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Antebellum and Postbellum Testamentary Transfers in Three Kentucky Counties Symposium: Empirical Analysis of Wealth Transfer Law

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This Article analyzes wills and inventories probated in three Kentucky counties, Boone, Woodford, and Wayne Counties, between 1860 and 1870. The results of the study show that married women in the three counties generally did not execute wills during the sample period, which is an expected result given the testamentary limitations imposed upon married women by Kentucky law. Despite dual encumbrances imposed by common and statutory law during the sample period, legislative and judicial action before, during, and after the sampled decade illustrates the advance of women's property rights in Kentucky. The Kentucky General Assembly passed a number of private and public bills that expanded the testamentary authority of married women after 1848, which is striking given the relative absence of legislation that authorized wills by married women before 1848. Furthermore, a number of testators placed assets in separate use trusts for the benefit of daughters thereby allowing those daughters to transfer separate estates by will after marriage pursuant to Kentucky common and statutory law. The authority to execute a will to dispose of a separate estate provided a married woman with an opportunity to express her intent on paper with the sanction of law.

The largest difference between wills probated before and after 1865 is the distribution of slaves. Notably, sampled testators opted to distribute slaves to females (wives and daughters) with greater frequency than to males (sons). Although women are historically depicted as bystanders to the slave economy, testamentary gifts of slaves to women suggests a greater degree of participation in the slave market than suggested by the traditional narrative. Regardless of the distribution of slaves by gender, each and every recipient of slaves by will did so before the ratification of the Thirteenth

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Amendment in 1865. The passage of the Thirteenth Amendment not only transformed enslaved persons to free persons, but also had a visible effect in the recorded pages of probate books — slaves are listed in testamentary instruments probated before 1865 but vanish in the wills and inventories of decedents' estates after 1865.

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INTRODUCTION

From a historical perspective, the law that governs the transfer of property at death by written instrument is, in a word, static. The legal authority to transfer real property at death in a writing called a "will" dates from the time of Henry VIII. Modern statutory witness and signature requirements for execution have a common ancestor in England's Wills Act of 1837.[1] Unlike the ossification of execution requirements,[2] the type of property that may be distributed by will is fluid. Recent advances in technology, for example, have created digital assets that individuals expect to transfer by testamentary instruments at death.[3] A 2012 *Wall Street Journal* article reported that Americans estimated their digital assets, such as emails, photos, or entertainment files, to be worth the hard-to-believe sum of $55,000.00 on average.[4] Whatever value is assigned to digital assets, courts and legislatures have been pushed to address issues involving the passage of those assets through a decedent's estate.[5] Similarly, the emergence of Bitcoin and other cryptocurrencies presents new challenges for estate planners.[6] The statutory formalities to transfer property by will have resisted

1 *See* Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng.), https://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/section/9 [https://perma.cc/4QK5-R8EN].

2 *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, The Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 177 (1991) ("In comparison to other statutory law, the wills acts have proved to be extraordinarily resistant to change.").

3 *See* Kelly Greene, *Passing Down Digital Assets*, WALL ST. J. (Aug. 31, 2012, 8:20 PM), https://www.wsj.com/articles/SB10000872396390443713704577601524091363102 [https://perma.cc/ZPB2-43F3].

4 *See id.*

5 *See, e.g.*, Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 606-07 (Mass. App. Ct. 2013) (examining whether a decedent's estate included his email account and communications); *Fiduciary Access to Digital Assets Act, Revised, 2015*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 (last visited Jan. 24, 2020) [https://perma.cc/S6EV-U7P5] (listing the numerous jurisdictions that have enacted the proposed statute).

6 *See The Future is Here: Dealing with Bitcoins and Cryptocurrencies in Tax and Estate Planning*, ACTEC FOUND. (Apr. 30, 2019), https://actecfoundation.org/podcasts/bitcoin-cryptocurrency-tax-estate-planning/ [https://perma.cc/P9M4-CP65] (describing the development of cryptocurrencies and similar assets as "probably one of the most significant changes that you will face as a trust and estates lawyer").

change,[7] but the *definition* of property that passes by will is in perpetual flux.

The most transformational change in the definition of property occurred following the conclusion of the Civil War. Before the war, statutory law in slave states categorized an enslaved person as an owner's real or personal property. An early law in the Virginia Colony, for example, deemed slaves "to be real estate (and not chattels),"[8] but Virginia's Revised Code of 1819 declared that "[a]ll negro and mulatto slaves, in all courts of judicature within this Commonwealth, shall be held, taken and adjudged to be personal estate."[9] Regardless of whether slaves were real or personal property, the owners of such property had the legal authority to buy, sell, mortgage, or purchase insurance policies on the lives of enslaved persons.[10] Furthermore, states imposed taxes on human property much like any other property owned by an individual.[11] In short, enslaved persons were commodities subject to all of the legal transactions that permitted an owner to exploit or protect investments in property.

Because statutory law designated slaves as a species of property, an enslaved individual was part of a decedent slaveowner's wealth that could be distributed to new owners following a slaveowner's death. The designation as real or personal property could be crucially important for an enslaved person/family because of rules governing legal rights such as dower that impacted the distribution of a decedent's estate.[12] During

[7] This is not to suggest that there has been no development in statutory law regarding what might constitute a valid will. In 2001, Nevada enacted a statute recognizing electronic wills, which relaxes traditional writing and signature requirements. *See* NEV. REV. STAT. § 133.085 (2019). *See generally* Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 108-11 (2008).

[8] WILLIAM WALLER HENING, 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 333 ch. XXIII § II (1823).

[9] 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 431 ch. 111 § 47 (1819).

[10] *See* Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J.S. HIST. 817, 822 (2010); Rachel L. Swarns, *Insurance Policies on Slaves: New York Life's Complicated Past*, N.Y. TIMES (Dec. 18, 2016), https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html [https://perma.cc/V3J3-P6KN].

[11] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 86 (2d ed. 1985).

[12] *See, e.g.*, RICHARD H. STANTON, REVISED STATUTES OF KENTUCKY, APPROVED AND ADOPTED BY THE GENERAL ASSEMBLY 1851 AND 1851, AND IN FORCE FROM JULY 1, 1852; WITH ALL THE AMENDMENTS SUBSEQUENTLY ENACTED, AND NOTES OF THE DECISIONS OF THE COURTS OF APPEALS OF KENTUCKY 425 (1860). *See generally* Roy W. Copeland, *The Nomenclature of Enslaved Africans as Real Property or Chattels Personal: Legal Fiction,*

the administration of an estate, personal representatives included slaves in inventories of a decedent's real and personal property and affixed values to them following appraisals as part of the process of probating a testate or intestate estate.[13] Upon distribution of a decedent's property, an individual or family could be divided between intestate heirs or testate takers to equalize the value received by each heir or sold to pay a decedent owner's debts. Indeed, a number of Thomas Jefferson's slaves were auctioned off to retire some of his debts following his death.[14]

After the conclusion of the Civil War, states ratified the Thirteenth Amendment and its declaration that "[n]either slavery nor involuntary servitude . . . shall exist within the United States . . . ."[15] From that point forward, human beings could no longer be included in the definition of property regardless of state statutes to the contrary. The passage of the Thirteenth Amendment and its elimination of human property, however, triggered a Newtonian fit of law-making in both Congress and southern states. In response to the Thirteenth Amendment, southern states passed Black Codes that sought to preserve antebellum society.[16] Subsequently, Congress enacted the Civil Rights Act of 1866,[17] but doubts about its constitutionality prompted Congress to pass the Fourteenth Amendment in 1868.[18] Two years later, Congress again entered the fray by barring states from prohibiting citizens from voting with its enactment of the Fifteenth Amendment in 1870 as well as another Civil Rights Act in 1875.[19] Despite the post-bellum flurry of congressional activity, a mixture of politics and Supreme Court decisions, such as the *Slaughterhouse Cases* and *Civil Rights Cases*,[20] impeded the effort to combat the vestiges of slavery. The postwar seesaw over civil rights cast doubt over the meaning of freedom for the newly

Judicial Interpretation, Legislative Designation, or Was a Slave a Slave by Any Other Name, 40 J. BLACK STUD. 946 (2010).

13 A testator could, of course, waive the requirement of completing an inventory by an express waiver in his/her will.

14 *See* HENRY WIENCEK, MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES 263 (2012).

15 U.S. CONST. amend. XIII, § 1.

16 *See, e.g.*, An Act to Amend the Vagrant Laws of the State, Laws of Mississippi, Law of the State of Mississippi ch. VI, § 2, at 91 (1865); *Black Codes of Mississippi*, TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/black-codes-of-mississippi/ (last visited Jan. 25, 2020) [https://perma.cc/5SJB-6RUN].

17 Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

18 *See* U.S. CONST. amend. XIV.

19 Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

20 The Civil Rights Cases, 109 U.S. 3, 25 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77-79 (1872).

freed, but the change in definition of property imposed by the Thirteenth Amendment cemented in probate courts — human beings were no longer legal property to be transferred at the death of another human being.

This Article examines the testamentary anatomy of wills in three Kentucky counties from 1860 to 1870. Part I describes the three counties sampled in this study — Boone, Woodford, and Wayne Counties. Part I also outlines the method employed to obtain data for this investigation as well as the specific data extracted from the probate records from the three counties. Part II reports the results of the study and provides a tentative analysis of those results. Like past studies, males comprised the majority of testators during the period. Although the overwhelming majority of probated wills were written by men, Kentucky's General Assembly passed several private bills expressly permitting married women to transfer property at death and, more broadly, enacted numerous statutes that provided greater economic opportunities for women. The combination of private bills and public laws that equalized economic agency between *femes covert*, married women, and *femes sole*, unmarried women, likely reflects the expansion of women's rights post-1848. Furthermore, the data reveals that females received enslaved persons via will with greater frequency than males, which suggests that females were more involved in the slave economy than traditionally depicted. As a corollary to the transfer of enslaved persons to family members, few sampled testators chose to manumit their enslaved persons by will and instead chose to transfer those individuals to family members. This Article concludes that probate records not only represent personal histories on a micro-level, but also national history on a macro-level as the change in the definition of property associated with the Thirteenth Amendment is reflected in the testamentary instruments of the sample period.

I. SETTING AND METHODOLOGY

During the late eighteenth century, land-hungry speculators from eastern Virginia, Maryland, North Carolina, and Pennsylvania pushed westward in search of fertile land upon which to homestead and ultimately settled in what is now Kentucky.[21] In fact, one of the counties sampled in this study, Woodford County, was a county in Virginia prior

[21] *See* WILLIAM E. RAILEY, HISTORY OF WOODFORD COUNTY, KENTUCKY 4 (1938).

to Kentucky statehood.[22] Although the other two counties used for this study, Boone and Wayne Counties, do not predate Kentucky statehood,[23] the geographic combination of the three counties exemplifies the push-pull of northern and southern influences within a border state. Indeed, the three counties form a north-south axis through the heart of Kentucky with Boone County the northernmost on the Ohio-Kentucky border, Woodford County in the middle of the state, and Wayne County on the border between Kentucky and Tennessee.

Located opposite Cincinnati, Ohio, on the banks of the Ohio River, Boone County, Kentucky, was created in 1798 and named for frontiersman Daniel Boone, who allegedly was the first white person to establish a permanent settlement in the region.[24] The county's Ohio River location both spurred its settlement and promoted its expansion. Boats on the Ohio River carried crops like corn and oats from Boone County's fertile soil to the rest of the nation, which sustained the county's population and generated great wealth for some.[25] As an indication of the relative prosperity of the county by the mid-nineteenth century, the price for an acre of land had risen to $14.39 by 1846, which was almost three times greater than the state average of slightly more than $5.00 per acre.[26]

Denominated as the "Asparagus Bed of Kentucky," the area that would become Woodford County was settled by emigrants from eastern states due to its location near the Kentucky River, which provided a means to export products to the rest of the country.[27] The county's vegetative moniker derived from the quality of the soil in the area that supported the cultivation of hemp, tobacco, corn, and wheat while also providing a substrate for the growth of high quality timber.[28] The value of Woodford County's taxable land in 1846 was approximately $6,000.00 and the average value of an acre of land equaled $32.58,[29]

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22 *See* LEWIS COLLINS, HISTORICAL SKETCHES OF KENTUCKY: EMBRACING ITS HISTORY, ANTIQUITIES, AND NATURAL CURIOSITIES, GEOGRAPHICAL, STATISTICAL, AND GEOLOGICAL DESCRIPTIONS 552-53 (1850).

23 *See id.* at 179 (stating that Boone County was formed in 1798); *id.* at 548 (stating that Wayne County was formed in 1800). Kentucky became a state in 1792. *See id.* at xv.

24 *See id.* at 181-82.

25 *See id.* at 179-80; *see also* ANN LUTES, A BRIEF HISTORY OF BOONE COUNTY, KENTUCKY 2-4, 11 (1958).

26 *See* COLLINS, *supra* note 22, at 179.

27 RAILEY, *supra* note 21, at 5; *see also* COLLINS, *supra* note 22, at 553-54. Presumably, asparagus was also grown, but Collins does not include it on the list of crops grown on the area's farms.

28 *See* COLLINS, *supra* note 22, at 553.

29 *See id.*

which serves as evidence of the quality of the area's farming and timber interests. Recognizing the utility and profitability of the timber, Woodford County residents eventually felled a significant portion of the area's forested lands to the point that the quantity and quality of the wooded lands became a memory.[30]

The southernmost county sampled in this study is Wayne County, which was created in 1800 near the Cumberland River. In comparison to the other two counties in this study, the price for an acre of land was cheap at $3.02 per acre.[31] The reason for the difference, presumably, is that the surface of the land was "broken with hills."[32] As evidence of the topography's effect on industry, the primary exports of the county were not items like corn or oats, but instead livestock, such as cattle, hogs, or mules.[33] Although the land may not have been as conducive for farming compared to other areas of the state, individuals could mine a "seam of coal upwards of thirty miles in length."[34] Furthermore, iron ore and saltwater could be extracted from the county's lands.[35] Interestingly, Wayne County claims to have been the site of the first oil strike in 1817.[36] After a stream of oil made its way to the nearby river and caught fire, however, "the well was stopped up to prevent the nuisance."[37]

To study wills in Boone, Woodford, and Wayne Counties, this study employed the data acquisition techniques of prior empirical investigations of probate courts in other locations.[38] Information from available wills and inventories documented in probate books from Boone, Woodford, and Wayne Counties between January 1, 1860 and December 31, 1869 was extracted and coded for analysis. A possibility

[30] *See* RAILEY, *supra* note 21, at 7.

[31] *See* COLLINS, *supra* note 22, at 548.

[32] *Id.*

[33] *See id.*

[34] *Id.*

[35] *See id.*

[36] *See* AUGUSTA PHILLIPS JOHNSON, A CENTURY OF WAYNE COUNTY, KENTUCKY, 1800-1900, ch. IV (1939), *available at* http://genealogytrails.com/ken/wayne/chapter_4.html [https://perma.cc/X86U-M578].

[37] *Id.*

[38] *See, e.g.*, Alfred L. Brophy & Douglas Thie, *Land, Slaves, and Bonds: Trust and Probate in the Pre-Civil War Shenandoah Valley*, 119 W. VA. L. REV. 345, 370-73 (2016) ("After we identified the 128 usable wills probated [in Rockbridge County, Virginia], we coded each will for testator's and beneficiaries' gender and relationship; preference between heirs; incidence, sophistication, and purpose of trusts; incidence of bequests of and emancipation of slaves; and other peculiar provisions."); Stephen Duane Davis II & Alfred L. Brophy, *"The Most Solemn Act of My Life": Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 774-75 (2011).

exists that some wills from the sample period are excluded from the data set for various reasons. For example, a will probated in 1869 might not make its way into the will book until mid-1870 due to a clerical error, which is beyond the end of the sampling period.[39] Although the total number of wills sampled in this study is similar to that of prior studies of similarly populated locations, the claim that every will from the decade is included in this sample cannot be made.

Specifically, the data recorded from sampled wills includes the following:

- Gender of testator
- The testator's ability to write as indicated by the signature on the will (a signature or an "X" with a notation that the "X" represented the testator's mark)
- Whether or not the testator provided for a spouse under the express terms of a will
- Specific dispositions of the testator's real and personal property — all property to a surviving spouse, divided among children, etc.
- Specific identification of slaves distributed under the terms of wills
- Manumission provisions in wills
- Review of inventories to determine monetary value of slaves
- Conditions associated with the distributed property
- Creation of an explicit trust and the terms of the trust
- Beneficiary of remainder of estate
- The number of executors appointed and the relationship of the chosen executors to the testator
- Terms of a codicil to testator's will[40]

[39] Furthermore, a will may not have been indexed properly, which would make it difficult to locate without leafing through each page of the relevant Will Book. In effect, such a will is lost.

[40] Although information for each datum was recorded from the wills during the sample, the results and analysis portion of the paper do not include a discussion of each type of data. Furthermore, a data point could not be recorded from each will because of illegible handwriting or damage to the will that obscured information. In addition,

In total, this study evaluated 209 wills with eighty-two of those wills from Boone County, eighty-five from Woodford County, and forty-two from Wayne County. The wills from Boone County were recorded in Will Records books H, I, K that span the years 1851-1873.[41] The sampled wills from Woodford County are recorded in Will Records books P, Q, R, S, and T that include wills from 1854-1870. Wayne County's sampled wills are contained in Will Records Book A that lists wills from 1836-1909. While the sampled wills may have been executed at any time before or during the sample period, the data used for evaluation was extracted from wills probated during the between the first day of 1860 and the last day of 1869.[42] A will executed in 1845 and probated in 1865 would be included in the sample while that same will would be excluded from the sample if probated in mid-1870.

II. RESULTS AND ANALYSIS

With a few exceptions, such as opening with the phrase "In the Name of God Amen!!!",[43] the wills in this sample were constructed in much the same way as modern wills. The introductory clause established the identity of a testator, specified the domicile of the testator, and declared that the testator was of sound mind.[44] After the traditional introduction, most testators desired that their "just debts" be paid and then provided for specific, general, and residuary gifts that varied in drafting skill. While the reasons for making distributional decisions went with most testators to their graves, some offered explanations for the gifts made in their wills that likely stung the targeted individuals. In his 1863 Wayne

interpretation of the language required some latitude in coding. Wills that employed language that made gifts of property with directions to a third party regarding usage of that property were coded as "trusts." A testator did not have to use the word "trust" to create a trust, but intent was difficult to discern in some cases.

[41] Will Record H begins in 1861 and its immediate predecessor, Will Record F, ends in 1856. As a result, wills from 1860 were unavailable for sampling.

[42] After visiting several county courthouses and libraries, a court clerk informed me that wills books from the period are not held in county courthouses. Instead, all original probate books from the sample period are housed at the Kentucky Department of Libraries and Archives in Frankfort, Kentucky. However, a microfilm reproduction of the relevant will records can be examined on Family Search at familysearch.org under the heading of Kentucky Probate Records and then selecting the records for each county during the relevant time period.

[43] *Last Will and Testament of William Hodges*, *in* BOONE COUNTY WILL RECORD H 1861-1896 (1862) (on file with the UC Davis Law Review).

[44] *See id.* (reciting that "I William Hodges, of the County of Boone and State of Kentucky, being of sound mind but of feeble health, feel that it is my duty to settle my worldly affairs, do hereby make this my last will and Testament").

County will, John Bell wanted to revoke a gift of two pieces of real property that he had made to his two sons and daughter four years earlier.[45] After revoking the prior gift to his sons, Bell's will continued:

> [M]y will is that my daughter Polly Ann Bell have all the lands . . . which may be in my possession at the time of my death and all my personal estate of every kind owned by me at my death after paying my just debts and funeral expenses. Giving to my two sons one dollar each the reason why I revoke the deed of gift as to my two sons they have wholly failed to comply with their promise to make provisions for my support in my old age.[46]

Although the law of gifts may have prevented the revocation of a completed gift, Bell's will would likely be admissible in a probate court today. Indeed, most of the wills in this sample would be admitted to probate today.

A. *Gender and Marital Status of Testators*

The time-honored tenet of testamentary freedom applied to men throughout nineteenth century Kentucky regardless of marital status or skin color so long as black men were not enslaved. To that end, one will from this sample shows that the power to transfer wealth at death applied broadly to those qualified to execute a will. In 1860, Woodford County's Charles Clarkson wrote:

> I Charles Clarkson (A free man of Colour) being of sound mind and memory, do make and constitute this my last will and testament in matter and form as follows to wit, ...
>
> At my death I want my House and Lot of land on which I live to be sold and the proceeds . . . divided between my children . . . .[47]

After making general monetary gifts derived from the sale of his home to two sons, two daughters, and the children of a predeceased daughter,[48] Charles Clarkson affixed his signature to his will. Clarkson did not know how to write his name; therefore, he signed his will with

[45] *See Last Will and Testament of John Bell*, *in* WAYNE COUNTY WILL RECORD A 1836-1909, at 189 (1868) (on file with the UC Davis Law Review).

[46] *Id.*

[47] *Last Will and Testament of Charles Clarkson*, *in* BOONE COUNTY WILL RECORDS G 1855-1862, at 508 (1861) (on file with the UC Davis Law Review).

[48] *See id.*

an "X" and someone placed a notation near the "X" that it represented "his mark."[49] Five months later, Clarkson executed a codicil that stated:

> Whereas having received information that my son Samuel is dead I will and devise that one hundred dollars be paid to his children after deducting the balance due on a note given to John Tompkins by him on which R. L. Bristow is security and which said R. L. Bristow has paid.[50]

Thereafter, Charles Clarkson again signed his name with an "X" and the Woodford County probate court subsequently accepted both instruments in 1861.[51] Clarkson, "a free man of Colour," exercised his testamentary authority over the property he owned at death — twice.

In contrast to the testamentary freedom afforded men, women were largely barred from exercising testamentary authority for the first half of the nineteenth century by a historical mix of statutory and common law barriers. In fact, most married women in the United States did not have statutory power to exercise testamentary freedom by making a will until the mid-nineteenth century or thereafter.[52] And some of those "progressive" statutes mirrored common law by only permitting a wife to execute a will with her husband's consent.[53] Nevertheless, numerous jurisdictions enacted statutory reforms providing wives with the power to dispose of property by will during the latter half of the nineteenth century.[54]

For its part, Kentucky proved to be a rather late subscriber to the statutory reforms regarding the testamentary authority of wives. The individuals who possessed the legal capacity to make a valid will under the provisions of the 1852 Revised Statutes of Kentucky included:

> [e]very person of sound mind, not being under twenty-one years of age, *nor a married woman*, may by will dispose of any

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[49] *See id.*

[50] *Id.*

[51] *See id.*

[52] *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1366 (1982).

[53] *See, e.g.* 1842 Md. Laws (1843) ch. 294 § 6 ("That a wife shall have a right to make a will and give all her property or any part thereof to her husband, and other persons with the consent of the husband subscribed to said will . . . ."); 1833 Pa. Laws 249 ("That a married woman may, under a power legally created for the purpose, dispose of her real or personal estate by will or appointment, in nature of a will, and that any married woman may, with the assent or license of her husband, dispose of her personal estate by will.").

[54] *See* Chused, *supra* note 52, at 1366 n.27.

> estate, right, or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs or pass to his personal representative; and though he may become so entitled after the execution of his will.[55]

Importantly, this exact statutory language remained on the pages of Kentucky statutory codes during the period of this sample,[56] which means that statutory law prohibited the married women in this sample from making a will. Table 1 shows the frequency of wills by testator's gender in the wills books of Boone, Woodford, and Wayne Counties during the sample period.

Table 1. Frequency of Wills by Gender in Boone, Woodford, and Wayne Counties 1860-1870[57]

County	Male Testators (%)	Female Testators (%)
Boone	87.8	12.2
Woodford	71.8	28.2
Wayne	85.0	15.0

The difference in testation by gender reported in Table 1 favorably compares with the results of prior empirical efforts.[58] Kentucky's statute defining who had the legal capacity to execute a will undoubtedly eliminated a significant percentage of potential female testators in this sample. However, a similar result would likely have been obtained even if Kentucky statutory law had provided married women with the legal capacity to make wills. The common law of coverture would, in all likelihood, have left married women with little property to transfer at death.[59] According to the law of coverture, marriage transformed a

[55] C.A. WICKLIFFE ET AL., REVISED STATUTES OF KENTUCKY ch. CVI, § 2, at 693-94 (1852) (emphasis added).

[56] *See, e.g.* Rev. Stats. of Kentucky ch. 106 § 2 (1860); Gen. Stats. Kentucky ch. 113 § 2 (1873); Gen. Stats. Kentucky ch. 113 § 2 (1879); Gen. Stats. Kentucky ch. 113, § 2 (1887).

[57] All sampled wills are included in the results displayed in Table 1.

[58] *See, e.g.*, Brophy & Thie, *supra* note 38, at 372-73 (finding that 70.9% of sixty-one wills probated between 1850 and 1861 in Rockbridge County, Virginia were written by men); Chused, *supra* note 52, at 1372 tbl.2 (noting that 78% of wills probated between 1841 and 1850 in Dukes County, Massachusetts were written by men); Davis II & Brophy, *supra* note 38, at 775 (reporting that 86.1% of testators from 1841 to 1845 in Greene County, Alabama, were men).

[59] An additional reason for the testation difference by gender is that the wills of husband testators frequently included gift-overs in gifts to surviving wives, which would again deprive surviving wives of property to transfer by will. For the structure of husband testators' gifts to surviving wives, see *infra* Part II.B.

single woman, a *feme sole*, into a married woman, a *feme covert*, and stripped her of almost all of her rights to own and manage property.[60] A woman lost the authority to manage any real property she owned once she married; the married woman's husband gained the right to deal with land as he saw fit and his wife had little to no legal power to alter whatever course of action he chose.[61] And, a married woman also lost ownership of her personal property to her husband upon marriage under the law of coverture.[62] Given the loss of legal rights over real and personal property, most married women probably had little property to distribute by will or intestate succession.

Although Kentucky courts maintained that "the general rule is, that a married woman can not make a will,"[63] the common law and statutory obstacles to testation by wives did not establish impenetrable barriers during the sample period. To the contrary, a wife's authority to execute a valid will expanded throughout the nineteenth century in the state's courts. In *In re Yates' Will*, the Court of Appeals in Kentucky eroded the barrier to testation by recognizing that "[t]here are well established exceptions to the general rule, that a feme covert can not make a will."[64] The court continued that:

> [w]here she is an executrix, she can make a will, so far as to appoint an executor, for the purpose of thereby transmitting an executorial trust. She can make a will in pursuance of an agreement with her husband before marriage; or in fulfilment of a power of appointment, reserved by herself, or delegated to her by another . . . .[65]

Furthermore, Kentucky courts later recognized that a married woman had the power to execute a will to dispose of personal property at death with the consent of her husband.[66] To fall within the exception, a wife would have to show that her husband waived the interest in her personal property accruing to him under coverture thereby granting testamentary authority over that property to his wife.[67]

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[60] *See* Chused, *supra* note 52, at 1367-68.

[61] *See id.*

[62] *See id.* at 1367.

[63] *See In re* Yates' Will, 32 Ky. (2 Dana) 215, 217 (1834); Anderson v. Miller, 29 Ky. (6 J.J. Marsh.) 568, 574 (1831) (observing that the "[w]ill of a feme covert is void").

[64] *In re Yates' Will*, 32 Ky. at 216.

[65] *Id.*

[66] *See* George v. Bussing, 54 Ky. (15 B. Mon.) 558, 563 (1855).

[67] *See id.*

In addition to the common law exceptions to the ban on testation, Kentucky's legislature enacted statutes that broadened testamentary power of married women in the state. For example, a married woman in this sample could have executed a valid will pursuant to a statute that recognized a wife's testamentary authority over "any estate secured to her separate use by deed or devise, or in the exercise of a special power to that effect."[68] Furthermore, the General Assembly added a section to its code in 1865 that provided a married woman with the authority to make a will "on the joint petition of husband and wife" filed in the appropriate court.[69] Despite the availability of common law and statutory exceptions in Kentucky, Table 2 illustrates that almost none of the married women in Boone, Woodford, and Wayne Counties relied upon them to execute wills.[70]

Table 2. Marital Status of Testators in Boone, Woodford, and Wayne Counties 1860-1870[71]

County	Total Married Testators	Male Married	Female Married
Boone	44	44	0
Woodford	28	27	1
Wayne	40	40	0

[68] STANTON, *supra* note 12, at 457.

[69] *See* 1866 Ky. Acts 36.

[70] For purposes of this study, marital status was determined by mention of a spouse within the terms of the will. The marital status of an individual testator is difficult to determine without consulting marriage, divorce, and death records in conjunction with the probate record. A will could, for example, mention a spouse, but that spouse could have predeceased the testator or divorced the testator and a testator may fail to update a will to account for the changed circumstances. As a result, a testator's will would indicate presence of a current spouse, but the testator was not, in fact, married at the time of probate. The relative absence of married female testators is consistent with other empirical studies of probate records. *See, e.g.*, Davis II & Brophy, *supra* note 38, at 777 (reporting that "[a]mong those who had spouses, all the testators were male" in Greene County, Alabama, during two sample periods).

[71] All sampled wills were evaluated to compile the data in Table 2. The one exception in Woodford County involved a married woman whose will did not seem to transfer any property in Kentucky. All of the property devised under her will was located in Iowa. The record contains no explanation as to how or why her will was admitted to probate.

In lieu of invoking a common law or statutory exception to make a will, some wives in Kentucky gained legislative permission to execute a will in the form of a private bill that allowed a specific wife to transfer her property by will. On March 21, 1851, for example, Kentucky's General Assembly passed a bill entitled "AN ACT for the benefit of Elizabeth C. Flourney, of McCracken County" with the following provisions:

> §1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That Elizabeth C. Flournoy, wife of L. M. Flournoy, of McCracken County, be and she is hereby authorized and empowered to make her last will and testament, which shall be as valid, and of as full force, in law, as if she were a *feme sole*; and all devises and bequests made by her in such will, if made by her while a *feme covert*, shall pass the title as fully and perfectly as if she were an unmarried woman at the time of making such will: *Provided*, said will shall be made, during the life of her present husband, L. M. Flournoy.
>
> §2. That the property hereby authorized to be devised, under this act, by the said Elizabeth C. Flournoy, is confined to the property that belonged to her before her marriage with her present husband.[72]

Although Mrs. Flournoy's private bill granted her the ability to make a will, the legislation did not grant her unfettered testamentary authority. Instead, the bill's language limited her testamentary power to the duration of her husband's life and only extended to the property she owned prior to marriage. Given the transaction costs of obtaining a private bill, Mrs. Flournoy had, in all likelihood, a significant pre-marital estate to transfer at death.

The legislation that specifically benefitted Elizabeth Flournoy is one of a number of private bills that addressed the ban on testation for married women during the nineteenth century. Prior to 1848, however, only one private bill provided testamentary authority to a married woman like the express testamentary power granted to Elizabeth Flournoy. The overwhelming majority of pre-1848 private bills enacted by the legislature granted divorces to married women whose husbands had violated the marital contract to a sufficient degree to justify a

[72] An Act for the Benefit of Elizabeth C. Flourney, of McCracken County, 1851 Ky. Acts 461.

legislative divorce.[73] John Lyon, for instance, "became an abandoned sot and vagabond, abusing and greatly maltreating" his wife; therefore, the legislature concluded that Nancy Lyon was entitled to a divorce from John.[74] With the exception of private bills for divorce, few pre-1848 enactments addressed the rights of married women and those that did fell short of increasing property or testamentary rights.

After 1848, Kentucky's General Assembly entertained an increasing number of bills that broadened testamentary power as well as the economic opportunities for the state's married women. A few private bills expressly granted testamentary authority to a specific married woman in much the same manner as Elizabeth Flournoy's private bill.[75] More commonly, however, the legislature authorized a married woman to act as a *feme sole*. In spring 1865, the General Assembly passed "An ACT for the benefit of Mary Ann Ford" that provided:

> That Mary Ann Ford, of Garrard County, be relieved of all disabilities of coverture in regard to any property she may now be entitled to by inheritance or otherwise, or which she may hereafter acquire, and contracts she may hereafter make; all such property, either in right of inheritance or acquisition aforesaid, shall be exempt from all liabilities or disposition of her husband; and she is here invested with all powers of a *feme sole*.[76]

Unlike Elizabeth Flournoy's bill, the primary aim of Mary Ford's bill may have been to permit her to conduct business or engage in transactions involving property acquired after passage of the bill.[77] Mary Ford, however, also received "all powers of a feme sole" and was "relieved of all disabilities of coverture." Because one of the "powers" of being a single woman was the ability to execute a will, a possibility exists that Mary Ford could have made a will to distribute property that she owned or acquired as a result of the removal of "all disabilities of coverture."

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73 *See, e.g.*, 1828 Ky. Acts 233. This act is rather unusual because it includes three divorces in one enactment and includes one that favored the husband, who was "restored to all the privileges of an unmarried man." *Id.* Nevertheless, most divorces were granted in favor of wives.

74 1839 Ky. Acts 373.

75 *See, e.g.*, An Act for the Benefit of Sarah S. Fowler, of Livingston County, 1849 Ky. Acts 96; An Act for the Benefit of Ellen D. Nicholas, 1849 Ky. Acts 104.

76 An Act for the Benefit of Mary Ann Ford, 1865 Ky. Acts 394.

77 The benefit of permitting individuals like Mary Ford to conduct business might primarily accrue to men because of the strictures of coverture.

In total, twenty married women obtained private legislation that authorized them to engage in economic activities reserved to a *feme sole* after 1848.[78] The raw number of private bills that expressly conferred testamentary authority or *feme sole* status on a specific married woman may not be eye-popping, but the number of such bills is noteworthy given their almost total absence prior to 1848. To that end, the increased number of private bills post-1848 represents a step on the continuum of property rights that led to full economic and testamentary agency for married women. Adding further momentum toward unencumbered individual autonomy for married women, the legislature also enacted public laws that recognized the capacity of married women to make valid wills under some circumstances, such as when a husband had abandoned his wife.[79] In combination, private bills authorizing will-making as well as public laws that sanctioned economic opportunities for married women occupied an expanded amount of space on the post-1848 legislative agenda, particularly when compared to their relative pre-1848 absence.

The increased number of bills concerned with issues involving married women after 1848 may not be a coincidence as the summer of 1848 witnessed the historic launch of the women's rights movement at Seneca Falls, New York.[80] While the elective franchise occupied the forefront of attendees' minds, the *Declaration of Sentiments, Grievances, and Resolutions* asserted that men have made women "if married, in the eye of the law, civilly dead" and that "[h]e has taken from her all right in property, even to the wages she earns."[81] Given the timing, the post-1848 legislation in Kentucky may reflect a legal shift toward increased economic opportunities for women, which led to increased property ownership and, ultimately, to the expectation that such property could be transferred at death. In that sense, post-1848 legislation represents the roots of Kentucky's incremental march toward testamentary

[78] *See, e.g.*, An Act for the Benefit of Klara Dinkelspiel, 1865 Ky. Acts 339; An Act for the benefit of Louise Friedman of Louisville, 1863 Ky. Acts 545.

[79] *See* Kentucky General Assembly, Law of Kentucky 338, An Act Authorizing Permanent Provision for Resident Families in Kentucky Stocks, and Guardians to Invest the Money of their Wards in Bank Stocks, ch. 955 (1837); Kentucky General Assembly, Law of Kentucky 140, An Act for the Divorce of Silas and Elizabeth Hedges, ch. 72 (1842).

[80] *See* Sherry H. Penney & James D. Livingston, *Expectant at Seneca Falls*, 84 N.Y. HIST. 32 (2003).

[81] *Declaration of Sentiments*, NAT'L PARK SERV., https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm (last updated Feb. 26, 2015) [https://perma.cc/GAP7-D9AZ].

equality for women regardless of marital status that ended in 1894 with the passage of statute authorizing testation by married women.[82]

B. Distributions of Non-Human Property

The primary purpose of a will, of course, is to transfer property at death and the wills in this sample display the full spectrum of complexity. Some testators executed lengthy wills that created complicated property arrangements following their deaths. The sixth clause of John Parker's sixteen-clause Woodford County will specified:

> I give to my wife Mary Parker my home farm to live on her lifetime, if she desire it, if she does not accept the farm it is to be sold with the balance of my estate both real and personal and mixed, my slaves burying ground and specific gifts excepted — and my wife have absolutely one half of the proceeds of the sale I direct that should the land not bring eighteen dollars per acre at the first offering at Public Sale that my Executor or Administrator rent out the land from year to year until it does bring that amount and to hire out the following slaves until such sale of land is made, Morgan, Andrew, William, James, Daniel, Adaline Lewis, and provisions made for their leaving the state according to provisions hereinafter made.[83]

Woodford County's William R. Gilmer's one sentence will, on the other hand, stated that he intended to "will and bequeath to my wife Sallie Gilmer all of my estate of every description after payment of my debts except a gray horse which I will to my Father Bernard Gilmer."[84] Regardless of the complexity of the plan, testators generally sought to leave property to family members, particularly surviving wives if they were married at the time of will execution. The following table, Table 3, shows the frequency of wills designating wives as the primary takers as well as the frequency with which those wills included conditions on the use of property received under those wills.

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[82] *See* KY. STAT. ch. 66 § 2147 (1894) (stating that "[a] married woman, if she be of sound mind and twenty-one years of age, may dispose of her estate, by last will and testament, subject to the provisions of this act").

[83] *Last Will and Testament of John Parker*, *in* WOODFORD COUNTY WILL RECORD BOOK Q 1854-1861 571 (1861) (on file with the UC Davis Law Review).

[84] *Last Will and Testament of William R. Gilmer*, *in* WOODFORD COUNTY WILL RECORD BOOK R 1861-1867, at 121 (1862) (on file with the UC Davis Law Review).

Table 3. Percentage of Wills Designating Wives as Primary Takers in Wills from Boone, Woodford, and Wayne County 1860-1870[85]

County	All Wills (%)	With Condition (%)	Without Condition (%)
Boone	42.0	79.4	20.6
Woodford	34.1	69.0	31.0
Wayne	51.2	85.7	14.3
Avg.	42.4	78.0	26.7

The results of Table 3 show that the structure of testamentary gifts made under the terms of husbands' wills often restricted the property rights of their surviving wives. The most common restriction in sampled wills was to limit the property rights of a surviving wife to the duration of her life. In his 1867 Boone County will, Benjamin Sandford stated:

> I give devise and bequeath all my real and personal property of every description to my beloved wife Elizabeth Sandford for and during her natural life and after her death all my estate to be equally divided among all my children.[86]

Other Boone County testators, like John White, added an additional durational limit on the rights of a surviving spouse. White's 1864 will specified that:

> I give devise and bequeath unto my beloved wife Minerva White for and during the term and period of her natural life all my estate real personal and mixed provided she remains my widow and in the event of her intermarriage she is to have one third portion of the same, my said wife is authorized to sell and dispose of any part or all of my personal estate and dispose of the proceeds in any manner she may think proper or see fit.
>
> The estate remaining after the death of my said wife to be equally divided amongst my children or their bodily heirs.[87]

Regardless of the number of restrictions on the gifts, the primary goal of these testators was to support their surviving wives.

[85] All sampled wills were evaluated to compile the results in Table 3. The category "With Conditions" was calculated by dividing the number of wills that identified a wife as a primary taker by the number of wills that attached conditions to the gift. The same process applied to the category "Without Conditions."

[86] *Last Will and Testament of Benjamin Sandford*, *in* BOONE COUNTY WILL RECORD BOOK I 1866-1870, at 293 (1867) (on file with the UC Davis Law Review).

[87] *Last Will and Testament of John White*, *in* BOONE COUNTY WILL RECORD BOOK I 1866-1870, *supra* note 86, at 214-15.

The language used to create the restricted gifts in wills like those of Sandford and White suggests that the surviving wives took life estates in their decedent husbands' property. As further evidence of the restricted nature of the gifts, husband testators typically made gift-overs of the property transferred to their surviving wives. As a result, surviving wives would not have the property they received from their decedent husbands' estate to transfer by will even if they remained unmarried for the rest of their lives; the disposition of that property was controlled by their husbands' wills. Combining the strictures of coverture with the structure of gifts made under husbands' wills, widowed women in this nineteenth century sample had little incentive to execute wills because of a lack of property/wealth, which is oft-cited as a factor that explains the low frequency of will-making today.[88]

In contrast to testators who limited the property rights of their surviving spouses, some husbands transferred all of their property to their surviving wives without any conditions whatsoever. Joel Gray's Woodford County will used the language of possessory estates in his unrestricted gift with the declaration that:

> After my debts are paid the balance of my estate is to be divided equally between my wife Mary P. Gray and my daughter Mary H Gray. This division is intended to embrace all the estate I have of every kind and description. If my daughter should die without a child or children living at the time of her death then the estate devised to her is to vest in my wife in fee simple.[89]

Similarly, Charles Buster executed a will that provided:

> To my dearly beloved wife Mary E. Buster I will and bequeath all the property hereinafter mentioned in this (second) paragraph to have and hold during her natural life and then to dispose of by will or otherwise as she may deem proper.[90]

Buster's will may have limited Mary's interest to the duration of her life, but authorizing Mary to dispose of the property by will suggests that

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88 *See, e.g.*, Barbranda Lumpkins Walls, *Haven't Done a Will Yet?*, AARP (Feb. 24, 2017), https://www.aarp.org/money/investing/info-2017/half-of-adults-do-not-have-wills.html [https://perma.cc/44PZ-FDBX] (noting that the results of a study showed that twenty-nine percent of respondents in one survey stated that they "don't have enough assets to leave to anyone").

89 *Last Will and Testament of Joel Gray*, *in* WOODFORD COUNTY WILL RECORD BOOK S 1861-1867, at 81 (1864) (on file with the UC Davis Law Review).

90 *Last Will and Testament of Charles Buster*, *in* WAYNE COUNTY WILL RECORD BOOK A 1836-1909, at 187 (1868) (on file with the UC Davis Law Review).

Charles intended her to take what amounted to fee simple in his property following his death. And, Buster's will did not make a gift-over of whatever portion of the gifted property remained in Mary's possession at her death, which reinforces the notion that Buster intended to transfer unencumbered control of his property to Mary at his death.

If married testators failed to make their surviving wives the primary objects of their post-mortem gifts with or without conditions, then they typically gave their property to their children. In most such cases, the likely reason for giving property to children and not a surviving spouse is that the spouse had predeceased the testator. In any event, the following two tables, Tables 4 and 5, show the frequency with which sons and daughters obtained either all property or a share in real or personal property from a testator's will.

Table 4. Percentage of Wills Giving Sons All Property, an Interest in Real Property, and/or an Interest in Personal Property in Wills from Boone, Woodford, and Wayne County 1860-1870[91]

County	All Property (%)	Real Property (%)	Personal Property (%)
Boone	16.0	20.1	27.2
Woodford	22.4	16.5	29.4
Wayne	39.0	26.8	12.2
Avg.	25.8	21.1	22.9

91 All sampled wills were included for the tabulation in Table 4.

Table 5. Percentage of Wills Giving Daughters All Property, an Interest in Real Property, and/or an Interest in Personal Property in Wills from Boone, Woodford, and Wayne County 1860-1870[92]

County	All Property (%)	Real Property (%)	Personal Property (%)
Boone	19.8	21.0	24.7
Woodford	22.3	15.3	27.1
Wayne	36.6	17.1	14.6
Avg.	26.2	17.8	22.1

Although Tables 4 and 5 reveal a rough equivalence regarding the preferences for sons or daughters among sampled testators, the language of a handful of the gifts to daughters attempted to impose a condition that had no equivalent in the gifting language to sons. In her Wayne County will, Nancy McDaniel emphasized:

> My will is that what land or real & personal estate which is willed and bequeathed to Rachel Wright, the wife of William Wright shall vest in fee simple to her & her heirs forever so as never to be taken from her (the said Rachel Wright) to pay any of the said William Wright's debts now or hereafter contracted unless the said Rachel Wright give freely and willingly by her consent for it to be did [sic]. And for fear that this my last will and testament would not be considered in the light in which I desire it to be considered, I have been this explicit in this this, the last part of it as it regards Rachel Wright, the wife of William Wright, one of my executors.[93]

Nancy's intent to preserve her estate for the benefit of Rachel would have been, in all likelihood, difficult to enforce. Nevertheless, Nancy's language unambiguously demonstrates that she was concerned about Rachel's well-being and sought to shield Rachel's gifts from dissipation by William Wright.

Rather than make outright gifts of property at death, some testators created testamentary trusts to transfer wealth and maintain a measure

[92] All sampled wills were included for the tabulation in Table 5.

[93] *Last Will and Testament of Nancy McDaniel*, *in* WAYNE COUNTY WILL RECORDS BOOK A 1836-1909, at 163 (1862) (on file with the UC Davis Law Review).

of control over the property from beyond the grave. The following table displays the percentages of sampled wills that created express trusts within the four corners of the instruments.

Table 6. Percentage of Wills with Testamentary Trusts in Boone, Woodford, and Wayne Counties 1860-1870[94]

County	Wills with Express Trusts (%)
Boone	7.4
Woodford	12.9
Wayne	7.3

While the trusts in this sample often benefitted children or grandchildren, a few testators/settlors created trusts with a less optimistic purposes — preventing property from being used to pay a beneficiary's debts. After making a testamentary gift to his wife, William S. Buford established a plan for the remainder of his estate that required that:

> [T]he remainder shall be divided amongst my six children Charles Buford, William R. Buford, Kate Buford, Mark Buford, Maggie Buford & Mary Duke Buford, it being specially provided that the portion of my estate thus bequeathed to Charles Buford shall be held in trust by my Executors who are hereby appointed trustees for this purpose till all debts which he shall heretofore have contracted or for which he may now be liable shall have been paid or satisfactorily arranged.[95]

Interestingly, spendthrift trusts created by the express language of the wills were singularly created for the benefit of sons — not daughters.

Although they lacked the prohibitions of spendthrift trusts, the express testamentary trusts created for the benefit of daughters imposed a different type of restraint on alienation. The third clause of Wayne County's James West's will provided that:

> The portion of my estate herein devised to my daughter Mary Margaret Anna Buster is to vest in L. A. Lanier who is hereby created a Trustee to hold the Title to the estate and property

94 All sampled wills are included in the tabulation in Table 6.

95 *Last Will and Testament of William S. Buford*, *in* WOODFORD COUNTY WILL RECORDS BOOK T 1867-1870, at 98 (1862) (on file with the UC Davis Law Review).

> devised to her in trust, for her sole & separate use and the use of such children as she may now have or may hereafter have and at her death the trust is to cease and her share is to pass to her children if she have any living at her death, but if any of her children should die before she dies, then the child or children of such dead child shall take the same part the parent would have taken if living at my daughter's death.
>
> The portion of my estate given to Mary Margaret Anne Buster is not be under the control of her present husband or any husband she may hereafter have but is to be free from the control of any husband she may have at any time.[96]

The restrictions on use by Mary's husband took direct aim at the law of coverture's retitling of property upon a woman's marriage as West not only sought to protect assets for the benefit of his daughter in the present, but also his descendants in the future.

Testators like James West commonly used the phrase "sole & separate use" in testamentary transfers intended to confer a benefit on their daughters and did so with the knowledge of legal consequences of that phrase. The phrase "sole & separate use" indicated that the testator intended to create a separate use trust of the assets to be used solely by the beneficiary and not available for consumption by a husband or creditor.[97] By creating a separate use trust, father testators sought to avoid the property rights sacrificed upon marriage by their daughters as a result of coverture.[98] Creating a testamentary separate use trust circumvented coverture by splitting legal and equitable title between a trustee and a married woman. Coverture transferred a married woman's property that she owned outright to her husband at marriage, but she did not own separate use trust assets outright; therefore, common law coverture did not apply.[99] Given its goal of providing assets for the singular use of a married woman, the separate estate offered a married woman some measure of economic agency amidst a legal framework in which she was "civilly dead" in many, if not most, situations.

While the separate use trust seemingly advanced married women's property rights, the link between the separate use trust and the promotion of married women's property rights is not without scholarly

96 *Last Will and Testament of James West*, *in* WAYNE COUNTY WILL RECORDS BOOK A 1836-1909, at 155 (1862) (on file with the UC Davis Law Review).

97 Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 173 (2014).

98 *See id.* at 167.

99 *See id.*

criticism. The bifurcation of title inherent in any trust forms the foundation of one basic criticism. A trustee holds legal title to separate use trust assets and can manage those assets as deemed prudent while the equitable title possessed by the married woman beneficiary, on the other hand, lacks decision-making authority over trust assets. Because of the difference in agency over trust assets, critics argue that the separate use trust did not promote married women's property rights but instead highlighted the limitations on those rights.[100] As a practical matter, one may only guess what happened to any property actually distributed from the trust to a married woman; testamentary restrictions settling separate use trusts may have been little more than paper barriers.

More fundamentally, historians maintain that the underlying goal of the separate use trust was not to broaden a married woman's autonomy, but rather to retain property within a family line by allocating some property to a daughter while transferring most of the property to a son.[101] Transferring property to sons increased the probability that accumulated wealth would remain within the family because sons benefitted from coverture while daughters lost property because of coverture.[102] To that end, the language of many separate use trusts suggests that the intent of the transferors was not to push the limits of married women's property rights but rather to serve as a protective measure. Numerous separate use trusts directed that assets are to be "free from the control of any husband," which preserves assets for future descendants by prohibiting a husband's transfer of trust assets to individuals or creditors outside of that family.[103] As a result, any advancement of married women's property rights associated with separate use trusts is ancillary to their primary function of insulating and transferring wealth down a bloodline.

Separate use trusts may have fallen short of unfettered promotion of married women's autonomy, but the absence of unfettered promotion is not the equivalent of the absence of any promotion. Whatever limitations accompanied the split of legal and equitable title, separate

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100 *See* Susan Moller Okin, *Patriarchy and Married Women's Property in England: Questions on Some Current Views*, 17 EIGHTEENTH-CENTURY STUD. 121, 124-25 (1983-1984).

101 *See* SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833, at 221-22 (1990).

102 *See id.*

103 *See* Tait, *supra* note 97, at 204 (stating that "families were certainly motivated to create these trusts as much to protect against a potentially irresponsible and spendthrift son-in-law as to provision the daughter, as is clear from the standard language used in creating the estate").

use trusts signify an important step in the direction expanding a married woman's agency. Married women who received benefits from separate trusts could, for example, use those benefits to remove themselves from difficult marriages because trust assets served as an independent means of support or recover property from husbands by filing a claim against him in court.[104] Freeing assets from the control of a husband offered a wife some measure of independence within a legal regime in which she was "covered" by her husband.

Within the context of probate, property accrued as a result of an equitable interest in trust could be transferred by a married woman in her will — if an exception for testamentary transfer of a separate estate was part of the common law in a given jurisdiction. And for the married women in this sample, Kentucky's common and statutory law recognized that a married woman could make a valid will "in consequence of her proprietorship of a separate estate, her dominion or right of alienation over which, is held to authorize her to dispose of it by will."[105] While a married women could not enter into contracts, serve as a plaintiff or defendant in court, or participate in the market for real property,[106] the ability to execute a will to dispose of property constituting a separate estate gave married women a mechanism by which to make distributional decisions regarding property that had the sanction of law. Transferring a separate estate by will provided a married woman with a legally valid mechanism to express her intent — on paper.

C. Testamentary Distributions of Human Property — Slaves

The most significant difference between wills executed before and after 1865 can be summed up in one word — slaves. Before 1865, an owner's enslaved population often constituted the most financially valuable asset in a slave-owning testator's estate other than land. In 1850, for example, an inventory of James Jones's Wayne County estate included a number of personal items, livestock, bank notes, and three slaves: Perry valued at $650.00, Toby worth $700.00, and one female, Judy, estimated to be worth $200.00.[107] Jones's executors estimated that

[104] *See id.* at 178-90.

[105] *In re* Yates' Will, 32 Ky. (2 Dana) 215, 216 (1834); *see* STANTON, *supra* note 12, at 457.

[106] *See* Tait, *supra* note 97, at 167.

[107] *See* WAYNE COUNTY BOOK OF APPRAISEMENTS AND INVENTORIES, 1852-1889, VOL. C 42-43 Film #004819944.

the total value of his estate was a little less than $2,500.00,[108] which means that Jones's slaves constituted over one-half of the monetary value of his estate.

The real property in this study's counties represented wealth that could be transferred at the death of the landowner, but that total wealth would not have been as great without enslaved people to work the land. From the earliest time of each county, slaves cleared land of trees, rocks, and brush and then either labored on new farms or in workshops to generate wealth for their owners. One estimate suggests that 70% of the individuals who settled Woodford County brought slaves with them to Kentucky.[109] Interestingly, publicly available comments about the treatment of slaves are haltingly positive. One description of slave life in Woodford County, for example, reports that "the antebellum negro in Woodford was a happy, well-fed, well treated slave."[110] While such descriptions are difficult to digest, few would disagree that the work of slaves contributed to the settlement and survival of the communities in each of the counties in this study. Table 7 below shows the percentage of wills in each county with provisions that distributed slaves to new owners.

108 *See id.*

109 *See* RAILEY, *supra* note 21, at 4.

110 *Id.* at 7.

Table 7. Percentage of Wills in Boone, Woodford, and Wayne Counties from 1860-1870 that Distributed Slaves or the Profits of Slave Sales[111]

County	Wills with Slave Distributions (%)
Boone	19.5
Woodford	27.4
Wayne	28.6

The lower percentage of Boone County wills that allocated slaves to new owners, as compared with the other two counties in this sample, is likely the result of the general exodus of slaves from the area during the period leading up to the Civil War. For the first half of the nineteenth century, slaves consistently constituted somewhere near 20% of the county's population.[112] By the time of the 1860 Federal Census, the population of slaves had decreased to 15% of the total population in the county.[113] During the ten years that transpired between 1860-1870, nearly 50% of the county's enslaved population left the area.[114] In fact, the relocation of enslaved individuals out of Boone County during that decade "represents one of the highest rates of out-migration in the country during the Civil War decade of 1860-1870."[115] Those enslaved persons that remained in Boone County lived with the risk that they would be among the 19.5% of Boone County wills that transferred slaves to new owners.

The fear of separation from family and friends at the death of an owner haunted the lives of slaves whether or not the owner made a will that explicitly denominated a new owner. Woodford County's Verpile Paine failed to make a will; therefore, his property passed by intestate succession. After appointing appraisers to put dollar values on Paine's property,[116] the appraisers submitted an inventory for court approval on

[111] All wills were included in the tabulation for Table 7.

[112] *See* Margaret Warminski, *African Americans in Boone County, Chronicles of Boone County*, BOONE COUNTY PUB. LIBR. (Apr. 19, 2018), https://www.bcpl.org/cbc/doku.php/african-americans [https://perma.cc/V7GY-YP64].

[113] *See id.*

[114] *See id.*

[115] *Id.*

[116] *See Inventory of Verpyle Paine*, *in* WOODFORD COUNTY WILL RECORDS R 1861-1867 290-91 (1862) (on file with the UC Davis Law Review).

November 17, 1862.[117] Included among Paine's property are a group of slaves among his personal estate:

Ben about	35 years old	275	Phyllis & child 30		250
Bob	32	300	Ellen & Bob & child		200
Charles	55	50	Alec		100
Martin about	56	50	Will		100
Jim	20	300	Fillmore		75
George	20	300	Aga		50
Frank	20	300	Ann		150
John	17	300	Martha	16 years old	150
Henry	10	175	Milly	13 Do	175
Clabe	10	175	6 Shares Midway & Versailles		
Preston	8	125	Turnpike Stock @ $20 per share		120
Wilson	65	10			$3505.00[118]
Hannah	40	100			
Harriet	18	225			

And on Christmas Eve 1862, the appraisers submitted a list of buyers and proceeds accruing from the sale of Paine's personal estate:

Mrs. Catharine Paine	Ben	480
"Priscilla Paine	Bob	405
Adam Harper	Charles	175
Mrs. Susan Brooke	Martin	230
Same	Hannah	200
Simeon Paine	Jim	505
James Ford	George	560
J.S. Alvers	Frank	615
Miss Eliza Paine	Preston	350
Mrs. Ele Paine	John	500
R A Alexander	Harvey	500
Adam Harper	Clayburn	475
Same	Ellen & five children	1680
Same	Harriett	535
Mrs. Priscilla Paine	Philis & child	550
C A Norstell	Ann	370
Miss Eliza Paine	Martha & Milly	910
J S Alvers	Wilson	130
		$9170[119]

117 *See id.* at 291.
118 *Id.*
119 *Id.* at 297.

While the appraisers' estimates of the values of Paine's slaves was off by almost 50%, the monetary differential pales in comparison to the real-world impact of Paine's death on the lives of his enslaved population. The inventory lists "Ellen & Bob & children," but the list of sales reports the sale of "Ellen & five children" without including Bob.[120] Bob may have died, run off with the hope that he would return, or sold. Whatever happened, the odds that Bob remained with Ellen and the children after Paine's death seem low, which likely would have had a devastating effect on Ellen and the children. Beyond the impact on Bob, Ellen, and the child/ren, Paine's death disrupted a coherent web of connections within a specific enslaved community.

Instead of leaving the distribution of enslaved persons to the operation of an intestate statute, the slave-owning testators in this sample bequeathed their enslaved populations to new owners in three basic ways. Because slaves were personal property under Kentucky law during the sample period,[121] a testator could make a generic gift of "personal property" to transfer slaves to new owners.[122] In his 1863 Boone County will, Absalom Gaines simply declared that "[i]t is my will and intention that all of my real and personal property be divided equally between my wife Fanny Gaines and my children according to Law."[123] Gaines's will does not indicate that he owned any slaves at the time of his death, but the inventory of his estate reveals that he did, in fact, own slaves.[124] At the time of his death, Gaines owned sixteen people and each enslaved individual became the property of either Fanny Gaines and Absalom's children after Gaines' death because of the gift of personal property in Gaines's will.[125] Second, some slaveowners identified their slaves by name in the testamentary clauses that transferred them to new owners. Blending the first two approaches, some slave-owning testators allocated specific slaves to specific takers and left the rest to be distributed by a sweeping gift of personal property. In his 1863 Boone County will, John Conner distributed Artemere, Benjamin, Newton, John, and Bill to specific children and a daughter-

120 The list of sales includes a "Bob" as the second recorded sale, but that individual seems likely to be the "Bob" who is the second slave listed on Paine's inventory, especially because the list of slaves on the inventory and list of sales appears to identify the individuals in the same order.

121 *See* WICKLIFFE ET AL., *supra* note 55, at 627.

122 *See* Warner's Ex'rs v. Swearingen, 36 Ky. (6 Dana) 195, 197 (1838).

123 *Last Will and Testament of Absalom Gaines*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, at 167-68 (1863) (on file with the UC Davis Law Review).

124 *See Inventory of Absalom Gaines Estate*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, *supra* note 123, at 250.

125 *See id.*

in-law and then transferred "one third of the remainder of my blacks to my wife Elizabeth Conner for and during her natural life."[126] The inventory of Connor's estate showed that Roena, Perry, Cynthia, and Mime were assets included in his personal estate;[127] therefore, a portion of those individuals belonged to Conner's widow following his death by way of Conner's gift of his remainder. Regardless of the specificity with which slaves were transferred, the following table shows who received slaves from the testators in this sample.

Table 8. Percentages of Slaveowners' Wills that Allocated an Interest in Slaves to Wives, Daughters, Sons, and Others in Boone, Woodford, and Wayne Counties 1860-1870[128]

County	Wife (%)	Daughter (%)	Son (%)	Other (%)
Boone (16)	43.8	37.5	25.0	25.0
Woodford (22)	50.0	50.0	27.2	31.8
Wayne (12)	58.3	41.7	33.0	16.7

Recent research reveals that daughters received slaves from parents more often than sons,[129] which is supported by the results in Table 8. The difference in preference may be understood in conjunction with three prior tables, Tables 3, 4, and 5. Table 3 revealed that husband testators often left most, if not all, of their property to their surviving wives while Tables 4 and 5 showed that father testators left real property to daughters and/or sons, albeit with a lesser frequency than surviving wives. Devising real property to surviving wives and children without labor threatened to diminish the value of the devise because labor would need to be hired if the land was to be maintained and made profitable. In addition to preserving the value of real property by transferring enslaved labor to an owner of real property, the transfer of enslaved persons to wives and children provided a possibility of future wealth. Female enslaved persons might have children and those children would be enslaved to the owner of the mother; therefore, the wealth resulting

[126] *Last Will and Testament of John Conner*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, *supra* note 123, at 195-96.

[127] *See Inventory of John Conner Estate*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, *supra* note 123, at 287.

[128] The numbers in parentheses indicates the number of wills containing provisions that allocated enslaved persons to new owners. A transfer of slaves could involve two of the parties listed in the table, such as a shared transfer of enslaved persons to a surviving wife and daughter.

[129] *See* STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH xii (2019).

from a bequest of a female slave might multiply. The additional value derived from human property could be valuable to surviving wives and daughters because human property could be sold if the land value or crop earnings diminished. In that sense, transferring enslaved persons to surviving wives and daughters — so long as they remained unmarried — represented a form of insurance against loss that may have been more important for females compared to males in the mid-nineteenth century legal culture.

The traditional relationship between women and slavery portrays women as lacking sufficient management skills as well as the ability to wield authority like a "master" to engage in transactions involving human beings.[130] Slavery, in short, was the domain of men. Data from the 1850 and 1860 Federal Censuses, however, shows that women constituted somewhere near 40% of all slaveowners.[131] To that end, the preference for transferring enslaved persons to daughters changed those daughters into slaveowners themselves.[132] Once they became slaveowners, women became active participants in the slave economy vested with the authority to manage human property,[133] which might lead to transactional opportunities in the broader world. Slave-owning females had an economic interest in the slave economy and could seek to advance that interest in much the same way as men.

The results in Table 8 support the notion that women played a greater role in the slave economy than traditionally recognized, but the nature of the gifts that transferred enslaved persons may have limited the extent to which some women could trade in human property. Instead of making an unencumbered gift of slaves to wives, slave-owning testators frequently limited the interests of surviving spouses to the duration of their lives or continued widowhood. Following the standard introductory clauses, the second clause of the 1861 will of Wayne County's Squire Roberts stated that:

> It is further my will and desire that my farm and landed possessions, all my slaves, and all my stock of every kind and

[130] *See id.*

[131] Becky Little, *The Massive, Overlooked Role of Female Slave Owners*, HISTORY (Mar. 12, 2019), https://www.history.com/news/white-women-slaveowners-they-were-her-property [https://perma.cc/4FCM-M6MH].

[132] *See* JONES-ROGERS, *supra* note 129, at 2-3.

[133] *See id.* at 3-8.

> sort, rest and remain in the possession of my beloved wife . . . during her natural life . . . .[134]

Four clauses later, the will continues that:

> My will and desire further is, that at the death of my wife . . . my entire estate aforesaid, real personal and mixed be sold on such terms as my Executors may deem best and the proceeds arising from said sale be equally divided among my children[135]

The following table, Table 9, shows that a majority of slave-owning testators limited the ownership rights of surviving spouses to an interest for the duration of life or continued widowhood.

Table 9. Percentage of Wills that Limited Property Rights of Surviving Wives to Enslaved Persons in Boone, Wayne, and Woodford Counties 1860-1870[136]

County	Wills with Limitations/Conditions (%)
Boone (8)	50.0
Woodford (11)	72.7
Wayne (8)	87.5

The language employed by the slave-owning testators represented in Table 9 indicates that they intended to pass an interest that did not include full power to distribute human property, especially because of the gift-overs in the granting clauses. Bequeathing an interest for the "duration of life" suggests that the surviving spouse's interest ended at her death, which meant that she could not include those slaves in any will she might make because they immediately transferred to the recipient of the gift-over. A surviving wife's life interest in enslaved persons coincides with the life interest in real property — the enslaved persons worked to make real property productive for the benefit of a surviving wife during her life. Following a surviving wife's death, the enslaved then labored for the recipient of the gift-over in the deceased

[134] *Last Will and Testament of Squire Roberts*, *in* WAYNE COUNTY WILL RECORD BOOK A 1836-1901, at 144 (1861) (on file with the UC Davis Law Review).

[135] *Id.* at 145.

[136] The number in parentheses is the total number of wills utilized in the calculation. For purposes of this table, the total number of wills includes only those wills where slaves were distributed and a spouse is expressly mentioned in the terms of the will. Wills that did not identify a spouse were excluded from the calculation. The results include those gifts that were conditioned on remaining a widow because they also indicated that something less than full control over the disposition of slaves was intended by the testator.

husband's will. Despite the absence of testamentary control, a surviving wife received the benefit of slave labor and had to manage the slaves during her life, which likely broadened a widow's agency in ways that may not have existed otherwise. Even gifts of property with limitations from a decedent spouse could expand a woman's sphere of influence.

In addition to durational limits on the interests of surviving wives, some testators drafted specific limitations on the ability of their surviving wives to participate in the slave economy by restricting the power to sell gifted slaves. Boone County's Harry Bannister executed his will in 1859 with the provision that:

> I devise to my wife Hannah Bannister my servant and slave Reuben, during her life, and at her death, to return to my heirs, and it is my will that he shall never be sold or hired except to my said heirs.[137]

Moses Hawkins went one step further in his 1863 Woodford County will by prohibiting the sale of a specific slave and providing that:

> It is my will & desire that my faithful old servant Jim remain in the possession of my wife as long as she lives to be treated with great care & humanity & should he be living at her death & physically incapable of supporting himself the sum of Seventy five dollars per annum is to be set apart out of my estate and retained by my Executor & by him appropriated to the support & maintenance of said Servant Jim so long as he lives & is hereby made a charge thereon for the purpose.[138]

Slave-owning testators who transferred an interest for life with a restriction on the power of sale foreclosed the option to transfer during the taker's life, which served as a barrier to full entry into the slave economy.

Rather than perpetuating the enslavement of people by transferring enslaved persons to new owners at death with or without restrictions, testators in nineteenth century Kentucky possessed the testamentary authority to manumit slaves by will.[139] The testators in this sample,

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[137] *Last Will and Testament of Harry Bannister*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, at 303 (1864) (on file with the UC Davis Law Review).

[138] *Last Will and Testament of Moses Hawkins*, *in* WOODFORD COUNTY WILL RECORD BOOK R 1861-1867, at 393 (1864) (on file with the UC Davis Law Review).

[139] *See* WICKLIFFE ET AL., *supra* note 55, at 643; Harry Toulmin, *An Act to Reduce Into One the Several Acts Respecting Slaves, Free Negroes, Mulattoes, and Indians*, *in* A COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY § 27, 308 (1802).

however, generally chose not to exercise such transformational authority to change enslaved individuals to freed people by will. In lieu of immediate manumission, several slave-owning testators chose to provide a path to freedom for their slaves in their wills. In Item 2 of her 1866 Woodford County will, Sarah Taylor declared:

> It is my will and desire that my negro man slave named Henry about twenty seven years old, who has been a faithful and trustworthy servant, have the privilege of selecting a master and that he be sold by my Executors or any of them to whomsoever he selects regardless of price, my object being to provide him a good and comfortable home, or if the said slave Henry prefers his freedom then it is my will and desire that he be removed by my said Executors or any of them beyond the limits of the State of Kentucky to any free State he may select and there be manumitted and set free by said Executors or any of them.[140]

Upon first blush, one may wonder what might possess Henry to remain enslaved in lieu of the opportunity to live as a free person in a free state. Whatever impulse Henry may have had to exercise the choice to live outside of Kentucky as a free person, however, may have been tempered by his real-life circumstances. Henry may have had family nearby that would remain enslaved after he chose freedom; therefore, Henry may have understandably chosen a new owner near family members instead of leaving the state for freedom. While Henry may have opted for freedom and returned to Kentucky as a free person to be near his family, such a decision carried a risk of losing a freedom paper, subsequent re-enslavement with or without a freedom paper, and the associated fear and hardship. As a result, Henry's decision may have been far more difficult than it might seem on paper. The following table shows the number of slaveowners that granted decision-making power about the future to an enslaved individual.

[140] *Last Will and Testament of Sarah Taylor*, *in* WOODFORD COUNTY WILL RECORD BOOK T 1867-1870, at 257 (1866) (on file with the UC Davis Law Review).

Table 10. Frequency of Mandatory or Optional Manumission in Wills from Boone, Woodford, and Wayne Counties 1860-1870.[141]

County	Wills with Manumission Clauses (%)
Boone (16)	25
Woodford (22)	13.0
Wayne (12)	0

As Table 10 shows, the possibility of freedom for slaves decreased as the sampled counties move from north to south. In the northernmost county, Boone County's shared border with the free state of Ohio may have spurred some Boone County testators to execute wills that freed slaves. By comparison, the location of Woodford County may have insulated it from immediate messaging from abolitionist Ohioans. Similarly, Wayne County residents were likely to be influenced by ideas from the slave state of Tennessee on its southern border. In short, the geographic location of the land on which the enslaved labored may have impacted the possibility of freedom at the death of a slaveowner.

One of the few testators to grant unconditional freedom to an enslaved individual also executed one of the most interesting wills in the sample. In 1858, sixty-five-year-old Adam Brockman, "a man of color," made a gift:

> [B]equeathing to my wife Keziah Brockman, who was on the 25th day of September 1849 purchased by me . . . and evidenced by a "Bill of Sale" or Memorandum of Relinquishment in writing her entire and absolute freedom after my death.[142]

After devising a plot of land in Kentucky to his daughter, a "woman of color" who lived in Cincinnati, Brockman appointed an executor with the last clause of his will:

> [B]egging him to accept the appointment hereof, and with the request that he will see that this my last will shall be fully and specifically executed, and especially in relation to the freedom of my wife Keziah.[143]

[141] The numbers in parentheses following the county names represent the total number of wills that included distributive provisions that allocated slaves at death.

[142] *Last Will and Testament of Adam Brockman*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, at 549 (1865) (on file with the UC Davis Law Review).

[143] *Id.*

Without question, Brockman's primary testamentary intent was to ensure freedom for his wife after his death and his selection of an executor was critical to the effectuation of his intent.

Unlike Adam Brockman, slaveowners who executed wills after the passage of the Thirteenth Amendment did not need to consider how to distribute slaves through their wills because that amendment changed slaves from legal property to legal people.[144] A review of the few wills that were executed before the passage of the Thirteenth Amendment but probated after the amendment illustrate the transformational effect in bold relief. Woodford County's Robert Alexander executed a will in March 1860 that benefitted his brother by granting him:

> [A]ll my lands houses & tenements in Woodford Co together with all my negroes & stock of all sorts & kinds also all my agricultural implements wagons harness pertaining to the farm also all my carriages wagons & buggies & everything like furniture pictures books & plate of which I am possessed either in this County or abroad.[145]

At the time Alexander's will entered probate in 1867, however, the Thirteenth Amendment barred transferring humans as wealth. As a result, an 1868 inventory of Alexander's estate does not enumerate any humans as assets of Alexander's estate.[146] The absence of slaves in Alexander's estate was not likely to be a simple mistake — the meticulous inventory conducted by Alexander's executors consumes eight, single-spaced pages in Will Record Book T and values the estate at nearly $125,000.00.[147] Similarly, Sarah Yowell's 1856 will distributed

[144] One might hypothesize that the elimination of the option to transfer wealth in the form of slaves by will to family members would change the estate plans of testators. A testator might, for example, create a trust to benefit children as a measure of protection against future financial hardship after 1865 in lieu of human property that could be sold to generate income as needed. However, the number of express testamentary trusts created before and after 1865 was almost identical, which suggests that there was little to no change in the utilization of trusts as a wealth transfer mechanism. In the alternative, a testator could simply have changed the proportion of wealth to given takers to account for the absence of enslaved persons in an estate after 1865. For example, a testator could have devised more real property to daughters after 1865 to account for the wealth in the form of enslaved persons that would have been legally transferable before 1865. The number of available inventories and appraisals for testators who executed wills pre-1865 and then had their wills probated after 1865, however, did not readily permit a comparison to be made.

[145] *Last Will and Testament of Robert Alexander*, *in* WOODFORD COUNTY WILL RECORDS BOOK T 1867-1870, at 127 (1867) (on file with the UC Davis Law Review).

[146] *See id.* at 206.

[147] *See id.* at 213.

one portion of her slaves to one daughter and three sets of grandchildren.[148] The March 1866 inventory of Yowell's estate, however, does not list any human property as assets.[149] While the Thirteenth Amendment prohibited slavery as a legal institution, its function in probate courts was to redefine "property" subject to transfer at death by individuals like Robert Alexander and Sarah Yowell.

CONCLUSION

On a micro-level, the historical information warehoused in probate court records is personal history. Wills and inventories record information about a specific decedent's property and the choices made regarding the disposition of her property. The property owned by a decedent at death and the decisions made about the distribution of that property convey non-trivial information about a testator. Robert Alexander, for example, possessed great wealth that did not include slaves, kept meticulous records as evidenced by his efforts to update his estate plan, and sought to secure care for his children in the future, including one who may not have been his biological child, by settling trusts that designated them as beneficiaries.[150] Jane Bristow's wealth, on the other hand, included slaves, but she also sought to benefit her children in the future using the most valuable property she owned at death — her slaves. To transfer her wealth in human property, Jane made gifts of slaves to her children and created a trust that held some of her slaves for the benefit of one of her sons.[151] Jane's reason for treating some slaves differently from others is lost to history; any investigation of probate records will likely raise questions for which the paper trail will vanish.

More broadly, the results of this investigation of Boone, Woodford, and Wayne County testators illustrate that probate records are archival documents that reflect and foreshadow broader historical trends in the aggregate. The absence of wills by married women in this sample highlights the restrictions on married women imposed by Kentucky

[148] *See Last Will and Testament of Sarah Yowell*, *in* WOODFORD COUNTY WILL RECORDS BOOK S 1861-1867, at 454 (1866) (on file with the UC Davis Law Review).

[149] *See id.* at 538-39. An entry from the Woodford County Court recorded with the inventory suggests that the inventory was returned to the court and accepted for recordation in June 1865. However, the court order appointing appraisers and the inventory and appraisal undertaken pursuant to that order are dated March 1866. As a result, the June 1865 date seems to be a mistake.

[150] *See supra* note 145 and accompanying text.

[151] *See Last Will and Testament of Jane Bristow*, *in* BOONE COUNTY WILL RECORD BOOK H 1861-1866, at 165 (1863) (on file with the UC Davis Law Review).

statutory and common law. In some cases, married women sought and obtained private legislative bills that expanded testamentary authority as well as property rights. The natural extension of broadening property rights for married women during life is the expansion of testamentary authority at death, which ultimately occurred in Kentucky two decades after this sample period. Similarly, slaveowners in this sample distributed their human property in wills, placed them in trusts, or manumitted them pursuant to the testamentary authority over property owned at death. The passage of the Thirteenth Amendment, however, eliminated humans from the definition of property; therefore, testamentary instruments executed post-ratification exclude provisions that transfer the ownership of one human to another. The Thirteenth Amendment not only had a tangible impact on the lives of individuals who were once enslaved, but also made a visible impact on the yellowing pages of probate books in county courthouses in places where slavery was a legal institution.