2010 WL 2752553 (Ky.) (Appellate Brief)
Supreme Court of Kentucky.

Joseph FISCHER and Cindy Fischer, Appellants,
v.
John R. FISCHER, Successor Executor of the Estate of John Fischer, Appellee.

No. 2009-SC-000245-D.
March 22, 2010.

Appellee Brief

James C. Nicholson, Nicholson Law Office, 121 South 7th Street, Suite 200, Louisville, Ky 40202, (502) 583-3212/Fax (502) 569-0596, Counsel for Appellee, John R. Fischer, Successor Executor of the Estate of John Fischer.

I** ***COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

Appellee, John R. Fischer, as Successor Executor of the Estate of John Fischer, respectfully requests that an oral argument be scheduled in this appeal because he believes an oral argument will be of benefit to the Court in understanding the parties' positions as well as the applicable legal principles.

ii** ***COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT CONCERNING ORAL ARGUMENT i
COUNTERSTATEMENT OF POINTS AND AUTHORITIES .... ii-v
INTRODUCTION 1
COUNTERSTATEMENT OF THE CASE .... 2 - 5
COUNTERSTATEMENT OF FACTS .... 5 - 9
ARGUMENT 9-26
I. ***THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT A CONTRACT COULD NOT BE FOUNDED UPON JOHN'S ASSIGNMENT OR CONVEYANCE OF AN EXPECTED INHERITANCE FROM HELEN*** .... 9 - 15

Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992) 10
Hunter v. Hunter, 127 S.W.3d 656 (Ky. App. 2003) 10
Hunt v. Smith, 191 Ky. 443, 230 S.W. 936, 938 (1921) 10
McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S.W. 406 (1895) 10
Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644 (Ky. 2007) 10
Speedway Superamerica, LLC. v. Erwin, 250 S.W.3d 339 (Ky. App. 2008) 10
War Fork Land Company v. Carr, 236 Ky. 453, 33 S.W.2d 308 (Ky. 1930) 14
***iii** *Pendley v. Lee*, 233 Ky. 372, 25 S.W.2d 1030 (Ky. 1930) 14
Harkins v. Hatfield, 221 Ky. 91, 297 S.W. 1109 (Ky. 1927) 14
Consolidated Coal Company v. Riddle, 198 Ky. 256, 248 S.W. 530 (Ky. 1923) 14
Spacey v. Close, 184 Ky. 523, 212 S.W. 127 (Ky. 1919) 14
Elliott v. Leslie, 124 Ky. 553, 99 S.W. 619 (Ky. 1907) 14
Prater v. Hicks, 220 S.W.2d 1011 (Ky. 1949) 14
Duffy v. Williams, 2007 WL 491302 (Ky. App. 2007) 14

II. ***ALTERNATIVE GROUNDS EXIST FOR AFFIRMING THE OPINION*** 15-26
A. ***John's Offer to Joseph And Cindy Was Gratuitous, And Thus Insufficient As A Matter Of Law To Form A Binding Contract*** .... 15 -17

Grisby v. Grisby, 1 Ky.L.Rptr. 62, 1880 WL 7324 (Ky. 1880) 16

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Buford's Heirs v. McKee, 1 Dana 107 (Ky. 1833) 16
Kelley-Koett Mfg. Co. v. Goldenberg, 270 S.W. 15, 18 (Ky. 1924) 16
28 C.J. 629 16
Goodan v. Goodan, 184 Ky. 79,211 S.W. 423 (Ky. 1919) 16
Dick v. Harris, 145 Ky. 739, 141 S.W. 56 (Ky. 1911) 16
***iv** *Foxworthy v. Adams*, 136 Ky. 403, 124 S.W. 381 (Ky. 1910) 16, 17
27 L. R. A. (N.S.) 308, Ann. Cas. 1912A, 327........ 16
Pikeville Nat. Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 430 (Ky. 1939) 16
Brashears' Adm'r v. Oder, 165 S.W.2d 801, 802 (Ky. 1942) 16
Gernert v. Liberty Nat. Bank & Tr. Co., 284 Ky. 575, 145 S.W. 2d 522 (Ky. 1940) 17
Hale v. Hale, 189 Ky. 171, 224 S.W. 1078 (Ky. 1920) 17

B. ***There Was No Meeting Of The Minds Between The Parties*** 18-20

Long v. Reiss, 160 S.W.2d 668 (Ky. 1942) 18
Mitts & Pettit, Inc. v. Burger Brewing Co., 317 S.W.2d 865 (Ky. 1958) 18
Utilities Elec. Mack Corp. v. Joseph E. Seagrams & Sons, 187 S.W.2d 1015 (Ky. 1945) 18

C. ***The Agreement Violated The Statute Of Frauds*** 20-21

KRS 371.010 20

D. ***Kentucky Law Required A Written And Signed Instrument For John To Disclaim A Portion Of His Interest In Helen's Estate*** .... 21 -22

KRS 24A.120 21
Grubbs v. Wurtland Water Dist., 384 S.W.2d 321 (Ky. 1964) 21
***v** 1KRS 394.610 21
KRS 394.630 22
KRS 394.620 22

E. ***Joseph's And Cindy's Sole Remedy Was A Claim For Services Against Helen's Estate*** 22-24

KRS 396.011(1) 23
Lucius' Adm'r v. Owen, 198 Ky. 114, 248 S.W. 495, 496 (Ky. 1923) 24
Oliver v. Gardner, 192 Ky. 89, 232 S.W. 418, 419 (Ky. 1921) 24
Hardin v. Savageau, 906 S.W.2d 356 (Ky. 1995) 24

F. ***The Trial Court Erred In Instructing The Jury*** 24-26

Reece v. Dixie Warehouse and Cartage Co., 188 S.W.3d 440, 449 (Ky. App. 2006) 24
McKinney v. Heisel, 947 S.W.2d 32, 34 (Ky. 1997) 24
Cox v. Cooper, 570 S.W.2d 530 (Ky. 1974) 25

CONCLUSION 26

*1 *INTRODUCTION*

This matter is before the Court on Discretionary Review filed by the Appellants, Joseph Fischer ("Joseph") and Cindy Fischer ("Cindy") from the unanimous Opinion rendered by the Court of Appeals on February 13, 2009 ("the Opinion"). The Opinion reversed and remanded the Trial Court's June 27, 2007 Judgment ("Judgment") entered upon a jury verdict in Case No. 06-CI-004734. The Jury found that a valid and enforceable oral contract ("Agreement") existed whereby John Fischer ("John") agreed to relinquish his entitlement to all but thirteen percent (13%) of the estate of his mother, Helen Fischer ("Helen"), in return for Joseph and Cindy providing end-of-life care for Helen.

At issue in this appeal is whether the Court of Appeals correctly held that John did not form an enforceable contract with Joseph and Cindy because Kentucky law does not recognize the validity of contracts when the only basis of consideration is the

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

assignment or conveyance of an expected inheritance. More than 100 years of case law supports the Court of Appeals' holding. In this appeal, Joseph and Cindy are asking the Court to wholly ignore this long-followed legal principle. The Opinion should be affirmed because both Kentucky law and public policy are well-established that a putative heir may not assign or convey an expected inheritance. This legal principle thus negated the enforceability of any contract advanced by Joseph and Cindy upon John's alleged promise to relinquish a portion of his inheritance from Helen in consideration of their provision of care for Helen. Further, the Opinion should be affirmed because alternative grounds existed upon which the Court of Appeals could have held that the Agreement was invalid and unenforceable.

2** ***COUNTERSTATEMENT OF THE CASE

On May 25, 2006, Joseph and Cindy filed a Complaint against John in the Jefferson Circuit Court.[1] In Count I of their Complaint, Joseph and Cindy alleged that John had breached the parties' oral contract to accept only thirteen percent of the value of Helen's stock in consideration for Joseph and Cindy's providing care for Helen.[2] In Count II of their Complaint, Joseph and Cindy alleged *quantum meruit/unjust* enrichment theories.[3] Joseph and Cindy further alleged in Count II of their Complaint that John had unjustly benefitted from their efforts in caring for Helen in that he avoided any **financial** responsibilities for her care during her lifetime.[4] Finally, Joseph and Cindy alleged in Count II of their Complaint that their efforts prevented Helen's estate from being consumed by expensive nursing home care.[5]

John filed his Answer to Joseph's and Cindy's Complaint on September 5, 2006.[6] In his Answer, John denied the operative allegations stated in the Complaint.[7] John further affirmatively asserted defenses that enforcement of the Agreement was barred by the statute of frauds, statute of limitations and failure of consideration.[8]

The cause was tried before a jury on May 8 and 9, 2007. John made a Motion for Directed Verdict at the close of Joseph's and Cindy's proof[9] and at the conclusion of his own ***3** proof.[10] John premised both directed verdict motions upon the assertion that: (1) the proof was insufficient to establish an express contract between the parties; (2) any claim by Joseph and Cindy rested solely against Helen's estate; (3) John's offer to Joseph and Cindy was gratuitous; (4) there was no meeting of the minds between the parties; and (5) the Agreement violated the statute of frauds because it purportedly concerned the transfer of an interest in Helen's real estate. The Trial Court denied John's initial Motion upon Count I of Joseph's and Cindy's Complaint, but reserved a ruling with respect to Count II of the Complaint.[11] The Trial Court also denied John's renewed Motion, but refused to instruct the Jury as to Count II of the Complaint, thus essentially directing a verdict against Joseph and Cindy upon their *quantum meruit* claim.[12]

The Trial Court submitted the case to the Jury upon the following operative instruction and interrogatories:

INSTRUCTION NO. 2

You will find for the Plaintiffs Joseph Fischer and Cindy Fischer if you are satisfied from the evidence that both they and the Defendant John Fischer understood and agreed that in exchange for the Plaintiffs providing for Helen B. Fischer for the rest of her natural life, that the Defendant would only receive 13% of the value of the estate of Helen B. Fischer. Otherwise, you will find for the Defendant John Fischer.

INTERROGATORY NO. 1

Are you satisfied from the evidence that both the Plaintiffs Joseph Fischer and Cindy Fischer and the Defendant John Fischer understood and agreed that in exchange for the Plaintiffs providing for Helen B. Fischer for the rest of her natural life, that the Defendant would receive a percentage of the value of the estate of Helen B. Fischer?

4** ***INTERROGATORY NO. 2

If you find for the Plaintiffs, you will determine from the evidence and state in your verdict whether the amount on which they agreed was 13% of the value of the stock owned by Helen B. Fischer at the time of her death, OR 13% of the value of her entire Estate. [13]

The Jury returned a verdict which found that John had agreed to forego all but 13% of Helen's estate. [14] On June 27, 2007, the Trial Court entered a Judgment in accordance with the jury verdict. [15]

On July 9, 2007, John filed a Motion for a Judgment Notwithstanding the Verdict or, in the alternative, for a new trial. [16] On July 11, 2007, the Trial Court entered an Order which granted John's Motion. On or about July 13, 2007, Joseph and Cindy moved the Trial Court to set aside the July 11, 2007 Order. [17] On July 18, 2007, the Trial Court entered an Order which set aside its July 11, 2007, Order, and reinstating the jury verdict. [18]

John timely filed his Notice of Appeal from the Judgment in the Trial Court on August 9, 2007. [19] Joseph and Cindy, however, did not file a cross-appeal with respect to the Trial Court's refusal to instruct the Jury on their *quantum meruit* claim. On February 13, 2009, the Court of Appeals issued its unpublished Opinion which reversed the Judgment, and remanded the action to the Trial Court for further proceedings. On February 27, 2009, Joseph and Cindy thereafter moved the Court of Appeals to rehear the Opinion. The Court of ***5** Appeals denied Joseph's and Cindy's Motion for Rehearing by an Order entered on March 31, 2009. Joseph and Cindy timely moved this Court for Discretionary Review on April 29, 2009. This Court granted Discretionary Review on October 21, 2009.

COUNTERSTATEMENT OF FACTS

Helen was John's and Joseph's mother, and Cindy is Joseph's wife. [20] Dating back to the 1980's, Joseph and Cindy had contemplated what they would do when the time came that Helen could no longer care for herself. [21] Joseph and Cindy decided that when that time came, Helen would move in with them. [22] There is no evidence that, at this point in time, the parties ever discussed the concept of John foregoing any portion of his inheritance from Helen. Thus, when Joseph and Cindy purchased a new home in 1998 they chose one which had a separate living suite in anticipation that Helen would eventually reside with them. [23]

By early 2001, the record shows that Helen could no longer care for herself due to physical problems and short-term memory loss resulting from the onset of Alzheimer's disease. [24] Helen began residing with Joseph and Cindy during either the last week of January or first week of February 2001. [25] Helen's Alzheimer's progressed rapidly and care for her became extremely difficult. [26] The Court of Appeals found, and John does not contest, that Joseph and Cindy provided Helen with exemplary care

throughout her thirty-two-month stay ***6** with them. [27] The Court of Appeals also found, and John also does not contest, that he provided no assistance during this period, and apparently saw his mother on only a few occasions. [28]

The Court of Appeals found that John expressed his appreciation for Joseph's and Cindy's efforts shortly ***after*** Helen began residing with them. [29] As a sign of this appreciation, John informed Joseph and Cindy that he would take only thirteen percent [30] of Helen's estate upon her death in consideration of their care for Helen, and for relieving him of that burden. [31] As Joseph was Helen's only other heir, this would leave him the remainder of her estate. [32]

The record shows that Joseph did not contemporaneously accept John's offer, but instead simply thanked John. [33] The record also shows that similar conversations concerning John's offer occurred several times over the course of the next thirty-two months. [34] The Court of Appeals found that John and Joseph were aware that Helen's Last Will provided that each was to receive fifty percent of her estate, but they did not know the total value of Helen's estate (including the value and nature of her stock holdings). [35]

***7** Helen died in October 2003, and Joseph was named Executor of her estate. [36] Helen's Last Will was admitted to probate on or about November 4, 2003 by an Order of the Jefferson District Court in Case No. 03-P-004429. The record evidences that Helen's residence was worth approximately $200,000.00, and the remainder of her estate, consisting primarily of her stock holdings, was worth approximately $160,000.00. [37] The record does not indicate that John filed a partial disclaimer of his interest in Helen's estate as required by KRS 394.620.

During the course of settling Helen's estate, Joseph's counsel prepared settlement papers which, if signed by John, would have memorialized an agreement that he would receive the value of thirteen percent of Helen's stock, consistent with Joseph's understanding of the parties' agreement. [38] John, however, pointed out his understanding that the agreement was for thirteen percent of the total value of Helen's estate. [39] The parties, however, never memorialized any agreement in writing. After further discussions with Joseph, John again balked at any proposed settlement because he believed that Joseph had undervalued Helen's residence. [40] Instead, John suggested that he take his full fifty percent share of Helen's estate, and pay Joseph and Cindy $2,000.00 per month for their services in caring for Helen. [41] Joseph and Cindy refused this suggestion, and litigation followed. [42]

***8** At trial, however, Joseph and Cindy reversed course, and testified that John's stated intention was to take only thirteen percent of Helen's stock holdings. [43] Joseph and Cindy also admitted at trial that John's offer to take a reduced share of Helen's estate was not material because they would have provided care for Helen irrespective of such offer. [44] More importantly, Joseph repeatedly conceded in his trial testimony that no agreement existed with John as to the division of Helen's estate at the time she moved in with Joseph and Cindy. [45]

Joseph testified that he moved Helen into his home and began caring for her without any expectation of compensation. [46] Joseph and Cindy, nevertheless, also testified that they refrained from paying various expenses from Helen's estate because of John's offer. [47] Joseph and Cindy also presented evidence that if Helen had been placed in a nursing home, the cost of her care would have consumed her entire estate. [48] Thus, according to Joseph and Cindy, their efforts ultimately saved Helen's estate. [49] Joseph and Cindy introduced this evidence although Joseph was adamant in his testimony that at no time would he have ever put Helen in a nursing home. [50]

John's testimony was starkly different from that presented by Joseph and Cindy. John acknowledged at times after Helen began residing with Joseph and Cindy that he had ***9** discussed with Joseph the idea of taking only 13% of Helen's estate.[51] John was also adamant in his testimony that the idea of him taking only 13% of Helen's stock was never discussed with Joseph and Cindy.[52] John, however, did not at the time know the value of all of Helen's assets. As such, this was John's mere gratuitous intention of a gift which never turned into a binding contract. After hearing the parties' respective testimony, the Jury found that John had agreed to forego all but thirteen percent of Helen's estate.

John died testate on August 15, 2009, and his Last Will was admitted to probate on or about October 12, 2009 by an Order of the Jefferson District Court in Case No. 09-P-003815. John's son, John R. Fischer, was appointed as his Successor Executor, and he has moved the Court pursuant to CR 25.01 to substitute him as the appellee in this appeal.

ARGUMENT

I. *THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT A CONTRACT COULD NOT BE FOUNDED UPON JOHN'S ASSIGNMENT OR CONVEYANCE OF AN EXPECTED INHERITANCE FROM HELEN.*

The Court should affirm the Opinion because the Court of Appeals did not err in reversing the Judgment. It is necessary to affirm the Opinion because the Court of Appeals correctly determined that the Agreement was void and unenforceable because Kentucky law prohibited John from contracting to assign or convey to Joseph and Cindy any portion of his expected inheritance from Helen prior to her death.

***10** Under Kentucky law, matters relating to the interpretation of a contract are questions of law. See *Morganfield National Bank v. Damien **Elder** & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Ostensibly, this would include the threshold question of whether the parties formed a valid contract. Under Kentucky law, appellate courts review issues of law under the *de novo* standard. See *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003). Therefore, the Court of Appeals appropriately conducted an independent review of whether the Agreement was valid as a matter of law.

Count I of Joseph's and Cindy's Complaint asserted a claim against John for breach of an oral contract.[53] At trial, John repeatedly challenged the underlying validity of the Agreement.[54] At page 9 of the Opinion, the Court of Appeals correctly acknowledged that John properly preserved the question of the Agreement's underlying validity in his directed verdict motions.

In his directed verdict motions, John alleged that the Agreement was invalid based upon several grounds, including: (1) the absence of proof of a contract by clear and convincing evidence; (2) the gratuitous nature of John's offer; (3) a lack of meeting of the minds between the parties; and (4) the Agreement violated the Statute of Frauds.[55] Granted, John did not specifically assert the ground that the assignment or conveyance of a prospective inheritance cannot serve as the consideration for a contract. However, such fact is not totally dispositive of the issue given that appellate review of the Agreement's validity ***11** was conducted by the Court of Appeals on a *de novo* basis. In other words, the Court of Appeals was entitled to independently review the validity of the Agreement based upon all viable legal theories.

In this instance, the Court of Appeals acknowledged at page 9 of the Opinion that its *de novo* review of the validity of the Agreement required it to apply basic contract principles, particularly the existence of mutual consideration. In conducting its *de novo* review, the Court of Appeals then focused upon whether the assignment or conveyance of an expected inheritance could serve as valid consideration for a contract. The Court of Appeals rightly held that Kentucky law does not recognize the validity of such a transaction.

In support of its holding, the Court of Appeals relied upon *Hunt v. Smith*, 191 Ky. 443, 230 S.W. 936, 938 (1921) and *McCall's Adm'r v. Hampton*, 98 Ky. 166, 32 S.W. 406 (1895). Both *Hunt* and *McCall's Adm'r* premise that a putative heir's contract to assign or convey an inheritance is void at common law on public policy grounds. Under Kentucky law, the determination

of whether a contract is void against public policy or otherwise invalid is also reviewed under the *de novo* standard. See *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007) and *Speedway Superamerica, LLC. v. Erwin*, 250 S.W.3d 339 (Ky. App. 2008). Given that appellate review of the validity of a contract is conducted on a *de novo* basis, it was wholly appropriate for the Court of Appeals to consider whether the Agreement was void on public policy grounds.

McCall's Adm'r, *supra,* was a case in which one brother sold and deeded an expected inheritance from his father's estate to another brother in consideration for monies needed for medical treatment. This transaction occurred some three years before the father's death. The ***12** grantor brother was sued by a third-party creditor after the father's death, and the creditor obtained an attachment against the grantor's share of the father's property. The grantee brother intervened in the creditor's action for the purpose of asserting his purported superior rights to the grantor brother's inheritance. In ruling in the creditor's favor, the former Court of Appeals acknowledged that the common law prohibited the sale or assignment of a naked possibility or expectancy.

In reversing the Judgment in this case, the Court of Appeals, at pages 12 and 13 of the Opinion, adopted the following discussion from *McCall's Adm'r* concerning the rule prohibiting conveyance of an expectancy as the consideration for a contract, the public policy behind the rule, and why courts may not turn to equity to salvage an agreement for the assignment of an inheritance:
"It is axiomatic that in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject-matter, nothing in *esse*, about which a contract can be made, the essential thing to the validity of a contract is absent; hence such contract is declared by the law to be void. If it be void, then no party to it can maintain an action upon it. A wise public policy produced the law which fixed the status of parties to such a contract. If it is wholesome to declare such contracts invalid, why should courts of equity enforce such contracts, in defiance of the law and a wise public policy? If this is to be the practice of courts of equity, then the common law on this subject is a dead letter, and inoperative. Why should the common law declare a contract invalid and void, if courts of equity have the power to verify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void, and yet say that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity, any more than at law, and we agree with such courts upon the question.

***13** It seems, at this late day, it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, [and] save free and untrammeled the actions of the possessors of estates in their distribution. If there were no other reason for adhering to the rule, to avoid the consequences to flow from its abrogation, those just suggested would be all-sufficient, in our opinion, for doing so."

32 S.W. at 408. The principles underlying *McCall's Adm'r* are as applicable now as they were 115 years ago, and have been followed numerous times by Kentucky's appellate courts in the intervening years.

The second case relied upon by the Court of Appeals was *Hunt v. Smith*, *supra*., in which the Court was again confronted with a contract for the assignment or conveyance of an expected inheritance. In *Hunt*, seven children each separately deeded their expected inheritance in their father's real property to several third-party grantees. At the time of the conveyances, the father was mentally incapacitated and institutionalized. The grantees took possession of the property, and remained in possession until ousted by a judgment rendered in favor of the father's guardian. Thereafter, the grantees brought an action against the seven children for breach of their deed warranties, and amended their complaint to assert title to the property through the aforementioned deeds following the father's death.

In affirming the dismissal of the grantees' action, the former Court of Appeals held in *Hunt* that:
"To make a contract of bargain and sale valid, there must be a thing or subject matter to be contracted for, and if the subject matter is not *in esse* at the time of the contract no rights can be acquired under it. This principle, as it should be applied to the case at hand, is quaintly stated in Coke, ***14** Litt. 262, 2 Bac. Abr. title "Bargain and Sale," p. 4, as follows: "If a son and heir bargain and sell the inheritance of his father, this is void, because he hath no right in himself."

By the common law such a contract is declared void because contrary to public policy; and there is no statute in this state changing the common law on this subject...."

230 S.W. at 939. In other words, "[A] naked possibility or contingency not founded upon a right or coupled with an interest cannot be assigned or sold. Id. In applying *Hunt* to this case, John's expectancy of inheriting half of Helen's estate "was not the subject of assignment or sale, and the contract is not enforceable either at law or in equity after the father's death." *Id.*

In light of *McCall's Adm'r* and *Hunt*, Joseph and Cindy cannot prevail in this appeal because the Agreement lacks the fundamental element of consideration. The law does not allow one in John's position to assign or convey an expected inheritance as consideration for a contract. This is so because John had no vested right to convey to Joseph and Cindy until Helen died and her Last Will was admitted to probate. In this instance, more than 100 years of law supports the Court of Appeals' holding. See *War Fork Land Company v. Carr*, 236 Ky. 453, 33 S.W.2d 308 (Ky. 1930); *Pendley v. Lee*, 233 Ky. 372, 25 S.W.2d 1030 (Ky. 1930); *Harkins v. Hatfield*, 221 Ky. 91, 297 S.W. 1109 (Ky. 1927); *Consolidated Coal Company v. Riddle*, 198 Ky. 256, 248 S.W. 530 (Ky. 1923); *Spacey v. Close*, 184 Ky. 523, 212 S.W. 127 (Ky. 1919); and *Elliott v. Leslie*, 124 Ky. 553, 99 S.W. 619 (Ky. 1907). More modern application of the principle is shown in *Prater v. Hicks*, 220 S.W.2d 1011 (Ky. 1949) and the Court of Appeals' unpublished decision in *Duffy v. Williams*, 2007 WL 491302 (Ky. App. 2007).

***15** Since the law on this issues is settled, the Court should be loath to allow putative heirs to "count their chickens before they are hatched" by presumptively bargaining for the assignment or conveyance of an inheritance which might never materialize. [56] For the reasons set forth above, the Opinion should be affirmed.

II. *ALTERNATIVE GROUNDS EXIST FOR AFFIRMING THE OPINION.*

While the Court of Appeals correctly determined that the Agreement was void for lack of consideration, other viable legal grounds existed which support the Court of Appeals' reversal of the Judgment.

A. *John's Offer to Joseph And Cindy Was Gratuitous, And Thus Insufficient As A Matter Of Law To Form A Binding Contract.*

John argued in his directed verdict motions that his offer to take only thirteen percent of Helen's estate was gratuitous, and thus insufficient to form a binding contract. [57] Joseph and Cindy performed the disputed services for Helen's benefit, and the law does not require that John compensate them for such services. Thus, as a matter of law, John's offer to compensate Joseph and Cindy was merely a gratuitous expression of appreciation. While such offer was a noble gesture on John's part, it was not one which the law required him to make, and should therefore not be enforced against John.

***16** An example of this concept is demonstrated in *Grisby v. Grisby*, 1 Ky.L.Rptr. 62, 1880 WL 7324 (Ky. 1880) in which the former Court of Appeals declined to enforce a man's gratuitous promise to give his brother an interest in property which he had purchased. The Court in *Grisby* noted that the disputed declaration was purely voluntary, and was no more than an unperfected gift. See also *Buford's Heirs v. McKee*, 1 Dana 107 (Ky. 1833).

At best, John's offer to Joseph and Cindy can be also characterized as an unperfected *inter vivos* gift. This is the case because Kentucky law requires either actual or constructive delivery of property by a donor to a donee as an essential element of an *inter vivos* gift. As a matter of law, delivery is effected by the donor's parting with dominion over the property and placing it with the donee. On this point, *Kelley-Koett Mfg. Co. v. Goldenberg*, 270 S.W. 15, 18 (Ky. 1924) holds that:

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

> "...[I]t is everywhere declared to be the law that a mere intention to make a gift will not suffice to complete it ... a gift not fully executed by delivery cannot be enforced because there is no valuable consideration...."

See also 28 C.J. 629; *Goodan v. Goodan*, 184 Ky. 79, 211 S.W. 423 (Ky. 1919); *Dick v. Harris*, 145 Ky. 739, 141 S.W. 56 (Ky. 1911); *Foxworthy v. Adams*, 136 Ky. 403, 124 S.W. 381 (Ky. 1910); 27 L. R. A. (N.S.) 308, Ann. Cas. 1912A, 327; and *Pikeville Nat. Bank & Trust Co. v. Shirley*, 135 S.W.2d 426, 430 (Ky. 1939). In this instance, it is undisputed that John never delivered the subject matter of his offer, and thus never perfected a delivery of his interest in Helen's estate to Joseph and Cindy. Quite simply, there is no gift for Joseph and Cindy to enforce against John in the absence of delivery.

In *Brashears' Adm'r v. Oder*, 165 S.W.2d 801, 802 (Ky. 1942), the former Court of Appeals held there are many facts necessary to constitute the existence of an *inter vivos* gift, ***17** including: completion of the gift, delivery of the property, and gift must become immediately effective and irrevocable. See also *Gernert v. Liberty Nat. Bank & Tr. Co.*, 284 Ky. 575, 145 S.W.2d 522 (Ky. 1940). Whether or not something is a gift is a question of law, and the elements of a gift must be shown by clear and convincing evidence. 165 S.W.2d at 803. See also *Hale v. Hale*, 189 Ky. 171, 224 S.W. 1078 (Ky. 1920) and *Foxworthy*, *supra*.

As a matter of law, John's declaration of an intention to part with a portion of his inheritance was insufficient to constitute an enforceable gift in the absence of either actual or constructive delivery of such foregone portion. The very facts of this case highlight the underlying reason why a person cannot make an *inter vivos* gift of an expected inheritance. Because there is nothing in existence to transfer, it is simply not possible for a putative heir to make an actual or constructive delivery of their expectancy to a donee, and thus impossible to effect a valid gift.

Finally, the record evidences that the parties were unable to agree upon the precise quantum of Helen's estate which John would agree to forego. The record shows that John made his initial offer, but the parties materially dispute whether the offer encompassed John foregoing all but 13% of the entirety of Helen's estate, or 13% of the value of her stock. Thus, John's refusal to accede to Joseph's and Cindy's counter-offer that he forego all by 13% of the value of Helen's stock is tantamount to the revocation of prior gratuitous offer before any gift came to fruition. For such reason, the Opinion should be affirmed.

***18 B. *There Was No Meeting Of The Minds Between The Parties*.**

John argued in his directed verdict motions that the Agreement was unenforceable because there had never been a meeting of the minds between the parties. [58] At pages 9-10 of the Opinion, the Court of Appeals discussed the necessity that a contract's terms be full and complete. On this point, the Court of Appeals found that the parties had a meeting of the minds in stating that:

"the full and complete terms of the contract were that John would give up a portion of his inheritance in return for Joseph's and Cindy's care for Helen."

However, the Court of Appeals then directly contradicted itself in acknowledging that the parties materially disagreed regarding exactly what portion of Helen's estate John had agreed to relinquish. Given this latter fact, the Court of Appeals erred in holding that the parties had a full and complete agreement since a meeting of the minds cannot occur when the parties to a contract materially disagree on the material terms of a contract.

In *Long v. Reiss*, 160 S.W.2d 668 (Ky. 1942), the former Court of Appeals held that the terms of a contract must be definite and certain in order for that contract to be enforceable at law or equity. The purpose of the certainly requirement is to enable a court to determine the measure of damages in the event of a breach. *Mitts & Pettit, Inc. v. Burger Brewing Co.*, 317 S.W.2d 865 (Ky. 1958). Kentucky law provides that a meeting of the minds is the most essential factor to constitute a binding contract. *Utilities Elec. Mack Corp. v. Joseph E. Seagrams & Sons*, 187 S.W.2d 1015 (Ky. 1945).

***19** At trial, the record shows that the parties differed significantly about their understanding of precisely the quantum of Helen's estate which John would forego. For instance, Joseph and Cindy claimed that John agreed to take only thirteen percent of Helen's stock holdings. [59] On the other hand, John claimed that he had initially agreed to accept thirteen percent of the entirety of Helen's estate. [60] From the record, there is a significant difference between the two understandings.

Thus, John agreeing to relinquish some substantial portion of Helen's estate was the subject matter of Agreement. It therefore begs the question that there could not have been a meeting of the minds sufficient to form a binding contract when the parties materially and consistently disagreed throughout this case about whether John was to forego all but thirteen percent of the entirety of Helen's estate, or all but thirteen percent of the value of Helen's stock.

Furthermore, the very fact that the parties were still negotiating what percentage of Helen's estate that John would forego well after her death evidences the fact that the parties never had a sufficient meeting of the minds necessary to form a binding contract. More importantly, the absence of a meeting of the minds between the parties concerning the precise amount of Helen's estate which John allegedly agreed to forego is perhaps best evidenced by the fact that the Trial Court left such determination to the Jury. Instead, the Trial Court should have been in a position to instruct the Jury as to the exact terms of the Agreement. The fact that the Trial Court could not do so is precisely why it should have directed a verdict against Joseph and Cindy.

***20** On these points, the Court of Appeals erred in finding that the Agreement's terms were full and complete. However, as John has demonstrated here, the lack of a meeting of the minds evidenced by the record is an alternative viable legal theory which warrants that the Opinion be affirmed.

C. *The Agreement Violated The Statute Of Frauds*.

Joseph specifically argued in his directed verdict motion that any assignment or conveyance of his interest in Helen's estate would have failed under the Statute of Frauds in the absence of a written instrument signed by him since a portion of his inheritance involved Helen's real estate. [61]

In articulating the Kentucky Statute of Frauds, KRS 371.010 provides in pertinent part that:
"No action shall be brought to charge any person:

(6) Upon any contract for the sale of real estate, or any lease thereof for longer than one year . . . unless the promise, contract, agreement, representation, assurance, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith..."

In this instance, it is undisputed that the parties never memorialized in writing any agreement concerning John foregoing any portion of Helen's estate allotted him by her Last Will. Therefore, the Court of Appeals erred in failing to hold that John's directed verdict motions were proper was a matter of law in light of KRS 371.010 in the absence of a written instrument.

***21** In this instance, the Jury found that John had agreed to forego all but 13% of Helen's estate. Yet, this case should never have seen the inside of the jury room because John's directed verdict motion was proper based upon the Statute of Frauds. As a part of its *de novo* review, the Court of Appeals could have, and should have, held that the Agreement was unenforceable as a matter of law under the Statute of Frauds. The Opinion should be affirmed because it reached the right result, however the subject issue was an additional basis upon which the Court of Appeals could have reversed the Judgment.

D. *Kentucky Law Required A Written And Signed Instrument For John To Disclaim A Portion Of His Interest In Helen's Estate*.

Next, the Court of Appeals could have held as a part of its *de novo* review that the Agreement was invalid under KRS 394.610 to 394.630 as a defective disclaimer. While John did not invoke KRS 396.610 to KRS 396.630 in moving for a directed verdict, the requirements of these statutes nevertheless evidence another reason why the Agreement is unenforceable with respect to the division and distribution of Helen's estate. [62]

KRS 394.610 allows an heir the right to fully, or partially, disclaim an interest in inherited property. In this instance, John's attempt to assign or convey a portion of his ***22** expected inheritance from Helen is tantamount to an attempted disclaimer under the Kentucky Probate Code. Under KRS 394.630, the effect of a disclaimer is that:

> "the property or interest disclaimed devolves as if the disclaimant had predeceased the decedent or, if the disclaimant is designated to take under a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power."

However, KRS 394.620 requires the filing of a written instrument with the probate court within nine months of a decedent's death in order to effect a valid disclaimer.

In this instance, there was nothing filed with the Probate Court evidencing John's disclaimer of an interest in Helen's estate. Clearly, this statutory procedure could not have been followed in the absence of a written agreement signed by John. The Kentucky Probate Code contemplates, and imposes, an orderly protocol for probating testamentary instruments, administering estates, and distributing estates to a decedent's heirs. The method of disclaiming an interest in an estate is a part of that orderly protocol.

Thus, even if the John had agreed to disclaim a portion of his inheritance from Helen's estate, the failure of Joseph and Cindy to timely file in the Probate Court a written and signed instrument evidencing such disclaimer negates any attempt to belatedly enforce such agreement. Such failure is yet another reason why this Court should affirm the Opinion.

E. *Joseph's And Cindy's Sole Remedy Was A Claim For Services Against Helen's Estate*.

At trial, Joseph repeatedly asserted that any costs associated with Helen's care were an expense of her estate, and that Joseph's and Cindy's sole remedy was a claim against the ***23** estate. [63] Under the law, John was under no legal obligation to pay for, or provide any services, to Helen. Therefore, to borrow an old adage, Joseph and Cindy are "barking up the wrong tree" in asking that John forego any of his inheritance to cover such expenses.

In addressing claims against a decedent's estate, KRS 396.011(1) provides in pertinent part that:

> "All claims against a decedent's estate which arose before the death of the decedent. . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within six (6) months after the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death."

The import of KRS 396.011(1) means that a claim against Helen's estate was Joseph's and Cindy's exclusive remedy for the value of the services they provided to Helen, not a claim for reimbursement against John. The record clearly reflects that Joseph and Cindy failed to timely file a proof of claim against Helen's estate. Under KRS 396.011(1), such failure precludes any recovery by Joseph and Cindy.

Nevertheless, it is doubtful whether Joseph and Cindy were even entitled to relief as a matter of law had they timely filed a proof of claim. Kentucky follows a well-established rule that where the relation of the parties is sufficient to raise the presumption that they live together as a matter of mutual convenience, or as members of the same family. Thus, there exists no presumption under the law that one member, though sick, has promised or agreed to ***24** pay the other family members for services rendered to the sick person. To the contrary, *Lucius' Adm'r v. Owen*, 198 Ky. 114, 248 S.W. 495, 496 (Ky. 1923) holds that the presumption is that the services, being natural, were rendered without hope or expectation of pay, and before a recovery can be had, an express contract must be proved with stricter proof than in the case of an ordinary contract. In other words, proof must be by clear and convincing evidence. See also *Oliver v. Gardner*, 192 Ky. 89, 232 S.W. 418, 419 (Ky. 1921).

Here, Joseph and Cindy failed to prove the validity of the Agreement by clear and convincing evidence. Alas, the Trial Court did not even instruct the Jury on the necessity of finding proof of the Agreement's validity by clear and convincing evidence. Kentucky law, however, requires that a jury be specifically instructed as to any heightened burden of proof. See *Hardin v. Savageau*, 906 S.W.2d 356 (Ky. 1995). The Opinion should be affirmed because Joseph and Cindy failed to prove the validity of the Agreement by clear and convincing evidence.

F. *The Trial Court Erred In Instructing The Jury*.

In overruling John's objections to the jury instructions, the Trial Court noted that any objections were preserved for the record though his tendered instructions. [64] Under Kentucky law, the appellate review of jury instructions is a matter of law reviewed under the *de novo* standard. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). *Reece* holds that the language of jury instructions should not "over-emphasize an aspect of the evidence or amount to a comment on the evidence." Id., at 450 quoting ***25** *McKinney v. Heisel*, 947 S.W.2d 32, 34 (Ky. 1997). That, however, is precisely what occurred here.

At trial, John objected to Instruction No. 2. This instruction stated that the jury was to find for Joseph and Cindy if they were satisfied from the evidence that both they and John understood and agreed that in exchange for Joseph and Cindy providing care to Helen for the rest of her life, that John would only receive 13% of the value of her estate. [65] Otherwise, the jury was to find for John. [66] In no uncertain terms, Instruction No. 2 was contrary to the evidence presented at trial. The record reflects that Joseph and Cindy, and their witnesses, all testified at trial that the Agreement was for thirteen percent of Helen's stock. [67] Such testimony was consistent with Joseph's and Cindy's Complaint and demand for relief.

In submitting Instruction No. 2, the Trial Court laid out the terms of an agreement before the Jury ever considered the corresponding Interrogatories. The Trial Court did not word Instruction No. 2 in a "bare bones" manner as required by Kentucky law, but instead verbosely gave the jury the option whether the Agreement was for thirteen percent of Helen's stock or thirteen percent of Helen's estate. Thus, Instruction No. 2 was a comment on the evidence and over-emphasized to the Jury that an agreement between the parties must have existed for John to take thirteen percent of Helen's estate.

Kentucky law requires that juries be given "bare bones" instructions. See *Cox v. Cooper*, 570 S.W.2d 530 (Ky. 1974). In this instance, the Trial Court should have worded Interrogatory No. 2 in a "bare bones" manner which simply informed the Jury that an ***26** agreement existed between the parties, and set out the terms of such agreement. In turn, the Trial Court should have simply asked to the Jury in a single interrogatory to determine whether or not John had breached that agreement. Instructing the Jury in this matter was proper because the question of whether a contract existed between the parties was a purely legal issue for the Trial Court to determine, and the question of whether John had breached the contract was a purely factual issue for the Jury to determine.

In this instance, the Trial Court's erroneous jury instructions are but another reason why the Court of Appeals could have reversed the Judgment, and why this Court should affirm the Opinion.

CONCLUSION

Based upon the grounds set forth above, the Court of Appeals' February 13, 2009 Opinion should be AFFIRMED.

Footnotes

1 TR 1-9.

2 *Complaint*, ¶¶ 3 - 10; TR 1 - 3.

3 *Id.*, at TR 3 - 6.

4 *Id*.

5 *Id*.

6 TR 17-18.

7 *Id.*

8 TR 18.

9 See 30-11-07-VCR-034B1 at 12:19:28 - 12:25:26 (5/9/07).

10 See 30-11-07-VCR-034B2 at 2:02:01 - 2:08:22 (5/9/07).

11 See 30-11-07-VCR-034B1 at 12:25:27 - 12:32:38 (5/9/07).

12 See 30-11-07-VCR-034B2 at 2:08:24 - 2:08:43 and 2:12:10 - 2:13:28 (5/9/07).

13 TR 124 -129.

14 Specifically, ten of the twelve jurors answered Interrogatory No. 1 in the affirmative, and all twelve jurors found that John had agreed to forego all but 13% of Helen's estate.

15 TR 130.

16 TR 131 - 142.

17 TR 145-146

18 TR 147.

19 TR 148 - 149.

20 *Opinion,* p. 2.

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*.

27 *Opinion*, p. 2.

28 *Id.*

29 *Id*. See also 30-11-07-VCR-034B1 at 3:39:37 - 3:39:55 (5/8/07) and 11:40:27 - 11:41:13 (5/9/07).

30 At page 3 of its Opinion, the Court of Appeals explained that John arrived at the thirteen percent figure because that was one of his favorite numbers.

31 *Opinion,* pp. 2-3.

32 *Opinion*, p. 3.

33 *Id.*

34 *Id*.

35 Id.

36 *Opinion,* p. 4.

37 *Opinion,* p. 3.

38 *Opinion,* pp. 3-4.

39 *Opinion, p. 4*.

40 *Id*.

41 *Id*.

42 *Id.*

43 *Opinion,* p. 3.

44 *Opinion*, p. 3.

45 See 30-11-07-VCR-034B1 at, 4:11:22-4:12:16 (5/8/07).

46 See 30-11-07-VCR-034B1 at 4:12:25-4:12:32 (5/8/07).

47 *Opinion*, p. 3. However, the Court of Appeals' Opinion does not illuminate the nature or quantum of these expenses, or how refraining from paying an expense allegedly damaged Joseph and Cindy.

48 *Id*.

49 *Id*.

50 See 30-11-07-VCR-034B1 at 4:01:12-4:01:27 (5/8/07).

51 See 30-11-07-VCR-034B2 at 1:30:51 - 1:36:08 (5/9/07).

52 *Id*.

53 TR 1-3.

54 See 30-11-07-VCR-034B1 at 12:20:00 - 12:21:34 (5/9/07); 12:24:21 - 12:24:48 (5/9/07); and 30-11-07-VCR-034B2 at 2:02:01 -2:08:22 (5/9/07).

55 See 30-11-07-VCR-034B1 at 12:19:28 - 12:25:26 (5/9/07) and 30-11-07-VCR-034B2 at 2:02:01-2:08:22(5/9/07).

56 Joseph and Cindy cannot be heard to argue that equity mandates a recovery against John. The Trial Court refused to instruct the Jury on Joseph's and Cindy's *quantum meruit* claim, and they did not cross-appeal in order to preserve such issue for appeal. This fact is important because the arguments set forth by Joseph and Cindy in their Brief seem to intimate a mix of law and equity as their basis for reversing the Opinion. To the point, Joseph's and Cindy's entitlement to equitable relief against John are not before the Court in this appeal.

57 See 30-11-07-VCR-034B1 at 10:50:52 (5/9/07) and 30-11-07-VCR-034B2 at 2:02:33 (5/9/07).

58 See 30-11-07-VCR-034B1 at 12:24:21 - 12:24:48 (5/9/07) and 30-11-07-VCR-034B2 at 2:02:01-2:08:22(5/9/07).

59 *Opinion*, p. 3.

60 See Tape 30-11-07-VCR-034B2 at 1:30:51 - 1:36:08 (5/9/07).

61 *Id.*, at 2:04:46 (5/9/07).

62 John asserts that considering Joseph's and Cindy's failure to satisfy the requirements of KRS Chapter 394 is appropriate at this point of the proceedings on jurisdictional grounds. Matters relating to the administration of estates are within the exclusive jurisdiction of the District Court. See KRS 24A.120. Ostensibly, this would include matters relating to the determination of whether a party effected a valid disclaimer. Thus, Joseph and Cindy should have addressed any question about whether the Agreement was a valid disclaimer before the Jefferson District Court in Helen's probate matter, instead of before the Circuit Court.
Matters involving the absence of subject matter jurisdiction can be raised at any stage of the proceedings. See *Grubbs v. Wurtland Water Dist.*, 384 S.W.2d 321 (Ky. 1964). Thus, the Court should consider the validity of the Agreement *vis-a-vis* the requirements of KRS 394.610 and 394.620.

63 See Tape 30-11-07-VCR-034B1 at 12:20:00 - 12:21:34 (5/9/07) and 30-11-07-VCR-034B2 at 2:02:01 -2:08:22 (5/9/07).

64 See Tape 30-11-07-VCR-034B2 at 2:35:10 - 2:35:15 (5/9/07).

65 TR 124-129.

66 Id.

67 See Tape 30-11-07-VCR-034B2 at 2:31:08 - 2:32:30 (5/9/07).

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works.