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Family Law (Survey of Kansas Law)

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The past two years found the Kansas Supreme Court, almost exclusively, reiterating the doctrines expressed in the main stream of prior Family Law cases. A few fact situations presented troublesome eddies and at one point the court created two streams winding in opposite directions. As in past years the bulk of the cases concerned the rights of adults to children, the support of children and the division of family resources upon dissolution of the marriage partnership.

**Children**

*Adoption*

Although *In re Estate of Shirk* represents a novel problem, it further illustrates the continuing conflict between the role of the state as *parens patriae* and the hallowed right of freedom of contract. In *Shirk*, a mother agreed to consent to the adoption of her child by the child’s grandmother in exchange for the grandmother’s agreeing: (1) to consent to the mother adopting back her child when the mother became financially able, (2) to give the child by will a child’s share of the grandmother’s estate and (3) not to disinherit the mother. Subsequently, the grandmother adopted the child. Still later the mother re-adopted. At the death of the grandmother, the mother sought to enforce the agreement. The executor claimed that the agreement was void as against public policy. The trial court sustained a demurrer to the claim, but the supreme court reversed. After agreeing that one could not “sell” his child for gain, the court found several outs which render the opinion a bit weak as precedent. Underlying the court’s decision was the fact that it must have felt that the motives of the mother were pure. It spent considerable time discussing the fact that the grandmother (the purchaser of the child) was “in the family” and had prepared the deal, and that the mother was unable, financially and emotionally, to care for the child. In short, the court felt that this contract was in the best interests of the child. Technically, the court relied on the fact that the agreement provided a monetary advantage to the child, while the only monetary
gain to the mother was a promise by the grandmother not to disinherit. The court distinguished a Georgia case which held a contract void because monetary benefits flowed to the mother. It purported to follow another Georgia case where the benefits flowed only to the child. But in Shirk, both mother and child benefitted so actually neither case was in point.

On balance, the case represents the oft held view that courts protect the weaker party. Here the grandmother was dead and had disinherited both the mother and child. The court did not want to find illegality. But attorneys should be careful. They dare not assume that the court will feel bound by this case when an attorney has advised a mother that she can sell her child through an agreement providing some extra benefit to the child.

**Custody**

In Bolinder v. Borkert, a trial court order awarding custody of a minor child to non-parent habeas corpus petitioners, was affirmed. Both parents were out of the picture. An aunt prevailed over a great-aunt. The court reaffirmed the principal that the primary issue in such a proceeding is the present and future welfare of the child. And this is a factual matter for the trial court. Previous to the habeas corpus proceeding the appellant filed a petition for guardianship in the probate court. Appellant contended that this gave the probate court jurisdiction, to the exclusion of the district court. The supreme court said no—for two reasons. First, the probate court proceedings were invalid. No letters of guardianship were ever issued. But assuming the guardianship proceedings were valid, the court suggested that even then the district court and not the probate court had jurisdiction. Habeas corpus is a proceeding to test the legality of the restraint of one's liberty. The probate code was not intended to deny its use where child custody is involved. The court cited Johnson v. Best, where a mother used habeas corpus to recover her child from an appointed guardian. In Johnson the restraint was keeping the child from her mother and natural guardian. But in Bolinder the restraint of liberty was a custody arrangement that was not for the child's best welfare. Habeas corpus may have been the logical remedy, but the court, in effect, said that when the custody arrangement is not for the child's best welfare, then the child's liberty is being restrained. The dicta may broaden the use of habeas corpus in these situations. It certainly makes insecure probate court attempts to gain custody.

The court, following Heilman v. Heilman, said a guardian ad litem for the child was not necessary. All parties were in court, with the exception of the

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mother. Her whereabouts was unknown, but plaintiffs had obtained publication service upon her. The Heilman case was a custody action. But extension of the Heilman rule to habeas corpus hearings is logical.

Child Custody and the Conflict of Laws

In five cases decided during this survey period and in a lead case from the preceding period the Kansas Supreme Court was forced to wrestle with the perplexing problem of the jurisdiction of various Kansas courts to determine custody rights. Generally the court treated each case, as so frequently happens in child custody matters, as sui generis. Consequently precedent was badly mangled although a somewhat consistent result may be detected.

As reported in the 1959 Survey, the court, in *Leach v. Leach*, held that a Kansas District Court in a divorce case loses jurisdiction to enter a new custody order under Kan. G.S. 1959 Supp., 60-1510, when the parent, who has custody, and the child are no longer domiciled in Kansas. The court relied on *Kruse v. Kruse* which had denied continuing jurisdiction to a Missouri court when, prior to the order changing custody, the child became domiciled in Kansas. In the *Kruse* case, the court relied on 2 Beale, Conflict of Laws § 144.3 (1935), to the effect that without domicile a court loses continuing jurisdiction.

Then in two cases decided the same day, *Neccum v. Lawrence* and *Hannon v. Hannon*, the court reaffirmed its stand that a Kansas district court loses jurisdiction to determine custody when the child has been removed to another state by the parent having custody, since the child acquires a new domicile. In *Neccum* the mother had custody and was domiciled in Kansas City, Missouri. She was induced to turn over her child to her husband on the basis of an ex parte order of temporary custody granted to the father by the court which had originally entered the custody order. Consequently the child was in Kansas at the time of the order charging permanent custody. However, the court found the temporary order void, since the child was not domiciled in Kansas. Therefore the child was not "domiciled" (although physically present) in Kansas at the time of the permanent order. In *Hannon*, the father had received custody in the original divorce action. After the mother had obtained an increased and definite visitation right, the father took the child to Oklahoma, where he, apparently, was maintaining a domicile. Then the mother obtained an order from the court that had granted the divorce, giving

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15 The child's domicile is traditionally considered to be that of the parent having custody.
16 The child had been living with a grandmother in Kansas.
her temporary custody. A motion by the father to set aside this order was sustained by the trial court on the grounds that the child was no longer domiciled in Kansas. On appeal, the supreme court affirmed, concluding that without domicile, the Kansas court had no power. The court suggested that the situation was a mess, but that “some court of competent jurisdiction will be able to provide for its welfare and custody.”

The next case, *Price v. Price*, raised the problem in a different setting and illustrates the limitations on the *Leach, Neccum and Hannon* cases. In *Price* the father had been given custody by a Delaware court at the divorce of the parties. The mother kidnapped the child and brought her to Kansas where the mother and child now live. The father, in a habeas corpus action, was granted custody by the Kansas district court against the contentions of the mother that there had been changed circumstances entitling her to increased visitation rights. The supreme court cited the language of *Wear v. Wear* that “the jurisdiction of the trial court . . . to determine what disposition should be made of the child . . . did not depend on the domicile of the child, nor on the domicile of either of its parents,” and held that the mother had not shown any change of circumstances. Therefore, under the evidence presented the father was entitled to custody with no change in visitation rights. The court pointed out, citing *White v. White*, that the Delaware decree must be given weight and since the mother had not shown why the Delaware decree should be changed, the father should be given the child.

Certainly, on its face, *Price* does not follow, either in its language or in its holding, the domicile requirement of *Leach et al.* The supreme court, in the last paragraph of the *Price* opinion, without mentioning the word domicile does admit that there are two lines of cases but suggests that the facts and circumstances are different. The court points out that one line of cases cite *Beale, Conflict of Laws* § 144.3, while the other line cites *Beale, Conflict of Laws* § 147.1. The court also cites *Ehrenzweig, Conflict of Laws*, Part One § 87, pp. 281, 284 (1959) for a discussion of the “Kansas Rule.”

*Beale* does not offer much help. Section 144.3 suggests that only domicile is the proper jurisdictional base while section 147.1 argues that a custody award

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1 Kans. 231, 233, 350 P.2d 26, 28.
3 The case is somewhat clouded as to its actual holding since the mother, in her answer, requested a change of custody. On appeal she complained of the refusal of the trial court to change visitation rights. The court points out that she now does not object to the custody holding and, since this was the issue under the pleading, there is no issue presented for review. However the court goes on to decide whether the trial court properly denied a change in visitation rights. In so deciding, the court makes no suggestion that they would treat a change in visitation rights in a different manner than a change in custody.
7 *Neccum, Leach, et al.*
8 *Wear, White, et al.*
in a first state, having jurisdiction, will be recognized in a second state and in order to change custody the second state will have to show changed circumstances.

Professor Ehrenzweig's discussion, cited above, of the "Kansas Rule" is much more enlightening. Written prior to the cases under discussion, Professor Ehrenzweig argues that in the custody area concepts of full faith and credit and domicile are particularly unworkable and, although courts use traditional domicile-res language, many have taken the earlier Kansas position that the state under its power as *parens patriae* may always do what is best for the child. He cites the *Wear* case as establishing the Kansas Rule. Certainly *Leach, Neccum et al.*, with their emphasis on domicile, would seem to overrule the freedom of *Wear*. But *Price*, without discussion, says there is a distinction.

It would unduly extend this survey article to detail the possible future position of the Kansas court in this area. However, it would appear that the following distinctions can be made.

If faced with a foreign decree awarding custody, the Kansas court will take jurisdiction whether the child is domiciled here or not (but assuming the child is physically present) and will retain for itself the right to determine custody in the best interests of the child. If the child was brought here by the person not entitled to custody under the foreign decree, the court, while maintaining its right to change custody on the best interests theory, will not do so unless a strong case of changed circumstances can be made. If, however, the child is properly brought into Kansas by one lawfully having custody and becomes domiciled here, a foreign decree entered by the court originally granting custody changing that custody, will not be given effect. The Kansas court will feel free to act in the best interests of the child. This is particularly true where the first state's change order was entered as punishment for removing the child.

On the other hand, there are the cases where the natural custody of the parents was disturbed by a Kansas court in a divorce decree. Here the court, relying on a case involving a foreign custody decree, held that the Kansas court loses jurisdiction if domicile no longer exists. But even the rule of

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27 See also Johnstone, *Child Custody*, 1 KAN. L. REV. 37, 165 (1953) for an explanation of the "Kansas Rule" prior to these late cases.
28 A future issue of the KANSAS LAW REVIEW will contain a student comment on these cases.
29 Incidentally these distinctions seem to follow the discussion in Ehrenzweig, *Conflict of Laws*, Part One, §§ 86, 87 (1959) as to what the courts are doing in fact, despite their language.
Leach et al is modified by the holdings in Duffy v. Duffy and In re Heilman which are not mentioned in Leach et al. There the court, without discussing the domicile concept, held that where a parent steals the child away either prior to or after a Kansas custody decree, the Kansas court does not lose jurisdiction even if technical domicile no longer exists in Kansas. In Leach et al the domicile of the child had been changed by the leaving parent without kidnapping.

The court’s increased emphasis on domicile dictated the result in the last two cases in this period. In Robben v. Robben the court required domicile for the appointment of the guardian of the estate of a child. The child was domiciled in Ohio with the mother. The father was domiciled in Colorado. After the mother’s death the child moved in with an uncle living in Great Bend. The uncle obtained a probate court guardianship appointment (of the estate only). He then filed a motion in the original divorce action between the parents asking for back child support payments and an increase. The court, following Kansas law, found that upon death of the mother custody automatically transferred to the father and consequently the child’s domicile shifted to Colorado. Without domicile, the Kansas probate court had no jurisdiction to appoint a guardian of the estate. Since the appointment was void, he had no standing to ask for child support. Apparently it made no difference whether the guardianship of the person or of the estate is involved. Domicile is now king. In Love v. Love, parents who had a claim to custody sought, through habeas corpus, to obtain their child from an uncle who had previously been granted custody. The parents sought the order from the Johnson County District Court and obtained in personam jurisdiction over the uncle by personally serving him in Johnson County. The uncle and the child were domiciled in Leavenworth County. The court, without reaching the merits and relying on some earlier criminal habeas corpus cases, held that the Johnson County court lacked venue to issue the habeas corpus since the status of the child was a res and its location was at the child’s domicile.

Although these last two cases may be correctly decided as to the result, it is unfortunate that the court, now so imbued with domicile, uses this type of

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56 The court admitted that Ohio law was pertinent, but neither party had cited Ohio law, so the court assumed it to be the same as Kansas law.

57 The court relied on Jagger v. Rader, 134 Kan. 570, 7 P.2d 114 (1932), which had required domicile for the appointment of a guardian. But in Jagger only venue was in issue.

58 What should the uncle now do? He cannot obtain support for the girl. Surely he is under no obligation to support her himself. How does the child get supported?

legalistic conceptualism as a basis of its holding. With the United States Supreme Court talking about in personam rights and the Kansas Supreme Court talking about domicile, proper jurisdiction and venue may be difficult to obtain. To do justice in a custody matter is now extremely difficult. The imposition of legalistic conceptualistic technicalities which allow for protracted litigation does not aid the child.

Torts and Contracts

Dougan, Adm'x v. McGrew is a welcome case. How is a minor defendant served in an in personam action, when his natural guardian, a nonresident, cannot be served in Kansas, or with valid process in the state of his residence? Previously, many considered that this question lacked an answer. KAN. G.S. 1949, 69-408, providing for service on minors, states in part “If there be a natural or legally appointed guardian for such minor, . . . service shall also be made in the same manner upon such guardian.” If the statute was interpreted literally, both minor and guardian had to be served in the same manner. If the guardian was a nonresident this was impossible. Earlier cases seem to say just this, particularly Hurd v. Baty. Dougan clears the fog. Pointing out that the legislature could not have intended to confer immunity on this type of defendant, the court stated that service on the minor defendant alone was sufficient. The plaintiff had procured the service of summons on the defendant's father in Jackson County, Missouri, under KAN. G.S. 1949, 69-2529. The court approved this procedure as “sound practice.” In Walker v. Gray the same question arose. The court relied on the Dougan decision.

Farran v. Peterson, Adm't is primarily a pleading case. But the case does reaffirm two principles in this area. The statute of limitations does not run against a minor during the period of his minority. And contributory negligence on the part of a minor's parent or guardian may not be imputed to the minor.

In Ehrsam v. Borgen a passenger sued a twenty year old owner-driver for personal injuries. The parties commuted to work and had entered into a share-the-ride arrangement. The defendant, in his answer, stated that he disaffirmed any such share-the-ride arrangement and alleged that at the time of the accident the plaintiff was a guest in defendant's vehicle. At the parties' request at a pre-trial conference the trial judge ruled on the legal effect of the defendant's

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disaffirmance. He relied on Brown v. Wood, a Michigan case, which held that if to hold an infant liable in tort would in effect enforce his liability arising out of a connected and voidable contract, then the infant cannot be held liable for his tort, since he cannot be held liable under his contract. By applying the Brown case the trial judge must have reasoned that, if the minor driver received contractual benefits from the agreement and if his duty under negligence law to transport the passenger safely was identical to his contractual obligation to transport safely, then when his contractual obligation was initiated by the disaffirmance, any identical tort duties disappeared. In the trial judge's opinion this placed the facts within the guest statute. The supreme court reversed, holding that transportation to work was a necessity and that therefore the contract could not be disaffirmed. Brown v. Wood has never been applied in Kansas. Our court merely commented that it had no application to the present case. Someone will probably raise the question again someday.

ANNULMENT

A spouse seeking annulment on the ground of a prior subsisting marriage of the other party must establish the prior marriage "by proof so cogent as to compel conviction." In Harper v. Dupree, the trial court had admitted certificates of bonded abstractors from certain counties stating that their district court records failed to show any divorce proceedings between the defendant and a previous husband. In reversing, the court held such certificates inadmissible as not the best evidence. They went on to state that the husband's evidence was not good against a demurrer, even with the certificates. The presumption of the validity of the second marriage is "one of the strongest known to the law." The evidence to overcome the presumption must be so conclusive as to fairly preclude any other result. Parts of the plaintiff's "unconclusive evidence" demonstrate the court's point. The husband testified that the wife told him that the prior divorce was obtained in El Dorado. The abstractor's certificate failed to show such a divorce. To prove his case in a negative manner by proving no divorce anywhere, the plaintiff simply had to close every door. He undertook the task in an impossible manner. We must conclude that evidence to "fairly preclude any other result" simply means direct evidence that the prior marriage was still valid.

DIVORCE

Grounds

Since parties seldom litigate either the law or the evidence on grounds for

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50 The supreme court, in effect, said that the best evidence was court records.
51 In upholding the wife, the court had to call her a liar.
divorce, appeals to the supreme court are few. Usually, on the rare appeal, only
the sufficiency of the evidence is questioned as a means of upsetting an un-
favorable property or alimony decree.\textsuperscript{52} However, on occasion, an appeal, even
though grounded in materialism, will produce important "new" law or will
prove, once again, that the law can do justice. In \textit{Bariuan v. Bariuan,}\textsuperscript{53} the court
used a carelessly drawn journal entry to upset a divorce decree. A Filipino wife
had tried to defend herself without aid of counsel. The court was unable to
find the grounds for divorce. The procedural aspect of this case is discussed
\textit{infra} under \textit{Pleading and Practice}.

\textit{Crosby v. Crosby}\textsuperscript{54} is potentially the most important case in this survey
area. But to understand the case, background is needed. Back in 1940 an attorney
tried to convince the Kansas court that an adjudication of insanity was a de-
fense in a divorce action. In \textit{Toepfer v. Toepfer,}\textsuperscript{55} the court said no. It held
that you could rebut an adjudication of insanity and that the test was whether:
\textit{"... [T]he person charged with the marital wrong was capable, at the time,
of comprehending and understanding the wrong he was committing."}\textsuperscript{56} Or, as
stated another way in the opinion, the divorce should be granted: \textit{"...[P]ro-
vided the condition of the defendant's mind was such as to enable him to know
the nature and understand the consequences of his marital wrongs at the time
they were committed."}\textsuperscript{57}

Then in 1955, in \textit{Lindbloom v. Lindbloom},\textsuperscript{58} the supreme court reversed a
trial court that had divorced the parties for the wife's gross neglect and which
had granted the husband custody of the children. She had been in and out of
mental institutions and apparently had not looked after either the house or
the children properly. The court excused her behavior toward the children on
the ground that it was "obviously brought about by her illness, which affected
her emotions and moods, ..."\textsuperscript{59}

Considering whether the defendant in his cross-petition had proved gross
neglect, the court pointed out that gross neglect was more than just neglect\textsuperscript{60}
and, quoting from the first syllabus of \textit{Franklin v. Franklin},\textsuperscript{61} said that when a
person was temporarily insane \textit{"[T]he evidence showing an intentional deser-
tion . . . must be clear, convincing, and uncontradicted, and it must appear that\textsuperscript{62}}
such abandonment was not the result of the plaintiff's own wrongdoing." The court then added: "While in this case plaintiff was never adjudicated insane, we think the rule stated in the authority last quoted is applicable. What she had was an illness which affected the 'emotions and the moods' for which she was treated as the necessity therefor arose." Apparently the supreme court was saying that when the wife was ill and this illness affected her emotions and moods, she was not to be held responsible for her marital wrongs—here, gross neglect.

A little earlier in the opinion, the court also raised this interesting analogy. The court said: "If a wife should become ill of tuberculosis, cancer, or other disease and would be unable to perform her household duties as well as she ordinarily would perform them, we would not be willing to say that the husband was entitled to a divorce because of that situation."

This case was not too shocking. A commentator could explain it as an extreme example of the Kansas courts' protection of mother love. Although the supreme court had reversed the trial court on the divorce, it had spent most of its time about custody and her right to the children.

But then in the spring of 1960 the court decided Crosby v. Crosby. Mrs. Crosby had been happily married for some time. Then, in 1948, she started having mental troubles. She was treated at both Menninger's and a hospital in Kansas City. She drank excessively. In 1955 Mr. Crosby sued for divorce. There was a reconciliation and a post-nuptial agreement. Later her conduct deteriorated, and he again filed for divorce. She contested. Dr. Modlin, a psychiatrist from Menninger's, testified that she was mentally ill. There was no suggestion that she was insane and certainly she had never been adjudicated insane. The trial court granted the divorce on the basis of her gross neglect and the supreme court again reversed. The court admitted that there was sufficient evidence of gross neglect, but argued that Lindbloom controlled. The court quoted the language in Lindbloom about the equivalency of mental illness and cancer. The syllabus said: "It is the duty of a husband to provide and care for his wife in her illness as well as in her health." A bit later in the opinion the court suggested that when a wife had a mental illness affecting her emotions and moods, that was sufficiently serious to require treatment in well-
known mental institutions, and when this illness was the real cause of the acts of misconduct relied on by the husband as constituting gross neglect of duty... the husband has not shown a cause of action for divorce.

The rationale of *Crosby* is, technically, explainable on either of two theories: (1) That intent is a necessary element in gross neglect and that a "mental problem" is a defense since it destroys that intent, or (2) That contract law theories control marriage, *i.e.* that a marriage contract is for better or worse and if the worse is emotional and not based upon "fault," the court will find no breach of contract when the disturbed spouse misbehaves.

Apart from basic theory, these cases raise several questions. Note that in both cases the supreme court talked in terms of gross neglect. Will this doctrine carry over to other grounds, particularly cruelty? Gross neglect and cruelty are the most commonly used grounds in Kansas and our supreme court tends to mix the two together so that they are almost indistinguishable.\(^9\) There is some authority in other jurisdictions\(^7\) that this doctrine extends into cruelty and perhaps other areas.

But in whatever area the court applies the doctrine it will probably back off from the full implication of these cases. In any situation, where the parties are not getting along, and someone wants out, there are emotional difficulties or there would not be fights, drinking, going out with other women, and other actions considered to be misconduct. If the court would extend this doctrine to its logical extreme, no one could ever obtain a divorce if the defendant contested. The defendant could claim that she misbehaved because of emotional difficulties. Perhaps the court will work out some sort of rough scale with the amount of insanity inversely proportionate to the degree of fault. In other words, the more the defendant misbehaved the greater the amount of "emotional difficulties" that will have to be shown. Also some distinction between actual illness (psychosis) and neurosis may be forthcoming. The court will probably be forced to find a lower limit. Taking the language of the court at face value, it would seem that the court is adopting the *Durham* rule, which states that there is no criminal responsibility when the conduct is the "product" of a mental illness—a test emphatically rejected in criminal matters in the recent *Andrews* case.\(^1\)

From a practical point of view *Lindbloom* and *Crosby* leave room for some tactics that may not be desirable. In Kansas practice, almost any plaintiff that

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wants a divorce can have one. The district courts denied 29 and granted 4,617 divorces during the year ending June 30, 1959. In 1960 the courts granted 4,962 divorces and denied only 31. For the year ending June 30, 1961, an all-time high was reached. There were 5,060 divorces and 13 denials! The statistics have varied but little since World War II. The classical defenses are seldom used and when used are seldom successful. Still the possibility of a trial is a serious bargaining device when a property settlement is discussed. Spouses fear a public airing of their marriage. And the parties worry, probably unjustifiably, that a contest may jeopardize their chances of getting a divorce. With these new cases a mentally disorganized or disturbed spouse can threaten to have the psychiatrist testify if a proper settlement is not forthcoming.

Actually the Lindbloom and Crosby cases and a few like them in other jurisdictions represent the first attempts by the courts to recognize that divorce and the "causes" of divorce are not adequately handled by courts and lawyers. Ultimately lawyers and judges will have to work out some other system or else radically improve the judicial procedures in the divorce area.

Pleading and Practice

A petition and a summons stating that the plaintiff wife seeks "support money and division of property" is sufficient to support a divorce judgment awarding alimony. In Craig v. Craig the trial court had sustained defendant's motion to quash the alimony judgment on grounds that the petition made no reference to alimony and that the defendant had no notice that plaintiff was asking for alimony. In reversing, the supreme court said that the words "support money" gave the defendant fair warning that his wife was seeking alimony.

Hodge v. Hodge is a significant case. Can a wife attack and upset a property settlement agreement that she, herself, submitted to the divorce court, on the ground that the husband failed to inform her of the true extent of his property at the time the agreement was signed? The Hodge case holds that she may. Rosella Hodge filed a petition under KAN. G.S. 1949, 60-3007, Fourth, to set aside an alimony judgment in her divorce suit on the ground of fraud practiced by her ex-husband. She alleged that he had prevailed upon her to file a cross-petition asking for a divorce and to submit the property settlement agreement to the trial court for approval; that he misrepresented to her the value of a corporation, in which he was the principal stockholder; and that he

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73 Judicial Council Table A-4, p. 28 (Oct. 1960).
prevailed upon her to consult with his attorney and by-pass independent legal advice. The trial court's order overruling the husband's demurrer was affirmed. The supreme court denominates the alleged fraud as extrinsic\textsuperscript{74}—meaning fraud that has prevented a fair presentation or submission of the controversy. Kan. G.S. 1949, 60-1511, provides that upon divorce for the husband's fault there shall be a fair and just division of the property acquired during marriage. As interpreted, this means that an equitable division of jointly acquired property is mandatory.\textsuperscript{75} The trial court had to make a fair division of the property. The court reasoned that the fraud prevented a proper inquiry into the extent and value of the property involved. The fraud was extrinsic; without it the judgment would have been different.

By so reasoning our supreme court draws an even finer line between extrinsic and intrinsic fraud. \textit{Mathey v. Mathey} was a similar action, brought under 60-3007, \textit{Fourth}. There the plaintiff wife alleged that her ex-husband had falsely testified about his property during the trial. A demurrer to the petition was sustained. The court described the fraud as intrinsic. After reviewing many definitions of the difference between intrinsic and extrinsic fraud, the court observed that "‘extrinsic fraud’ relates to acts which prevent a fair presentation of a controversy, and . . . ‘intrinsic’ fraud relates to acts which prevent a fair determination of the issues once a court had a controversy before it."\textsuperscript{80} The court in \textit{Mathey}, quoting from 31 \textsc{Am.} \textsc{Jur.} \textit{Judgments} § 54, p. 230, also said "Fraud has been regarded as intrinsic, within the meaning of the rule, where the fraudulent acts pertain to an issue involved in the original action, or where the acts constituting the fraud were, or could have been, litigated therein."\textsuperscript{81} It certainly could be argued that the \textit{Hodge} fraud fell within the \textit{Mathey} definition. The acts pertained to an issue involved in the action—the division of property. The acts constituting the fraud could have been litigated in the divorce suit.

Obviously, there is a distinction. When one party has falsely testified in court, his opponent has the opportunity for cross-examination. As the \textit{Mathey} case pointed out, to allow collateral attack or perjured testimony would result in endless litigation in which nothing would be finally determined.\textsuperscript{82} Furthermore, in the absence of shown unfairness or overreaching, a trial court lacks discretion to disapprove a property settlement agreement.\textsuperscript{83} The dividing line can best be drawn on the facts. If the deceit is practiced in court, \textit{Mathey} would

\textsuperscript{75} \textit{Garver v. Garver}, 184 Kan. 145, 194, 334 P.2d 408 (1959), see \textit{circum note 110 infra} for other effects of \textit{Garver}.
\textsuperscript{81} \textit{Id.} at 289, 294 P.2d at 206.
\textsuperscript{82} \textit{Id.} at 291, 294 P.2d at 207.
still seem to apply. The fraud would be intrinsic and not subject to collateral attack. But if the fraud was practiced outside of court and ultimately prevented a fair determination—even if the court later passed on and approved its fruits—the fraud would be extrinsic. The court did fail to verbally distinguish between misrepresentation and fraud (knowing misrepresentation). Factually, the plaintiff had alleged knowledge of the defendant's misrepresentations. Later courts may quickly retreat when the husband has not made statements with a fraudulent purpose.

The case serves several important warnings. Willful failure of the husband either to tell all or to tell the truth at the time of entering into a property agreement appears to be adequate grounds for collateral attack. When property is involved both parties should have legal counsel. Under the Hodge case trial courts might properly view with suspicion any property settlement entered into without the aid and advice of an attorney. The Hodge case provides ample reason to specifically advise a client that without a complete and truthful disclosure about property by the husband, the litigants may some day find themselves back in court on this same question. But the case is most significant for the husband divorce client and his attorney seeking to use a property settlement agreement to avoid a detailed judicial inquiry into the client's financial arrangements. The agreement will be subject to attack for the statutory period. An inquiry into the extent of the property will be the very basis of the attack. And if the wife is not aware of all the property at the time of agreement, all property will be subject to judicial scrutiny.

Bariuan v. Bariuan is probably one of the most interesting cases reported during this period. The defendant wife was a resident of the Phillipine Islands. She filed an answer, pro se, but was not present at time of trial. The trial court entered judgment granting the husband a divorce and bastardizing the parties' four year old son. The supreme court declared the judgment void. The order bastardizing the child was outside the pleadings. The plaintiff had failed to request such a finding in his petition. The journal entry stated that the relief prayed for in plaintiff's petition should be granted. Plaintiff alleged gross neglect of duty and extreme cruelty. The supreme court said, "From other parts of the journal entry of judgment it would be reasonably inferred that either the First or Fifth grounds for divorce specified in G. S. 1949, 60-1501 had been attempted to be proved. Nowhere in plaintiff's petition are to be found any indication of such charges." This might be interpreted as a warning against the oft-used journal entry phrase, "The plaintiff should be granted the relief prayed for in his petition." But the equities were so heavily on the appellant's
side that such a conclusion is unjustified. The court also discussed the strong presumption of legitimacy as to a child born in lawful wedlock.

King v. King, 86 although involving a problem of full faith and credit to a California divorce decree, is important for its discussion of proper procedure under Kan. G.S. 1949, 69-1516 and -1518. After the parties were denied a Kansas divorce, 87 the wife moved to California. She then filed suit in Kansas for separate maintenance under Kan. G.S. 1949, 60-1516. While this suit was pending and after her husband filed an answer and cross-petition for divorce in the separate maintenance action, the wife obtained a California divorce on constructive service. She then set up the California decree as an answer to her husband’s cross-petition. She also asked, at this point, for the court to determine alimony and property rights under Kan. G.S. 1949, 60-1518. 88 The husband moved to strike the answer and reply which the trial court sustained.

The supreme court traced the history of Kan. G.S. 1949, 60-1518 and pointed out that the statute required recognition of foreign divorce, prior to the time the United States Supreme Court required it in Williams v. North Carolina. 89 Since recognition of the California decree, if valid, is required, it was improper to strike the answer. It made no difference that the California suit was started subsequent to the Kansas suit. The court with the first decree controls. 90 The court then pointed out that Kan. G.S. 1949, 60-1518 allows suit in Kansas for alimony and a division of property, despite the foreign divorce decree. The court, following Fencham v. Fencham, 91 said that no specific procedure is set out for such recovery and that use of a prior suit under Kan. G.S. 1949, 60-1516 was a proper vehicle, nor was the statute passed to protect only defendants in the foreign action. 92

86 185 Kan. 742, 347 P.2d 381 (1959).
88 This section reads: "A judgment or decree of divorce rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state; except, that in the event the defendant in such action, at the time of such judgment or decree, was a resident of this state and had not been served personally with process, or did not personally appear or defend the action in the court of such state or territory, all matters relating to alimony, and to the property rights of the parties and to the custody and maintenance of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two years after the date of the foreign judgment or decree, to the same extent as though the foreign judgment or decree had not been rendered."
89 317 U.S. 387 (1942). The court also cites the second Williams case, 325 U.S. 226 (1944), and in another place suggests that if, upon trial of the case, the husband could show that the wife was not domiciled in California, the Kansas court would not have to recognize the California divorce decree. Certainly under Williams II, Kansas would be free to refuse full faith and credit, but the still unresolved question is whether Kan. G.S. 1949, 60-1518, gives the court this freedom. The statute says we are to recognize the first state’s decree if valid in the first state. If the first state does not require domicile, and a few states are moving in this direction, see Note, 28 Kan. B.J. 74 (1959), the Kansas court, under the statute, might have to recognize the decree despite the lack of domicile. The dicta in the principal case does not raise this problem.
92 The court, following the Kansas statute, does not mention the full faith and credit problem that arises out of a concept of “divisible divorce.” See, e.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). For a discussion of the earlier Kansas cases in light of the Vanderbilt decision, see Comment, 6 Kan. L. Rev. 428 (1958).
The court also held, apparently for the first time, that a nonresident may bring suit under the Kansas separate maintenance action, KAN. G.S. 1949, 60-1516. The court points out that this action is different from an action for divorce and that a divorce action requires that the plaintiff be a resident for a year. Under the facts stated in the opinion, the plaintiff was not a Kansas resident at the time of filing her action under KAN. G.S. 1949, 60-1516. The separate maintenance statute by its terms imposes no limitation and the residence statute, KAN. G.S. 1949, 60-1502 speaks only in terms of divorce.

While this interpretation is probably valid, it raises some interesting questions. Does it mean that Kansas has opened its doors to the citizens of the other forty-nine states to sue for separate maintenance whenever a nonresident wife can serve her husband or find his property in Kansas? The implication would certainly be yes.

**Appellate Procedure**

Two cases discussed elsewhere will be mentioned here. In *Bunch v. Bunch* the court reaffirmed the rule that failure to file within ten days a notice of intention to appeal a divorce decree extinguishes the right to appeal from the divorce feature of the case. Appeal from the alimony and property portions of the judgment does not require such notice. In *Goodman v. Goodman* plaintiff-wife appealed from a trial court custody order. The defendant urged that plaintiff was in contempt of the trial court’s order and therefore barred from appealing from the order. The court did not sustain the husband’s contention. They heard the appeal. The court implied that there might be situations where such an argument had merit.

**Property Rights Upon Divorce**

*Alimony, Division of Property and Child Support*

Losing spouses continue to lose their appeals in the Kansas Supreme Court when they claim that the trial court abused its discretion in awarding alimony, division of property and child support. In *Goodman v. Goodman* the wife complained that she did not get enough. In *Nichols v. Nichols* the husband complained that his ex-wife got too much. In refusing to reverse the trial

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94 The court has long considered the alimony part of a divorce action distinct and independent of the divorce part. In an earlier rationale for this rule the court pointed out that a party could appeal from just the alimony branch of a divorce judgment. Metcalf v. Metcalf, 132 Kan. 535, 296 Pac. 353 (1951).
90 Id.
97 She received $5,000 in alimony at $100.00 a month, and $150.00 per month child support. She got at least half of the jointly acquired property. He was making $15,000 a year with a car and expense account.
court in both cases, the supreme court points out that there is wide discretion on the part of trial court judges. To upset judicial discretion the party must show "not merely an error in judgment, but perversity of will, passion, or moral delinquency when such abuse is exercised to an end or purpose not justified by, and clearly against, reason and evidence." This is strong language. In recent years the court seems to have abdicated to the trial courts on the amounts in alimony, child support and property division. This is probably good but it improperly leaves the impression that there are no standards.

Even in the Nichols case the court quotes from Carlat v. Carlat as to the various tests, e.g., conduct of the parties, needs of the wife, and future earnings of the husband. And even in Goodman, apart from the broad language, the court, by implication, upholds an express statement by the trial judge that the earning ability and education of the wife are important; that she was partly at fault; and that she is not entitled to be supported by her husband. However, the court later cites Packard v. Packard, which states that a wife is entitled to be maintained "as good a condition as if she were still living with her husband," but then seems to distinguish the Packard case on the grounds that the trial court has a wide discretion.

The analysis is, perhaps, a bit hazy. Discretion and standards should not be confused. If a court applies a wrong standard, it should be reversed no matter what its award. If it has applied the proper standard, the supreme court should reverse only if the trial court abused its discretion.

In Bunch v. Bunch the court attempts to mitigate the artificial requirements established in Garver v. Garver. In Garver the court had required the trial court judge, when making an award in a divorce case, to label part of the award "alimony" and part a "division of property." This, said the court, was required by KAN. G.S. 1949, 60-1511 when the divorce was granted for the fault of the husband. In Bunch, the trial court awarded the wife a farm as "a division of property and in lieu of alimony." The appellant argued that under

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100 She was in a wheelchair with not too much education. They had no property nor children. He made $605 a month plus traveling expenses as an engineer. The court gave her a total of $16,000 to be paid at $170 per month for eight months and $110 per month for a little over eleven years.

101 See also Bunch v. Bunch, 185 Kan. 543, 343 P.2d 624 (1959), decided during the survey period which reiterates this rule. The opinion does not disclose the award made by the trial court. The supreme court merely states that there is no abuse.

102 Goodman v. Goodman, supra note 95, at 44, 360 P.2d at 880.


106 The trial judge found that she was qualified to be a journalist and that she had some interest in being a lawyer.

107 Although the divorce was granted to her.

108 34 Kan. 53, 7 Pac. 628 (1885).

109 34 Kan. at 56, 7 Pac. at 626.


112 For a fuller discussion of this case see Casad, Family Law, 8 KAN. L. REV. 228, 295-297 (1959).
Garver, the court had to make a separate award. The court disagreed. It said, turning to two pre-Garver cases: 112 "[T]he failure of the judgment to so reflect such a definite division did not compel reversal .... It is clear the court in the present case, while not in the best manner, did allow alimony and did make a division of property by setting aside to plaintiff ... farm as a division of property and as an allowance of alimony." [Italics added.] 113

Where does the court now stand? Does a trial judge have to award alimony? Certainly the trial court can get by if it labels part of the award a division of property and part alimony. A trial court judge might be on safe grounds if he said: "I award this amount as a division of property and, although I am considering it, in my judicial discretion, I award nothing as alimony." But in Bunch the court, in using the language set out above, seems to be saying that the phrase "in lieu of" really means "and." Therefore, a trial court judge may be in trouble if he says that he has considered alimony but in his sound judicial discretion does not think it should be awarded. 114 To be on the safe side, a trial court judge had better label part of his award alimony and a part division of property.

Actually, this whole thing is silly and the statute ought to be changed. Even if there are theoretical distinctions between a division of property and alimony, the trial courts were correct when they said that under the Kansas statute and supreme court decisions a division of property and alimony are one and the same thing. The statute should be changed so that attorneys do not have to double-check and make sure the trial judge properly labels his award. 115

Contractual Control

In four cases the court was faced with an attempt by one of the parties, at the time of the divorce, to avoid the consequences of the now popular ante or post-nuptial property agreement. In Hoch v. Hoch, 116 the supreme court upheld a trial court's finding that the post-nuptial separation agreement was fair and understandingly made when the husband attacked it, while in Bremer v. Bremer 117 the supreme court upheld the finding that the post-nuptial contract

113 Actually the same trial court, Judge Raymond Carr, that decided Garver, decided Bunch. Moreover, Bunch was decided by Judge Carr prior to the opinion in Garver. The trial court judgment in Bunch was entered on October 16, 1958 with a new trial denied December 1, 1958. See Decree of Divorce, p. 9, Abstract of Appellant. Garver was handed down on January 24, 1959.
114 Note that in Grimes v. Grimes, 179 Kan. 340, 295 P.2d 646 (1956), the court required that the trial court award alimony. However, the opinion indicates that perhaps the reversal was based on the fact that the trial court abused its discretion.
115 The 1961 edition of a leading casebook in the field, Jacobs & Goebel, Cases and Other Materials on Domestic Relations, includes the Garver case at page 761. In the note following the case the editors comment: "[O]ne has to do with a distinction without a difference .... The principle case makes mandatory the labeling of the items."
was unfair on an attack by the wife, since in effect she received nothing from
the settlement. In both cases the court restates the traditional rules that to be
upheld these agreements must be fair, understandably made and entered into
without fraud or overreaching. Both cases were properly handled purely on a
fact basis. The supreme court left it to the trial court to determine the “fair-
ness” of the agreement.

But in Crosby v. Crosby,118 the trial court got reversed. In the first Crosby
appeal,119 discussed supra, the court held that the unstable mental condition of
the wife was a defense to the husband’s charge of gross neglect. Since the trial
court had approved the post-nuptial contract between the parties on the assump-
tion that the divorce was granted to the husband, the supreme court also re-
versed the property division. Apparently acting under KAN. G.S. 1949, 69-1506,
which allows a division of property when a divorce is denied, the parties retried
the case. The trial court once again approved the agreement and the wife ap-
pealed. The supreme court frankly stated that it considered the case unique
and that “nothing would be gained by laboring our decisions or the reasons on
which the six Justices of this court participating in this opinion have unani-
mously decided this case . . . .”120 However, Chief Justice Parker then suggested
that the court felt that in a situation where (1) she had a mental illness, (2) he
knew of her condition and (3) he obtained the bulk of the property,121 the
“execution . . . was not fairly and understandingly made, was not just and equit-
able . . . . and, of a certainty, was obtained by overreaching . . . .”122 He added
that as a matter of fact, on the date she signed the agreement “she could not,
and hence did not, fairly and understandingly make the . . . post-nuptial
agreement . . . .”123

If the Chief Justice had not said that the Justices disagreed, as to the reasons
for the reversal, the case might only stand for the proposition that although
Mrs. Crosby had not been declared “insane,” she did not have the required
mental equipment to “understandingly” enter into the agreement. But other
possibilities also present themselves which may either broaden or limit the case.
Here, the husband obtained a disproportionate share of the property. Must
this fact exist before the court will use the mental condition of the wife as a
means of upsetting the agreement? Must the husband know of her mental
condition? If he does not, would the court still protect her? On the other hand

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120 188 Kan. at 281, 362 P.2d at 9.
121 A trust was set up for her benefit. She contributed almost all of her property, $53,000.00; while he
contribution only $25,000.00 out of property worth $410,000.00.
122 Id., at 281, 362 P.2d at 9.
123 Id., at 282, 362 P.2d at 10. The supreme court also reversed the trial courts award of $2,000.00 to
her attorneys. There was testimony that the services were worth more than $12,800.00. Note, however,
that in reversing for the abuse of discretion the supreme court did not determine itself the proper attorney
fee. The case was returned to the trial court for its determination.
what kind of mental condition is the court using as a yardstick? Here it seems to find that she could not understand the nature and extent of her property. Yet there seemed to be little evidence of this reported in the divorce case. Is the court saying that, as a matter of law, if the wife has "mental problems" a husband cannot enter into a binding separation agreement with her? Suppose an attorney for the husband wishes to settle the property rights at the time of the divorce. The wife is unstable. He cannot have a guardian appointed for her since she is not incompetent or insane. May he protect his client by having available testimony, as in a deed or will case, that she knows the nature and extent of her property or is he prohibited, as a matter of law, from entering into the agreement? If the "something less than insane" test is going to be extended to property matters as well as to the area of the substantive law of the grounds for or defenses to divorce, the court should make explicit the requirements.

The final case in the quartet, Bunger v. Bunger, is probably the most puzzling. An ante-nuptial agreement was presented to the trial court. The agreement provided that each party was to keep his or her own property and the rents and profits therefrom whether the marriage ended in divorce or death or whether there was a mere separation. A later amendment provided that the wife should get half of the husband's property on his death. The trial court found that the agreement was "not invalid," but since the parties had lived together thirteen years she had acquired certain rights. In any event, the trial court set aside to the wife some jointly acquired property, ordered the husband to pay $3,000.00 to the wife and gave her a judgment lien on his real property for that amount. On appeal the husband complained that the trial court did not follow the agreement in making these awards. The wife argued that even though she had not complained to the trial court, the agreement was invalid in that it tended to promote divorce.

The court sustained the trial court, but its reasoning is obscure. The court states that the issue is the ante-nuptial agreement. It then says that it disagrees with the defendant that the contract is void, apparently on the grounds that the trial court found it valid and, quoting from In re Estate of Ward, that

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125 The court, in the past, has talked about "understandingly made" in terms of her business ability and whether or not she was represented by independent counsel. See, e.g., In re Estate of Ward, 178 Kan. 366, 285 P.2d 1081 (1955); In re Estate of Scheppel, 169 Kan. 151, 218 P.2d 192 (1950). Here the court makes no mention of whether she was so represented. However, since the agreement was entered into during divorce proceedings, it is more than likely, in this case, that she had counsel. Does this mean that even if the husband's attorney makes sure she has independent counsel, he is not protected?
127 In his opinion, Justice Robb does not set out the terms of the agreement. The agreement is found in appellant's abstract.
128 The agreement apparently provided that jointly acquired property should be held in joint tenancy. The supreme court made no mention of this part of the trial court's judgment.
there was consideration. The court does not mention the pro-motion of divorce idea. Yet in Fencham v. Fencham\(^{130}\) a divided court found that an ante-nuptial contract, providing that the wife was to receive $2,000.00 if they separated, was against public policy and void since it tended to promote separation and divorce.

The principle case, also concerning an ante-nuptial contract, provided that upon divorce or separation she would get none of his property while she would get one-half if she remained with him until his death. The wife’s attorney argued that the reason the husband sued for divorce was to insure that she would not receive one-half of his estate. The court does not mention Fencham, although cited by both sides in the brief.

However, since the court in its opinion does not cite Fencham nor mention the fact that the husband argued that the contract was void because it tended to promote divorce, the principle case surely cannot be taken as overruling Fencham and allowing parties, in an ante-nuptial agreement, to determine property rights on separation and divorce.\(^{131}\) Actually, the court protects the principle of Fencham by assuming, in the opinion, that the trial court could treat the rights of the parties as if they were governed by KAN. G.S. 1949, 60-1511,\(^{132}\) and not by the contract. The court cited Garver v. Garver\(^{133}\) and talked about the discretion lodged in trial courts in making a division of property. The court does say that the trial court did not change or modify the agreement. Comparing the agreement, the trial court’s judgment, and the supreme court’s opinion certainly leaves the impression that the trial court did award the wife an additional amount in order to prevent the husband from using a divorce to prohibit her from taking her one-half share as provided in the agreement. The result is a holding that an ante-nuptial agreement attempting to control a division of property and alimony is not binding. The opinion, however, leaves undecided the issue of whether the agreement is “void” or just “not binding” on a trial court.

The court decided one other case involving an attempt by the parties to control their property rights at the time of divorce. Here, however, child support, not inter-spouse rights, was the sole controversy. The result is probably good, but the handling of prior authority leaves much to be desired. In Grunder v. Grunder\(^{134}\) the court emphatically held, citing Phillips v. Phillips,\(^{135}\) that a


\(^{131}\) On other occasions the court has ignored a provision in a separation agreement that a wife could receive a certain amount at the husband’s death provided the parties had not separated or divorced at that time. In In re Estate of Neis, 170 Kan. 254, 225 P.2d 110 (1950), the court allowed the wife, at his death, the amount set out in the contract. Neither side argued, apparently, the invalidity of the provision. In Benjamin v. Benjamin, 197 Misc. 618, 95 N.Y.S.2d 167 (1950) aff’d per curiam, 302 N.Y. 560 (1951), such agreement was upheld against contention that it violated public policy. Perhaps the court is making a shift. However, an attorney should be extremely careful in an ante-nuptial agreement when trying to excuse support if the parties separate or are divorced.

\(^{132}\) This section provides for division of property and alimony when there is no agreement.


\(^{135}\) 163 Kan. 710, 186 P.2d 102 (1947).
separation agreement purporting to fix the amount of child support was not binding on the court. The court pointed out that Kan. G.S. 1959 Supp., 60-1510, provides that a trial court shall have discretion to modify custody and child support orders as the need of the child varies. To allow the parties to set a binding support order would oust the jurisdiction given the court under Kan. G.S. 1959 Supp., 60-1510. This, said the court, was not proper. There should be no quarrel with this result. The legislature has determined, and probably wisely, that support, as well as custody, should be variable as the needs of the child change. This opinion puts the court in at least a consistent position. It has long held that the custody of a child is not subject to contractual control by the parties.

But in reaching this result, the court, by ignoring earlier precedent, raised some new problems. Some time ago, the court held that in a separation agreement the parties might provide for variable alimony despite the fact that Kan. G.S. 1949, 60-1511, provides for a fixed and permanent alimony award. Attorneys, with the approval of the court, did this by having the contract approved and not merged in the decree. If merged, the contract was void, but if only approved, the contract controlled. In the so-called first Feldman case the court found a merger of an indefinite amount, but wanting to uphold the contract, distinguished the merger cases by saying that here the payment was to the wife for her support and the support of the child. Therefore, it was not alimony and it made no difference that it was for an indefinite amount. Later, in French v. French the court got off the track. It held that a trial court did not have the power to reduce child support payments after an agreement was entered into—the agreement arising after the decree. The court relied on earlier cases that had said that the husband could not be sued for non-payment of the amount set out in the original decree after a wife had agreed to accept a lesser amount.

Then in the second Feldman case the court was faced with this same contract that provided for indefinite payments to the wife for her support and for the support of the child. The trial court had reduced the payments at a hearing subsequent to the original decree. The supreme court, citing the French case as an alternative holding, said specifically that the contract controlled over Kan. G.S. 1959 Supp., 60-1510, and that the court had no jurisdiction to reduce child support payments in face of the contract.
But in this latest case, the Grunder case, the court distinguished the French case and the three cases the court relied on in French by saying that these cases involved post-decree agreements whereas Grunder did not. Yet the court neither discussed nor even cited the first or second Feldman case which did not involve a post-decree agreement and which purported to hold that the support contract binds the court.

Where does an attorney now stand, when trying to negotiate a binding child support agreement? Certainly Grunder is a specific holding that a contract, as to child support, is not binding on a trial court that wishes to later reduce child support payments. With this specific holding in mind, a first reaction would be that Feldman was overruled, even though the court did not mention it. This is probably the result of Grunder. However, the court may have inadvertently established three classes of support orders in this state. (1) Alimony agreements: These awards must be definite if merged into the decree, but may be indefinite if only approved. They are not subject to later modification. (2) Semi-support agreements: These agreements provide for the payment to the wife for her support and for the support of the children. They may be indefinite even though merged in the decree and apparently, if Feldman is not overruled, may not be later modified by the trial court. (3) Old-fashioned child support agreements: These agreements, apparently, are not binding on the trial court either at the first hearing or later if the court desires to modify the agreement. Surely it would be better to specifically overrule Feldman and eliminate the concept of a “semi-support” agreement.

Post Judgment Collections

Alimony payments in the hands of the clerk of a district court are subject to garnishment. In so holding, Mannel v. Mannel overruled H. & M. Tire Serv. Co. v. Combs. The 1934 Combs case was based on Kan. G.S. 1949, 60-955. This statute provides in part that no judgment shall be rendered on the liability of a garnishee by reason of any money in his hands and for which he is accountable as a public officer. In 1945, Kan. G.S. 1949, 60-965 was passed. It provides that money in custodia legis may be garnished. The court applied the rule that the later statute controls where there is an irreconcilable statutory conflict.

settlement whereby they agree upon a division of property as between themselves and payments to be made by the husband to the wife for the care and support of their children, including maintenance of the wife while such children remain in her care and custody, and thereafter such agreement is approved by the trial court in a divorce action and made a part of its judgment and decree, the rights and liabilities of such parties are governed by the terms of the contract, not by the statutory authority of the court in divorce cases." Feldman v. Feldman, 179 Kan. 109, 292 P.2d 716 (1956). For a fuller discussion of these cases, see Hopson, Family Law, 5 Kan. L. Rev. 268 (1956).

186 In defense of the court, it might be mentioned that the attorneys in the Grunder case did not cite the Feldman case in their briefs.
145 140 Kan. 35, 34 P.2d 943 (1934).
Smith v. Smith presents a novel question. Plaintiff had secured a divorce and an alimony judgment in the amount of $13,068 from the defendant, payable at the rate of $108 a month. The divorce decree contained a provision that on default of any monthly installment "the entire balance shall become due... and plaintiff shall be entitled to foreclose" the lien on the real estate securing the alimony payments. The evidence was that the defendant got sick and missed payments for about two and one-half months. The defendant's evidence was that the plaintiff told defendant's present wife that missing the payments was all right if they were made up. With defendant $274 in arrears the plaintiff filed her motion to have the entire balance declared due under the acceleration clause and to foreclose the real estate lien. Before the motion was heard the defendant paid up the delinquent alimony. The motion was overruled and appealed. The supreme court held that the appellant had waived her right to insist upon full maturity under the acceleration clause by orally agreeing to accept payment later.

The appellee had urged the court to consider the effect of the subsequent catch-up payments. The opinion observes that in Kansas such payments do not bar application of the acceleration clause in note and mortgage cases. The court declined to decide whether they would apply this rule to acceleration clauses in judgments.

In Kessler v. Kessler, the court held that attorney fees are allowable to an insane wife enforcing a judgment against her former husband for support under Kan. G.S. 1949, 60-1501. The court observed that the statute places the insane spouse in the same category as dependent minor children. The provision for the support of the insane person is enforceable the same as in child support cases.

Three cases in this area involving child support merit only passing mention. In Geiss v. Geiss the court held that a father's fraudulent conveyance, seeking to avoid child support payments, was subject to attack by the minor son nine years later. The child's rights during infancy were not affected by the statute of limitations. Dicta in Fangrow v. Fangrow reaffirmed the principle that delinquent child support installments become final judgments and a lien upon the real estate of the debtor father. Hains v. Hains was a proceeding in which the divorced wife asked to have unpaid child support converted into a judgment. It was held: (1) that no obligation accrued for payments in months where the trial court had not ordered payments even though the father (given

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custody through the summer) left children with the mother during summer months, and (2) voluntary summer payments could not later be credited against unpaid winter installments.

This last point raises a difficult question. By court order the husband was required to make payments for nine months out of the year. He fell in arrears before making the voluntary summer payments. In this situation is the husband making catch-up payments or voluntary contributions? Safe procedure requires a statement in the record concerning the application of excess payments.

The *Hains* case raises another question. The defendant had filed a motion asking that unpaid child support in the sum of $2,300 “be converted into a judgment in order that execution could issue thereon.” The plaintiff filed a motion to set the judgment aside. Acting on this motion the trial court modified the previous judgment. Procedurally, both parties acted incorrectly. Quoting from *Hains*, “The rule that each child support payment which becomes due and remains unpaid constitutes a final judgment was stated in *Oretz v. Ortez*, 180 Kan. 334, 304 P.2d 490, where it was also stated that a district court is without power to change or modify orders for past due installments for the support and education of minor children.”

The delinquent payment is a final judgment which the court is without power to modify. If a dispute arises over the amount of the judgment, how do the parties bring the dispute before the court?

**Effect of Judgment**

Although more of a property problem than a “family law” problem, two survey period cases may pose a real threat to the marketability of certain titles.

Suppose a client and his wife owned some savings bonds or a piece of property as joint tenants and not as tenants in common. There is a divorce decree and nothing is said about the bonds or the land. The husband dies. Does his administrator get half or does the wife get it all? Two Kansas cases, while maybe not controlling, must be considered in passing any abstract. In *Carson, Ex'x v. Ellis* the parties owned a duplex. The divorce decree embodied a separation agreement and in addition there was a post-divorce agreement which, after some difficulty, the court found severed the joint tenancy and turned it into a tenancy in common. But, as an alternative ground for the holding, the court talked about the four unities needed for joint tenancy and said that the divorce decree itself destroyed the joint tenancy. The court talked about the fact that the trial court under Kan. G.S. 1949, 60-1511 is required to make a division of property. The implication was that the statute effects the severance.

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152 *Id.*, at 381, 357 P.2d at 319.
154 Although the opinion is not clear, it is possible that the court found that the parties actually partitioned the property.
Then in *Baade v. Ratner* the court was faced with a claim by the surviving spouse to a joint account in a savings and loan association. Again, there was a property settlement and the decree specifically provided that the deceased husband was to receive the $1,000 in the account. However, after the divorce someone deposited another $2,000. After the husband died, the wife claimed the account, since the title had never been changed at the saving and loan association. The supreme court, reversing the trial court, said that she did not have title. The decree and the agreement not only gave the husband the $1,000 but also severed the account. On the facts, the *Baade* case is clearer in that the decree came closer to giving title in the whole account to the husband. But the court again quoted the language from the *Carson* case to the effect that the court shall make a division of property and that the divorce decree severed the joint tenancy.

If a divorce decree itself severs a joint tenancy when the property is not mentioned in the decree, an attorney may have a problem passing title in certain cases. Of course, the court could always fall back on the fact that in these two cases the parties agreed to destroy the joint tenancy, so if there was no agreement, the attorney could conclude that title vested in the joint tenant when there was no agreement. Yet in both cases the court added that the divorce decree itself severed it. So, does an attorney dare pass title if nothing is said? If the test for marketability is "no reasonable doubt," an attorney probably should not pass title. Surely these two cases raise a reasonable doubt. As a preventive measure, an attorney should have any property held in joint tenancy specifically taken care of in the divorce decree.

**Incompetent Persons**

In *In re Estate of Diebolt* the court severely limited the apparent breadth of *In re Estate of Correll.* In *Correll* the court held that under KAN. G.S. 1949, 59-2007, the superintendent of any Kansas mental institution could discharge an inmate "as restored to capacity" and the probate court had to so order under KAN. G.S. 1949, 59-2276, despite the fact that KAN. G.S. 1949, 59-2268 provided a method whereby the probate court, on petition, could restore to capacity and the fact that restoration of capacity was assumed to be a judicial function. Although the case arose in terms of the meaning of the word "cured" in a will, the court had used broad language in defining the power of the superintendents. The court pointed out that our state hospitals were staffed

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with good people. Therefore it was logical for the legislature to turn this power over to hospital people as well as to the probate court.

But then in *Diebolt*, an attorney argued that to allow the superintendent to make this determination violated due process and would be an unlawful delegation of judicial power. The court upheld the statute but to do so, had to narrowly construe the statute and distinguish *Correll*. The court found that the only power the superintendent has is the power to find, for the purpose of protection of society and the individual concerned, that the individual is restored to capacity sufficiently to allow for discharge. Such a finding and the order entered by the probate court pursuant thereto under KAN. G.S. 1949. 59-2276, therefore is limited to restraint of liberty. It has no effect on the power of the probate court to discharge or not discharge the guardian of the person or estate. Apparently to obtain restoration of these rights KAN. G.S. 1949, 59-2268 must be used.

The *Diebolt* decision is a sound result. It keeps for the judiciary the final determination of capacity for legal rights while leaving to the psychiatrists the determination of the desirability of hospitalization. *Correll*'s implication that the psychiatrists should have the power to determine legal capacity is now dispelled.

**LEGISLATION**

The 1961 session of the legislature effected several statutory changes which will be noted. KAN. G.S. 1959 Supp., 38-823 allowed a juvenile judge to order confinement of an alleged delinquent child in the county jail or police station pending a hearing. The new section expands this power to alleged miscreants. It then added that both delinquent and miscreant juveniles who were con-

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159 The court suggests that it may add or subtract words or clauses in order to hold a statute constitutional, 187 Kan. at 13, 353 P.2d at 814.

160 The court's opinion is a wonderful example of the use of legislative history to reconstrue the "plain meaning" of the statute.

161 These other minor statutory changes were also enacted. The provision of KAN. G.S. 1949, 23-116, requiring the person performing a marriage ceremony to return the license to the probate judge of the proper county was deleted. Kan. Sess. Laws 1961, c. 191. This section had duplicated KAN. G.S. 1949, 23-109, which requires the license to be returned in ten days. In the probate code, section 59-1804 was amended. Concerning the duties of a guardian of a ward, the limit on the amount of funds that may be deposited in any one savings and loan association was raised from $5,000 to $10,000. A new provision was added providing that a guardian "may deposit the funds of said ward under a time deposit or a savings account of an insured bank within the state of Kansas." Kan. Sess. Laws 1961, c. 269. In section 59-2261, providing for selection of jurors in a jury trial in an insanity commitment, the requirement that one juror, "be a duly licensed doctor of medicine to be selected by the court," was amended to one, "licensed to practice medicine and surgery by the state board of healing arts to be selected by the court." Kan. Sess. Laws 1961, c. 270.

fined in jail under this section had to be separated from adults. Kan. Sess. Laws 1961, c. 228. Kan. G.S. 1949, 39-401 thru -414, relating to the hospital treatment of children and dependent persons, were repealed. This area is now covered by the juvenile code.

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