Family Law (Survey of Kansas Law)

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FAMILY LAW

Dan Hopson, Jr.*

While the Soviets rattled their rockets, the Kansas Supreme Court calmly settled the eleven family law cases brought before it during the Survey period. As so frequently happens, even those eleven included many "fact" appeals. However, the cases presented some interesting issues. The court was forced to make a little "new" law. Handling most of the cases correctly and with dispatch, the court had a good year.

The 1957 legislature practically ignored family law. It enacted only a few minor amendments, but did revise the juvenile court code.

I. CHILDREN

Wahl v. Walsh1 reaffirmed Kansas' minority position that an illegitimate child has a common law right to sue his father for support. The Kansas court had early held that it could create such a right2 even though the common law treated bastards as nullius filies and despite the fact that the legislature had provided a bastardy proceeding.3 When the needs of the people of the state change, the court felt it could create new rights.4

In this case, neither the child, the mother, nor the defendant father were domiciliaries of Kansas. The defendant claimed that the law of Washington, the domicile of the mother and child, was applicable. And Washington law did not allow this type of action. The Kansas court rejected this argument and, citing Moore v. State ex rel.,5 a statutory bastardy case, held that support actions were transitory. The child could sue in Kansas. The court concluded: "... as we view the matter, no question of conflicts of laws is involved ... ."6

While the result is tenable, both the courts and counsel for the defend-

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1 180 Kan. 313, 304 P.2d 525 (1956). This case had previously been before the court on an appeal from an overruling of a demurrer to the petition; Wahl v. Walsh, 177 Kan. 176, 277 P.2d 623 (1954).
3 KAN. G.S. 1949, 62-2301 to 2321.
4 KAN. G.S. 1949, 77-109 provides that: "The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state . . . ." See Note, 6 KAN. L. REV. 95 (1957), discussing this aspect of the Wahl case, while analyzing Whitcomb v. Huffington; see text circa note 7 infra.
5 47 Kan. 772, 28 Pac. 1072, 17 L.R.A. 714 (1892).
6 180 Kan. at 318, 304 P.2d at 528.
ant apparently failed to distinguish between the problem of jurisdiction and that of choice of law. Whether Kansas could hear the action, the jurisdictional question, is different from whose law should be used to determine the rights of the parties, the choice of law question. The first issue turns on whether this suit is local or transitory. The court probably correctly decided that Kansas did have legislative jurisdiction and therefore the action was transitory.

But the court stopped there. Having decided the jurisdictional question, it should have then resolved the choice of law problem. The court must determine which state—that of the domicile or that of the forum—had the greatest interest in determining the right to support. Perhaps Kansas could hear the case, but the question is—should it? The court's decision allows forum shopping on the part of illegitimate children. Whenever the state of their domicile prevents suits, which will be quite frequently, they will lie in wait and hope to serve the putative father as he passes through Kansas.

The purpose of the rules of conflict of laws is to inform courts whether they should apply the law of the forum or the law of some other state having an interest in the results. The goal is uniformity. No matter where the suit is brought, the same law should be applied to the facts of the case. The Wahl decision subverts that policy. While Kansas has the right to choose its own law, the interest of the State in the suit is weak. The Kansas Supreme Court should have chosen to apply the law of the domicile, the state having the greatest interest.

Having broadened the rights of children in the Wahl case, the court refused to aid them in Whitcomb v. Huffington. There, the court reviewed the arguments and held that while it had the power, it would not create a right in children to sue the lover of their mother for alienation of affections. The court admitted that a few jurisdictions have created such a right, but declined to follow. Such suits cause more harm than good, suggested the court. If there are to be new rights in this field, the legislature will have to provide them.

The Kansas Legislature passed two statutes affecting children during the 1957 session. It amended Kan. G.S. 1955 Supp., 37-711 to increase from a misdemeanor to a felony the intentional solicitation of a child

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8 For arguments in favor of such a right, see Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). And see Annot., 162 A.L.R. 819 (1946) for the stand of the other states.
9 For a discussion of a validity of the arguments, pro and con, see Note 6 Kan. L. Rev. 95 (1957). The other cases concerning child custody and child support in divorce cases are discussed under that heading infra.
under twelve to commit an immoral act. If the child is under eighteen, but over twelve, the solicitation remains a misdemeanor.

And, for the first time since 1905, the legislature made extensive revisions in the Kansas Juvenile Code. While there are some controversial changes, the code is a needed improvement. The statute provides for increased protection to children while, at the same time, it allows the court to make full use of available community resources.

II. Divorce

Child Custody: The bulk of the Kansas family law appeals raised the issue of the propriety of a child custody order. Three cases are familiar ones, as the bitterness over the fight for the children continues to force repeated litigation.

In *Heilman v. Heilman*, the third appeal to the Kansas Supreme Court, the appellate bench upheld the trial court's order granting the mother custody. In the second appeal, the court had said, in dicta, that in a contest with paternal grandparents, a trial court could not deprive a mother of custody unless it found her unfit. The mother then started a new suit and, on virtually the same evidence as that presented in the second case, induced the trial court to again find her a fit and proper person and to award her custody. The grandmother appealed. She protested that (1) the mother gave her inadequate notice of the hearing; (2) the court did not appoint a guardian ad litem for the minor; and (3) the court had not given notice to the father.

The supreme court easily dismissed the first two arguments. Five days notice did not violate the fourteenth amendment nor need a guardian be appointed when the child is not a party. But the court had some trouble with the final argument. Notice must be given to all interested parties. And certainly a parent is an "interested" party. However, the court, construing *Lamberson v. Lamberson* and *Bailey v. Bailey*,

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12 No attempt will be made in this Survey to point up the changes as a comment on the new Code and the use made of it by juvenile courts will appear in a subsequent issue of the *Kansas Law Review*.
16 164 Kan. 653, 192 P.2d 190 (1948).
concluded that unless the parent had custody, or the right to custody under a previous order, no notice need be sent. But the court caveats. The trial court may, at its discretion, require notice in a particular case. However, unless other facts are shown, a trial court is not in error when it dispenses with notice. Certainly this decision is important for future litigation.

In *Leach v. Leach*, the supreme court emphatically approved the rule, expounded in *Christlieb v. Christlieb* and the second *Heilman* case, that in a contest between grandparents and a "fit" parent, custody may not be split. After the first appeal in this case, holding that the father had the right to custody as against the mother, the maternal grandparents obtained from the trial court the right of possession of the child for a two-day weekend every sixty days. The father, now living in Omaha, asked the trial court to change the award as he was financially unable to bring the children to Wichita (the grandmother’s home) every two months. From a refusal of the trial court to change the award, the father appealed. The supreme court held that the "possession" given by the decree was more than a mere visitation right. Since custody may not be split, the trial court’s award was erroneous.

The supreme court did not specifically hold that "possession" and "custody" were synonymous, but certainly it left the implication that an award giving possession was effectively the same as a custody award. Apparently the district court, prohibited from splitting custody,

19 "The Bailey case is authority for the rule that where, in an action for divorce and custody of a minor child, the trial court makes an order fixing custody and at a later date a proceeding is instituted to change such custody, the court may make such an order only where the person having custody, or right to custody of the child under the previous order, has had notice of the proceeding to change custody and an opportunity to defend. Further, under the facts of that case, the decision is authority for the proposition that notice to the mother of the motion for change of custody was unnecessary.

"As applied to the facts and circumstances of the case before us, the rule is clear. Here the grandmother had previously been awarded partial custody and she was given notice of the hearing as is required under the rule in the Bailey case. The father, not having custody, or a right to custody under a previous order, was not served with notice of the hearing and, under the rule of the Bailey case, was not entitled thereto as a matter of law.” 181 Kan. at 473, 312 P.2d at 626 (1957).

22 See note 14 supra.
24 The district court’s order read as follows: “It is, therefore, by the court ordered and decreed that the parents of the plaintiff be and they are hereby granted the right of visitation with said minor child and the right to have the person of said minor child in their possession on the last weekend in January, 1956, starting January 28, 1956, and that they are further granted the privilege of visitation and having the person of said minor child in their possession on each weekend every 60 days thereafter until the further order of the Court, and the defendant is ordered to deliver said child to said maternal grandparents at said time. (Emphasis supplied.)” 180 Kan. at 546, 306 P.2d at 194 (1957).
may not give to grandparents “visitation rights” if visitation includes the right to have the children in their home.

The other side of the rule was reaffirmed in Goetz v. Goetz.25 There the mother received custody, but the father was granted the right to have the children for part of the summer. On an appeal on other issues, the mother also complained of this splitting. The supreme court affirmed the trial court and pointed out that both parents were found fit. As suggested in last year’s Survey and affirmed in this decision and in the Leach case, discussed above, if the contest is between parents and both are fit, custody may be split. If the fight is between grandparents and a parent, even though both are fit, the parent must receive total custody.

The supreme court faced a tricky and very difficult question in Jackson v. Jackson.26 On the first appeal,27 the supreme court affirmed the trial court’s decree granting the wife a divorce and custody of the three children. In the summer of 1955, the husband moved for a change in the custody order. The wife had remarried and joined the Jehovah’s Witnesses. The trial court found that the mother had recovered from a nervous breakdown sustained after the prior divorce decree. But the cause of her breakdown, her religious beliefs, still existed. The husband introduced considerable testimony on her religious beliefs and, more particularly, on the beliefs of the children as to war and military service. The trial court granted custody to the father.

On appeal, the supreme court rather reluctantly reversed. Citing Denton v. James,28 the court said that religious beliefs should not determine custody awards. The church and state are separate. While the trial court has wide discretion to determine what is best for the child, the court’s view of the merits of a particular sect is of no importance. Although there was evidence of other valid grounds for granting the father custody, the record was too permeated with the religious testimony.

Justice Price, joined by Justice Wertz, pointed up the crux of the problem in his dissent.

“... in a dispute relating to custody religious views afford no ground for depriving a parent of custody who is otherwise qualified, but I think it may not be said that here the trial court’s decision was based solely on the ground of religion. In fact, conclusions 1 and 2 make it clear that it was not. If a divorced parent’s extreme religious views and activities are such as

26 181 Kan. 1, 309 P.2d 705 (1957). A discussion of the problem in this case will be found in a note on Lynch v. Uhlenhoop, 78 N.W.2d 491 (Iowa 1956), appearing in the November, 1957, issue of the KANSAS BAR JOURNAL.
to result in emotional instability in such parent, then most certainly I feel that a trial court has not only the right, but the duty to take such fact into consideration in the determination of what appears to be the welfare and best interests of the child and to which parent custody should be granted. As I read this record, that, in reality, was what was done in this case."

The majority skirted the problem in finding religion to be the test used by the trial court. Surely there comes a point at which religious belief becomes so extreme as not to be accorded first amendment protection. Yet, how is a trial court to draw the line? On retrial, the conscientious judge will have a puzzling problem.

**Child Support:** In recent years, the Kansas Supreme Court has reshuffled the status of the child support portion of a divorce decree. In 1949, the court declared that execution could levy on such decrees without first obtaining a judgment for the past due amount. And in the 1956 case of *Ortiz v. Ortiz,* the court stabilized that view.

The plaintiff mother sued the defendant husband, asking for a judgment for the previous five years of unpaid child support. He contended that since the child had married two years after the original divorce decree, the mother could claim only from the date of the decree to the date of the marriage; that at most she could claim only amounts actually expended; that the decree should be modified so that there should be no payment owing from the date of the marriage to the date of this suit; and that all future payments should be eliminated.

The trial court refused to grant a new judgment, struck from the record the amount owed from the date of the marriage to the date of trial, and eliminated any future payments. The wife appealed. She did not complain of the elimination of any future payments and the husband did not complain about the payments owing from the date of divorce to the date of marriage. Two issues remained: Should the court have entered a new judgment? And should the court have retroactively modified the amounts owing from the date of marriage to the date of suit?

The supreme court, following *Haynes v. Haynes,* held that the wife had a judgment that was valid and could be computed. Therefore, the trial court need not enter a new judgment. Actually the *Haynes*
case only held that in a contempt proceeding, the wife was not entitled to have her motion to reduce the amount to judgment sustained. However, the court was willing to extend the logic of the case to the situation where the wife sought a judgment in an independent suit.

On the second issue, the court found that the support judgment could not later be modified as to amounts due and owing. The court quoted liberally from the *Haynes* decision, emphasizing the final and execution properties of the judgment, and pointed out that the later cases, following *Haynes*, had so held.68

While prior to the *Haynes* case, the court had held that support judgments were not modifiable retroactively,87 it did not cite any of the pre-*Haynes* cases. Early in its history, the court had held that execution could not levy on a support or alimony judgment.3 However, starting with *Sharp v. Sharp*,39 it shifted ground. By 1949, in the *Haynes* case, the court was willing to hold such judgments final and allow execution to levy without obtaining a new judgment. Apparently the court did not cite any of the earlier cases since it felt that finality and execution must logically precede non-modifiability of judgments.

The *Haynes* and *Ortiz* cases have almost elevated support judgments to the level of other money judgments. All that is now left to establish the respectability of such judgments is a clear holding that they operate as a lien on the property of the husband without the district court specifically so directing.40

In the *Goetz* case,41 the court endorsed the trial court's decree of $200 per month for the two children. The parties were well to do, and the mother felt the amount inadequate. The supreme court reminded her that if her progenies were impoverished, she could move for an increase.

**Grounds:** Here, on some collateral issues, the court quietly shifted

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41 See text *infra* note 25 supra.
gears. In *Hoppe v. Hoppe*, the wife sued for divorce alleging cruelty. The trial court granted the divorce and the husband appealed. The evidence showed that the husband quarreled with his wife over money matters, used vile and abusive language, refused to give her money, would not take her out, attempted to give her pills which would cause a miscarriage and denied parentage of her child. When the wife wanted to leave, the husband threatened to either kill or disfigure her. The husband protested that this was insufficient evidence of cruelty. The court disagreed.

The husband also claimed lack of corroboration. The wife produced a deposition of a neighbor from their former home in Pennsylvania which corroborated the "unrelenting nagging, swearing and accusations, and denial of the parentage. . . ." The court said:

> The principal reason for the requirement of corroboration has been and is for the prevention of collusion between the parties to a divorce action. It is not essential that it alone sustain the judgment or that it support the plaintiff's testimony as to all the allegations.

And to this the court added:

> The corroboration required by the statute (G.S. 1949, 60-1509) . . . does not mean that it is necessary that corroboration support plaintiff throughout the course of mistreatment or as to every detail of her testimony. However, the corroboration should be such as will tend to establish some fact or facts testified to by plaintiff so as to make her testimony more probable and legally acceptable. . . . [T]he remoteness of the acts which are corroborated as affecting the sufficiency of the corroboration in general is a question largely within the discretion of the trial court.

In the *Goetz* case, the court indicated, without reviewing the evidence, that corroboration need only be circumstantial.

Perhaps these two cases indicate a relaxing of the corroboration requirement. In earlier cases, the court said, usually in dicta as there was either no corroboration at all or else a substantial amount, that corroboration must be of the statutory grounds and not to mere indignities and

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47 See text *circa* note 25 *supra.*
abuses which in themselves are not sufficient. In *Walton v. Walton*, the plaintiff argued that the statute was aimed at collusion and that since there was no collusion in this case, corroboration should not be required. The court disagreed. It said that collusion was not the only reason for the requirement and denied the divorce.

As the *Hoppe* case, quoted above, shows, the court is now looking for collusion since it feels that KAN. G.S. 1949, 60-1509 is aimed at preventing this. If it is not suspicious, it will allow the divorce.

In the *Goetz* case, condonation was also at issue. The wife had sued for divorce back in 1953, but before trial, the spouses reconciled their problems. They agreed to sell the business of the husband and move to another city. He agreed to quit drinking, to love her and to give her the joint bank account. She also agreed to condone his offenses.

When the trial court refused to grant her the divorce, presumably on the ground that he had shown condonation, she argued the hornbook rule that condonation is conditional and that lesser acts will revive former acts of cruelty. The court agreed on the state of the law, but found that she made no showing that he had not lived up to the reconciliation agreement.

Neither opinion adds much to the existing law, but both illustrate the increasing willingness of the supreme court to coast, leaving to the trial court its freedom to universally grant divorces. If need be, the high court is even willing to limit defenses and hold weak evidence of fault sufficient.

**Notice:** The 1957 Legislature amended the publication notice statute to conform to the decision of the Kansas Supreme Court in *Schooler v. Schooler*. The second paragraph of 60-2525 will now expressly provide

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50 The court, quoting from Frye v. Frye, 134 Kan. 3, 4, 4 P.2d 415 (1931), said: "The state is interested in the marriage relation and the fostering, protecting and permanency of it as an institution of society. The state is interested in preventing the disruption of the marital relation upon petty or unimportant causes or for any reason other than those prescribed by the legislature as grounds for the dissolution of the relation." 166 Kan. at 394, 202 P.2d at 200.
53 The court apparently assumed, correctly, that if the husband lived up to the agreement, he would not be guilty of cruelty or gross neglect of duty.
55 175 Kan. 201, 263 P.2d 233 (1955); See Hopson, *Family Law*, 4 KAN. L. REV. 224, 234 (1955). There the court held that KAN. G.S. 1949, 60-2525 (para. 5), which allowed publication service in all actions "where the defendant being a resident of this state, has departed therefrom, or from the county of his residence, with the intent to delay or defraud . . .," could be used in a divorce case, despite the fact that the second paragraph provides for service in divorce actions. The court did not feel that the second paragraph was exclusive.
that if the plaintiff in a divorce action is unable, with due diligence, to make service, he may use publication notice.

**Property Rights:** In dicta in the *Hoppe* case, following the old United States Supreme Court case of *Fall v. Eastin*, the court said that Kansas could not try title to Pennsylvania land even though the court, acting in personam only, could order one of the parties to convey. The supreme court refused to accept the argument of the husband that KAN. G.S. 1949, 60-1511, the general property division statute, gave the court power to try title to foreign land.

In the *Goetz* case, the wife complained of the property division, but the supreme court found no abuse. The court reiterated the rule that the division did not have to be equal.

**Miscellaneous:** In *Jackson v. Jackson*, the husband argued that the wife could not complain of the custody order since she had accepted attorney fees given her on order of the district court. The high court summarily dismissed the argument. If the wife has a right to attorney fees, she has the right whether she wins or loses on other matters. How could she fully benefit from her right to a husband-paid counsel if she could not accept the attorney fees?

In *Brunhoeber v. Brunhoeber*, the court said, also in dicta, that a promise to pay certain debts owing prior to a divorce settlement was enforceable. The moral duty to pay was sufficient consideration. The case raises the interesting question, not discussed by the court, of whether the court should distinguish between those separation agreements merged in the divorce judgment and those only approved by the court at the time of the divorce, when it examines the enforceability of subsequent promises.

While the appeal was pending in the first *Goetz* case, the wife refused to turn the children over to the husband for the summer vacation as the district court had ordered. On a contempt citation, the trial court held the wife in contempt and sentenced her to ninety days in jail.

In *Goetz v. Goetz*, the supreme court upheld the findings of con-
tempt, but overruled the trial court’s sentence. The wife had filed a 
supersedeas bond pending appeal. She argued that the bond allowed 
er her to ignore the orders of the trial court. The court disagreed on two 
grounds: First, the supersedeas statute allowed stay only in four situations 
—payment of money, execution of a conveyance, sale or delivery of real 
property, and delivery of a document. Since a child custody order was 
none of these, the bond did not supersede the trial court’s order. Secondly, 
KAN. G.S. 1949, 60-1510, provides for continuing jurisdiction in custody 
matters. Therefore, unless the supreme court issues an order of temporary 
custody, the trial court continues to have jurisdiction pending the 
appeal.

The court did find that the sentence was erroneous. The wife had no 
separate trial brought in the name of the state on the contempt charge. 
Therefore, a definite term sentence, which is the sentence for criminal 
contempt, was beyond the power of the trial court. The sentence should 
have ordered the wife to remain in jail until she purged herself of 
contempt.

III. INCOMPETENT PERSONS

In Sands v. Donge, the petitioner, an incompetent, misconceived 
her remedy. She wanted to be restored to capacity and to be free from her 
appointed guardian. For some reason, she sought a writ of habeas corpus 
from a district court. Stating in her petition that she was now competent, 
she claimed her guardian was “imprisoning” her. The guardian’s de-
murrer was sustained and the supreme court affirmed. KAN. G.S. 1949, 
59-2268 states a procedure for restoration to capacity before the probate 
court. The legislative intent was to make that procedure exclusive. Since 
petitioner neither alleged that she had been restored, nor that the original 
judgment was void, habeas corpus was an improper method of testing 
her sanity.

This decision is sound. Although the court, in In re Estate of Correll,
held that the director of a state mental hospital could restore to capacity, 
the basic legislative policy is that of funneling all questions of competency 
through the probate court. Incompetency is not a jurisdictional fact. Consequently, competency may not be used as a ground for collateral 
attack.

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64 This is allowed by KAN. G.S. 1949, 60-3322.
65 See, e.g., Ogg v. Ogg, 126 Kan. 310, 267 Pac. 977 (1928).
IV. Conclusion

At the close of last year's Survey, two areas were predicted to produce future litigation—the unfitness doctrine and the separation agreement in divorce. The Kansas court decided no separation agreement cases this year. The questions left from last year remain unanswered. In the custody area, the court emphatically continued on its predetermined course: unless a parent is found unfit, custody may not be given to a grandparent. Therefore, custody may not be divided, even though it be in the best interests of the child.

In all other areas, the court settled minor problems, disposing of several fact appeals. To a large extent, the court merely attempted to aid district courts in using common sense to work out the complex human problems of today's world.68

68 The cases decided by the Kansas Federal District Court and the Court of Appeals for the Tenth Circuit were examined, but no family law cases were found.