right to administer an estate is given to the surviving husband or wife. Upon failure of the surviving spouse to qualify, the preference is given to the next of kin, then to creditors, and, in most states, finally to such other person as the probate judge may appoint. Typical of this is the Kentucky statute, which reads, in part as follows:[1]

> (1) The court shall grant administration to the relations of the deceased who apply for administration, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court judges will best manage the estate.
>
> (2) If no person mentioned in subsection (1) applies for administration at the second county court from the death of an intestate, the court may grant administration to a creditor, or to any other person, in its discretion.

Examples of statutes which are similar to KRS 395.040, though varying in some details, are those of Alabama,[2] North Carolina,[3] Tennessee,[4] and Illinois.[5]

In a number of cases the courts have been called upon to determine whether or not these preferences are absolutely man-

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[1] KY. REV. STAT. sec. 395.040 (1953).
[2] ALA. CODE Title 61, sec. 81.
[3] N.C. GEN. STATS., sec. 28-6.
[4] TENN. CODE, sec. 8151.
[5] ILL. REV. STATS., Ch. 3, sec. 248.

datory. The typical case arises where there is hostility, real or fancied, between the surviving husband or wife and the heirs and next of kin who share in the estate. The courts of Alabama have consistently held that unless a preferred applicant is unfit by reason of specific disqualifying factors set out in another statute, he must be appointed.[6] A similar interpretation of the North Carolina statute was made in the case of *In re Edwards' Estate,*[7] where it was held that the right to be preferred in appointment is an absolute one unless the applicant is disqualified. On the other hand, in a number of states statutory preferences have been held not to be mandatory, and probate courts have been upheld in exercising a discretion to appoint a stranger while passing over a member of a class preferred by statute. Examples of such holdings are found in the Washington case of *Estate of W. R. Thomas*[8] and the case from North Dakota of *Ellis* v. *Ellis,*[9] where there were serious disputes and strong feeling between the various surviving members of the family.

The interpretation of Kentucky's preference statute has been strongly inclined to the view that the preference is mandatory, if statutory requirements are met. In the case of *Buckner's Admr.* v. *Buckner*[10] the Kentucky statute was held to be mandatory and to negative any power in the county judge to appoint a stranger in cases where a member of a preferred class is competent to administer and makes application within the statutory time. In that case it was held to be error for the county court to appoint the mother of the intestate and her nominee, when a daughter whose legitimacy was questioned had made timely application. Kentucky has refused to follow the rule applied in some states where the probate court appoints the person chosen by a majority of the heirs. The Court of Appeals has held that to do so would be contrary to the explicit provisions of the preference statute, which is mandatory in its terms.[11] The case of *Anderson's Committee* v. *Anderson's Adm'r*[12] provides an interesting interpreta-

[6] E. G. Loeb v. Callaway, 250 Ala. 524, 35 S. 2d 198 (1948); Griffin v. Irwin, 246 Ala. 631, 21 S. 2d 668 (1945); Calvert v. Beck, 240 Ala. 442, 199 So. 846 (1940).

[7] 234 N.C. 202, 66 S.E. 2d 675 (1951).

[8] 167 Wash. 115, 8 P. 2d 963, 80 A.L.R. 824 (1932).

[9] 42 N.D. 535, 174 N.W. 76 (1919).

[10] 120 Ky. 596, 87 S.W. 776 (1905).

[11] Moran v. Moran's Admr., 172 Ky. 343, 189 S.W. 248 (1916).

[12] 161 Ky. 18, 170 S.W. 213 (1914).

tion of the preference statute. There the decedent was survived by an only son, who had been adjudged a person of unsound mind and for whom a committee had been appointed, and a half-brother. The court held that the son's committee was entitled to appointment as administrator as against the brother. Such cases as this point up the underlying logic of the preference statutes. The key to these statutes is not the closeness of kin so much as it is the actual financial interest in the estate. Only because this is true, would a stranger who is the committee of a member of a preferred class be appointed instead of the brother himself of the decedent. The statute is designed to assure that the person who has the most at stake financially will be given the first opportunity to settle the estate. This is the conclusion reached in the case of *Ellwanger* v. *Ellwanger's Adm'r*,[13] where it was held that a resident of Kentucky who was a relative, but not entitled to share in the estate, had no control over the appointment of the administrator, even though all of the relatives who did share were disqualified by reason of non-residence.

While KRS 395.040 is mandatory, the preferences are not absolute, since the applicant must be qualified for appointment. As the court said in *Hood* v. *Higgins'* Curator,[14] the right of precedence established by the statute is a valuable one of which a party cannot be deprived without legal cause, but it recognized the existence of disqualifying causes. What then are the legal causes which can deprive a person, given a preference by statute, of his prior right to be appointed administrator? The *Hood* case lists nonresidence, nonage and "other sufficient cause." Some of these other causes are set out in the statute relating to the removal of representatives.[15] This statute lists, as grounds for removal of a personal representative, in addition to nonresidence, that the representative "becomes insane or otherwise incapable to discharge the trust, goes bankrupt or insolvent or is in failing circumstances" or that he fails to give additional security when required. It would be fruitless to appoint a person who was possessed at the time of appointment of one or more of these statu-

[13] 278 Ky. 584, 129 S.W. 2d 127 (1939).
[14] 225 Ky. 718, 9 S.W. 2d 1078 (1928).
[15] KY. REV. STAT. sec. 395.160 (1953).

tory grounds for removal, and the Court of Appeals has so held.[16] No other grounds for refusing to appoint one preferred by KRS 395.040 seem to have been recognized, but the term "otherwise incapable to discharge the trust" has been construed a number of times. In *Barnett's Adm'r* v. *Pittman*,[17] for example, it was held that the fact that the mother of the decedent had given birth to an illegitimate child more than thirty years earlier was not sufficient cause for denying her appointment, the evidence showing that she had been of good moral character since that time. The question of whether bad moral character is ever, of itself, sufficient reason for denying the right to appointment was not decided. While a mere personal hostility between an applicant for appointment as administrator and one or more of the distributees might not necessarily disqualify the applicant for appointment, it has been held that such an antagonistic position toward a distributee as might lead to an awkward or unsatisfactory situation would be grounds for removal of an administrator, and therefore grounds for denying the appointment in the first place.[18] On first examination, there is apparently some disagreement between the holdings in *Barnett's Adm'r* v. *Pittman*[19] on the one hand and *Hunt* v. *Crocker*[20] and the more recent cases of *Mullins* v. *Mullins*[21] and *Howd* v. *Clay*[22] on the other hand. The point of distinction seems to be that in the *Barnett* case, where it was held that hostility alone does not disqualify, the hostility toward other distributees was not accompanied by any adverse claim against the estate itself on the part of the applicant for appointment. Nevertheless, it is apparent that if the courts should systematically give to the phrase "otherwise incapable to discharge the trust" a broad and elastic enough construction the preference statutes could come to have little meaning. At least, it seems fair to state that the mandatory nature of the preference statute is much less certain when it is considered in the light of the more liberal interpretations of the disqualifying statute. In view of

[16] Barnett's Adm'r v. Pittman, 282 Ky. 162, 137 S.W. 2d 1098 (1940); Hunt v. Crocker, 246 Ky. 338, 55 S.W. 2d 20 (1932).
[17] *Supra* note 16.
[18] Price's Adm'r v. Price et al., 291 Ky. 211, 163 S.W. 2d 463 (1942).
[19] *Supra* note 16.
[20] *Supra* note 16.
[21] 307 Ky. 748, 212 S.W. 2d 272 (1948).
[22] 312 Ky. 508, 228 S.W. 2d 437, 18 A.L.R. 2d 629 (1950).

the result reached in such cases as *Howd* v. *Clay*,[23] it is obvious that the words "if qualified" are of critical importance. A close study of all the decisions cited herein reveals that there is no real conflict, though at times, based on particularly strong facts, language may have been used which went farther than necessary for general application. The following quotation from *Liberty Bank & Trust Co.* v. *Kentucky Title Trust Co.*[24] seems to state very well the limits to which the mandate of the preference statute in Kentucky is subject:

> It is error to deny the right of precedence to a person entitled thereto. While the right to be preferred as a personal representative is a substantial one and must be respected, it is to be applied only to the extent and under the circumstances indicated by the statute. The jurisdiction of the court is not delimited, but its discretion is directed, in those instances where a preference is prescribed.

In addition to exercising discretion in determining the qualifications of those who are preferred by statute, the courts must at times determine who among several applicants is actually within the preferred class. Thus, in case of dispute, the county court must first determine the degree of relationship of those applying for appointment and grant it to the one next entitled to distribution, and an error in the determination of the degree of relationship is not void, but merely erroneous.[25] The case of *Hood* v. *Higgins' Curator*[26] presented the problem, not of the degree of relationship as between blood relatives, but the legality of the status of an adopted daughter. The decedent died intestate and within the statutory time his adopted daughter applied to the county court for appointment as administrator. There was no widow or natural child surviving. Certain of the relatives and creditors of the decedent objected to the appointment of the adopted daughter on the ground that a suit was pending in the circuit court to set aside the judgment of adoption, and until this suit had been determined the adopted daughter should not be permitted to exercise rights which had been conferred on her solely by reason of the judgment of adoption. The county court

[23] *Ibid.*
[24] 239 Ky. 263, 266, 39 S.W. 2d 258, 261 (1931).
[25] Buckner's Adm'rs v. Louisville & N. R. Co., 120 Ky. 600, 87 S.W. 777 (1905).
[26] 225 Ky. 718, 9 S.W. 2d 1078 (1928).

refused to appoint the daughter administrator and appointed a curator instead. The circuit court affirmed, but on appeal the Court of Appeals reversed. It was held that the judgment of adoption was in full force and effect, and, until vacated, it was entitled to full faith and credit and was binding on the county court. The court observed that the preference statute would have little meaning if the rights of one entitled to be a personal representative could be indefinitely postponed and suspended by an action in which his status was attacked. It was also pointed out that the daughter was bonded and the estate was not going to suffer if she was permitted to qualify and begin the administration instead of suspending all activities until her legal status had been settled. The problem of this case possibly arises most frequently when relatives of the decedent resent a late-in-life marriage and seek to deprive the widow of the right to administer by attacking the validity of the marriage itself. In such a case it would appear to be the duty of the county court to appoint the widow and permit her to proceed with the orderly administration of the estate, under bond, while the necessarily long process of settling her status is determined by the proper courts.

A further question which arises under the preference statutes concerns the right of one, who is himself preferred, to step aside and nominate another to act in his place. The statutes of some states provide specifically for this procedure. Statutory provisions that the first class in the order of preference for appointment shall be the spouse, or a qualified person whom he or she may request, have been construed as making the appointment of a competent nominee of a surviving spouse mandatory, so that the right of the nominee is superior to that of a member of a subsequent class. The Illinois statute on preference[27] lists six preferred classes of relatives "or any person nominated by them." It would appear that under this statute the nominee of any of the preferred classes would become a member of the nominator's class, entitled to appointment ahead of a member of any less preferred class. On the other hand, where the statutes provide for preference but do not specifically provide for appointment of a nominee, the results are not uniform. In West Virginia, for example, the nominee is preferred on the ground that the statute

[27] ILL. REV. STAT., Ch. 3, sec. 248 (1953).

does not prefer the distributee because of any peculiar fitness to fill the office, but on account of his or her beneficial interest in the estate to be administered.[28] Although the North Carolina statute has been amended to provide for the appointment of the nominee,[29] for many years previous to the amendment, when there was no express provision for this procedure, the courts uniformly held that the nominee was entitled to appointment.[30] To the contrary, however, is the case of *Bivin* v. *Millsap*[31] where the Albama court held that the preferential right could not be delegated to a third person to the exclusion of a member of the class next preferred. While the Tennessee statute has been construed to permit the nomination of a stranger,[32] it has been held that where a widow declined to act as administratrix and nominated a bank to act and a daughter of the decedent protested the appointment of the nominee and sought to be appointed herself, the daughter had the right to administer the estate.[33] The New Mexico statute has been construed to mean that the preference in the right to administer does not carry with it the right to nominate a substitute where there is no specific statutory provision for nomination or delegation.[34]

In Kentucky the statutory authority for the appointment of the nominee is inferred from the negative reference to such procedure found in the following language in KRS 395.015(2):

> In case of intestacy, if there be no surviving spouse, or if such spouse waives the right of appointment or is not qualified to act and does not nominate a suitable administrator and there are more than one resident heir at law entitled to appointment, the court shall thereupon appoint a time for hearing such application. Notice of said hearing shall be given to the surviving spouse and all known heirs of the deceased residing in the state, in the manner provided in KRS 395.016. (1942, c. 167, sec. 5).

Under this statute, it has been held that only a person who is himself qualified for appointment can nominate another to be

[28] See Taylor v. Virginia-Pocahontas Coal Co., 78 W. Va. 455, 88 S.E. 1070 (1916).
[29] N.C. GEN. STATS., sec. 28-6 (b).
[30] In re Estate of Smith, 210 N.C. 622, 188 S.E. 2d 202 (1936).
[31] 238 Ala. 136, 189, 220 (1939).
[32] In re Wooten's Estate, 114 Tenn. (6 Cates) 289, 85 S.W. 1105 (1908).
[33] Commerce Union Bank v. Fox, 28 Tenn. App. 587, 192 S.W. 2d 233 (1946).
[34] Miller v. Murphy, 39 N.M. 40, 38 P. 2d 1116 (1934).

administrator. In the case of *Spayd's Adm'r* v. *Brown*[35] there were no resident heirs, but one of two nonresident sisters nominated a resident in opposition to another resident who applied for appointment. The court held that being disqualified herself, the sister had no right to dictate to the court who should act in her place. On the other hand, of course, where the nominator is the only person who is entitled to administer the estate, his nominee must be appointed, if a suitable person.[36]

The most serious question in connection with the right to nominate arises when there are members of several preferred classes available for appointment and one who himself has high priority attempts to have his nominee appointed in preference to a distributee of lesser preference. As has been shown, in some states the nominee steps into the shoes of the nominator, and becomes entitled to appointment as against a distributee of secondary preference. This does not appear to have been the case in Kentucky, at least until quite recently. In the case of *Lalley* v. *Lalley's Adm'r*[37] the surviving distributees consisted of a sister and three nieces, all of whom were qualified to administer. The sister waived her right and on her motion the court appointed a stranger to the estate. When the three nieces, prior to the second county court, made a motion for the removal of the nominee of the sister and for their own appointment, it was held that they were entitled to be appointed. In the case of *Treas* v. *Treas*[38] the Court of Appeals seems to have departed from this rule. There the decedent was survived by a widow and a nephew, both of whom applied, the widow at the same time nominating a suitable person to act in her stead. The court appointed the nominee of the widow and was upheld on appeal where it was also held that no notice or hearing was necessary when the surviving spouse who was first preferred had nominated a suitable person. The court said:

> Mr. Treas left a widow. She was qualified, but waived the right of appointment as administratrix. However, she did nominate a suitable person to administer the

[35] 31 Ky. Law Rep. 438, 102 S.W. 823 (1907). See also Ellwanger v. Ellwanger's Adm'r, *supra* note 13.
[36] Louisville Trust Co. v. Bingham, 178 Ky. 573, 199 S.W. 58 (1917).
[37] 256 Ky. 50, 75 S.W. 2d 544 (1934).
[38] 240 S.W. 2d 593 (Ky. 1951).

> estate. Therefore, no notice of a hearing was necessary. The preference given the surviving husband or wife under KRS 395.040 includes the right of the survivor to nominate a suitable administrator under the conditions set forth in Paragraph 2 of KRS 395.015.[39]

While this case does not specifically hold that the appointment of the nominee of the person first preferred, who is qualified, to the exclusion of another distributee is mandatory, that seems to be its meaning. There would appear to be no sound objection to such an interpretation. No one could successfully maintain that an unsuitable nominee must be appointed under any circumstances. As has been pointed out, it has been held that the nominator must also be suitable and qualified. Since the preference does not apply unless both the preferred spouse or distributee and his or her nominee are qualified in all respects, it would appear logical that when these conditions are met, the appointment of the nominee should be just as mandatory as would have been the appointment of the nominator. After all, the area of discretion in respect to qualifications is large, and the court has made it abundantly clear that the preference statute of Kentucky confers no absolute rights.[40] Wherever the applicant or nominee is, in the court's opinion, incapable of discharging the trust, that person's right to be appointed vanishes.

No attempt has been made here to discuss all of the problems which arise in the application of the statutory preference. However, the underlying problem created by these statutes is the matter of how far the discretion of the court is limited by them. The cases herein discussed, when considered together, show that while the preferences granted seem to make mandatory the appointment of a fully qualified member of a preferred class, or his nominee, the county court is still the judge of the applicant's qualifications. This being so, it cannot be said that the hands of the court are unreasonably tied by these statutes.

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[39] *Id.* at 594.
[40] 307 Ky. 748, 212 S.W. 2d 272 (1948).