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Family Law (Survey of Kansas Law)

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The last two years produced family law cases under both the old and new codes. Reported cases indicate that changes have been beneficial and the transition comparatively tranquil. Two areas, the scene of frequent and often puzzling decisions in the past, are now easily understandable. A survey of recent cases together with the 1965 Session Laws, reveals that the few transitional rough spots are being or have been placated.

**ANTE AND POSTNUPTIAL AGREEMENTS**

A not infrequent area of litigation generates from contracts between spouses, made before or after marriage, fixing property rights. The general rule by which our court judges the validity of such contracts was stated sometime ago in *In re Estate of Cantrell.* They “are to be liberally interpreted to carry out the intentions of the makers, and to uphold such contracts where they are fairly and understandably made, are just and equitable in their provisions and are not obtained by fraud or overreaching.”

In *In the Matter of Estate of West,* the court considers a trial court’s findings invalidating an antenuptial agreement. He was seventy-six years old and worth close to $500,000. She was fifty-seven and a successful business woman with an estate near $100,000. They had the same attorney. The attorney drew an antenuptial agreement and a subsequent corresponding will whereby she inherited about $27,000 from his estate and he would have received nothing from hers. The documents contained ample recitals that the parties knew what they were doing.

The trial court found that (1) he failed to inform her of the value of his property, (2) he failed to advise her to see independent counsel—his counsel being of no value to her, and (3) she was placed in a position of confidence toward him by the impending marriage. From these facts the trial court found the contract, “not freely understandably made . . . and . . . not just and equitable . . . .”

The supreme court did not agree. It pointed out that there was no misrepresentation or willful concealment, and in effect said that the lack of a positive effort to make complete disclosure is not in itself enough to sustain a finding that the agreement was not “fairly and understandably made.” Also, it did not agree with the trial court’s conclusion that $27,000 against a $500,000 estate was
disproportionate, when he would have inherited nothing from her. The court said that she did not absolutely need independent legal advice in that the attorney in question had served as her attorney in the past, and in that she received benefit from his services in this instance.

From this and other recent cases, one must conclude that with such contracts the court asks two questions:

1) Was the agreement fair?
2) Did the other party willfully conceal salient information? A proponent of invalidity must show a negative answer to both questions.

It is obvious that the court weighs the total situation in judging these matters. The finite lesson that an attorney can learn from these cases is that he must do the same.

A second case in the area of marriage contracts, In the Matter of Estate of Cooper, deals with a postnuptial agreement that coupled an agreement resolving rights during life and after, with a collusive agreement whereby he agreed to obtain and she agreed not to contest a divorce action. The trial court held that the agreements were separable. The supreme court said they were not. Since they were made together and since they were intended to stand together, they must fail together. The Cantrell case had also stated that an agreement that promoted divorce was void. In Cooper the court reviewed the law on the meaning of "promote" and concluded that agreements which, (1) imposed an obligation to sue for or procure a divorce, or (2) obligated a spouse not to defend or contest a divorce suit were void as against public policy. It has always been a concern that the court might find a particular agreement collusive. In a 1961 decision, Hoch v. Hoch, the court had hinted that an agreement might have been collusive. Since such agreements are very common and since the problem of collusion touches a significant percentage of them, this decision is helpful. Active knowledge of these rules is indispensable to an attorney handling divorce matters.

### COMMON-LAW MARRIAGE

Can a spouse joined in an invalid ceremonial marriage have such marriage annulled after the parties have lived together in Kansas as husband and wife? The answer should be an obvious no, and the supreme court in effect so states in Burnett v. Burnett. The court points out that in an annulment proceeding it is the present marital status that should be considered. Since the parties had

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9 See also Hopson, Divorce and Alimony Under the New Code, 12 Kan. L. Rev. 27, 43 (1963).
12 See Hopson, supra note 6, at 43.
engaged in a common-law marriage by living together, the validity of the prior ceremonial marriage is immaterial.

**Divorce**

**Grounds**

*Preston v. Preston*\(^{13}\) is another of the many cases in which the supreme court has limited its review of conflicting evidence on grounds to determining that some of the evidence supported the trial court’s findings. Appellant had been found guilty of extreme cruelty. The supreme court cited the oft-repeated rule that unjustified and long continued conduct which utterly destroys the legitimate objects of marriage constitutes extreme cruelty, even in the absence of physical violence or threats.\(^{14}\)

The appellee’s evidence is a good illustration of this principle.

Harlow’s evidence, as corroborated, showed that Gaynell commonly, and with no discretion, belittled him, his deceased father, and his friend and benefactor, Pete Charowhas, also deceased; that she complained of her husband’s failure to provide her with vacations, and of having to live in apartments and of Harlow’s not buying a home; that on nocturnal social occasions she would become quarrelsome and argumentative and refuse to go home unless forced to leave; and that on a couple of such occasions she had to be taken home.\(^{15}\)

The court then said, “We think the evidence was ample to establish a course of conduct on the part of the defendant sufficiently disruptive of matrimonial harmony and humiliating to her husband as to be characterized as extreme cruelty within the meaning of the statute.”\(^{16}\) Gaynelle’s transgressions serve not only as a warning to the nagging wife, but also as a boon to the harried attorney seeking evidence of grounds to present to the trial court.

*Gardner v. Gardner*\(^{17}\) was another case involving sufficiency of the evidence to establish grounds. But the appellee presented a much stronger case than in *Preston*. The appellant also complained about a lack of corroborative testimony. The court failed to recite the corroborative testimony in dispute, merely stating that it was satisfactory. It cited *Carter v. Carter*\(^{18}\) to the effect that corroborative testimony may be circumstantial and that testimony corroborative in character will not be disturbed on appeal.

With the *Gardner* case, the attorney may wonder if the court is loosening the requirements for corroborative testimony. The court talks in terms of the real need corroboration serves; this need being to prevent collusion. The *Gardner* case gives an argument that the court might some day say that corroboration need only prove no collusion. *Lindeman v. Lindeman*\(^{19}\) ends such speculation. The divorce was contested. The husband’s corroborative testimony was

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\(^{13}\) 193 Kan. 379, 394 P.2d 43 (1964).
\(^{16}\) Id. at 381, 394 P.2d at 45.
\(^{17}\) 192 Kan. 529, 389 P.2d 746 (1964).
\(^{19}\) 195 Kan. 357, 404 P.2d 958 (1965).
given by a son from a former marriage and the son’s wife; they testified that they felt unwelcome in plaintiff’s home. The trial court found this testimony sufficient, but the supreme court did not. The grounds were gross neglect of duty and extreme cruelty and plaintiff testified to acts that constituted such grounds. But, said the court, the corroborative testimony did not pertain to the acts that were the real basis for the divorce. The decision is totally consistent with earlier cases. It does, however, filter out possible conclusions that could be drawn from the Gardner case.

Pleading and Practice

Statutory Changes. Several statutory changes were made in divorce practice by the last legislature. Kan. Stat. Ann. § 60-1605 (1964) was amended by giving the defendant the right to cross-file regardless of residence, if the plaintiff meets the residence requirements of section 60-1603(a) or (b). Prior to the amendment, the right was given only if plaintiff met the qualifications of section 60-1603(a). Kan. Sess. Laws 1965, ch. 356, § (a) states that the plaintiff must have been a resident of the state at least one year. Section (b) states the residency requirement is met if the plaintiff “has been a resident of or stationed at a United States post or military reservation in the state for one year.” Thus, the change allows the spouse of a petitioner relying on military residence to cross-file.

An amendment to Kan. Stat. Ann. § 60-1610(g) (1964) should rectify a situation that caused considerable confusion. Prior to the amendment, the section read in part: “Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons until thirty (30) days after the decree shall become final.”

When was the decree final? When judgment was rendered by the court or when the time to take an appeal had expired? Attorneys developed three theories on when a divorced person could remarry:

1) Thirty days from the date the trial judge entered judgment (a judgment is entered on the day the journal entry is filed), based on the assumption that the judgment was final when entered.

2) Sixty days from the date the trial judge entered judgment, based on the assumption that the judgment was not known to be final until the appeal period expired, but that on such date it was final retroactively to the date the trial judge entered judgment.

3) Ninety days from the date the trial court entered judgment, based on the assumption that the judgment was not final until the appeal period expired, and that the thirty days began on the expiration of the appeal time.

The amendment reads: the “parties are prohibited from contracting mar-

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21 See Kan. Stat. Ann. § 60-2103(a) (1964) setting such period at thirty days plus an additional thirty days if the party shows excusable neglect in failing to learn of the date.
22 See also Hopson, supra note 6, at 45.
riage with any other persons until sixty (60) days after the entry of the decree and, if an appeal is taken, then until the receipt of the mandate from the supreme court in accordance with K.S.A. 60-2106(c)...." Now the remarriage date is clearly established as sixty days from the date the trial judge enters judgment, unless there is actually an appeal.

A final change in this area took place in Kan. Stat. Ann. § 60-1611 (1964) on the effect of a divorce decree in another state. Prior to the amendment, this section read, in part:

A judgment or decree of divorce rendered in any other state... shall be given full faith and credit in this state; except, that in the event the defendant... was a resident of this state and 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 (2) years....

With the enactment of the 1964 code this section had been left intact except that the phrase "had not been served personally with process," which appeared after the phrase "was a resident of this state" had been deleted.

Kan. Sess. Laws 1965, ch. 355, § 7 added the phrase, "and such court did not have jurisdiction over his person," after "did not personally appear or defend the action in the court of such state or territory."

It is universally accepted that an appearance in person by a nonresident before a court gives that court the same jurisdictional powers as personal service. These powers would include in a divorce case, the power to award alimony, child custody, and support. By the deletion of the phrase, "had not been served personally with process," the 1963 legislature seemed to be trying to protect the person, who was personally served in the other state, but who did not appear and defend, from alimony judgments. In view of the United States Supreme Court's interpretation of the full faith and credit clause of the constitution this was obviously futile. The only practical effect of the deletion was to cause attorneys to worry that the section might be unconstitutional.

The 1965 amendment brings section 60-1611 more closely in line with the United States Supreme Court cases that hold that, with in personam jurisdiction, matters once tried are res judicata. But since personal jurisdiction gives this effect, the requirement of personal appearance is meaningless and should have been deleted.

**Collateral Attack.** The *Lindeman* case deserves mention again at this point. The wife had sued for separate maintenance. The trial court awarded her a divorce. The supreme court reversed, stating it would be improper to

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32 *Ibid., supra* note 6, at 46.
force upon her that which she did not ask for. The opinion is consistent with decisions in other jurisdictions, and distinguishable from Thompson v. Thompson where the wife, after pleading for separate maintenance had stated on the witness stand that she wanted a divorce.

In Hodge v. Hodge a wife was allowed to attack collaterally and upset a divorce decree dividing the parties' property, by reason of the husband's extrinsic fraud in procuring the decree. In Hood v. Hood a Kansas ex-wife brought an action for monetary damages by reason of her ex-husband's deceit in procuring the divorce. She recovered $125,000 in federal district court and the court of appeals affirmed. He had artfully and grossly misrepresented the value of his property. The parties had entered into a stipulation, she without the benefit of effective independent counsel. Six months later, she presented the stipulation to court when obtaining the divorce.

Is the action a collateral attack upon a state judgment? If so, she could not prevail. The court concludes that the action is based on tort—his deceit—and therefore the divorce action is not a bar. Originally the opinion wrestles with whether the stipulation was merged in the decree—then later concludes that it didn't make any difference. As long as Mr. Hood's fraud was extrinsic the deceit action was maintainable. Absent the difference in forums, the case is simply a replay of Hodge v. Hodge.

Appealable Order. In Cusintz v. Cusintz the appellant sought dismissal of an ex parte support order on the ground that Kan. Stat. Ann. § 60-1611 (1964) was unconstitutional. The trial court ruled against him and he appealed. The supreme court found that such an order was not an appealable order in that it was not a final decision as defined by section 60-2102. Since the trial judge would have to pass on the constitutional question at the final hearing, the decision is obviously correct. While the opinion does not reveal the argument on unconstitutionality advanced by appellant, it may well be that the problem was cured by the 1965 amendment.

Alimony and Division of Property

During the survey period, the Kansas Supreme Court was concerned, in four different cases, with the problem of alimony and division of property. While all four cases involved the construction of section 60-1511 of the old code, having been decided by the trial courts prior to January 1, 1964, the four opinions illustrate both the continued confusion concerning the meaning of the old code and the desirability of the language in the new code—Kan. Sess. Laws

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80 See Davis v. Davis, 209 Iowa 1186, 229 N.W. 855 (1930); Cawley v. Cawley, 59 Utah 80, 202 Pac. 10 (1921).
82 186 Kan. 361, 349 P.2d 947 (1960); See Brand & Hopson, supra note 11.
83 335 P.2d 585 (10th Cir. 1964).
1965, ch. 355, §§ 6(b)-(c). The opinions also indicate that perhaps the supreme court will have, even under the new statute, a propensity to second guess the discretion of the trial court judge.

_Preston v. Preston_ best illustrates the problems mentioned above. The divorce was granted to the husband for the fault of the wife. The parties' net worth was a little over $50,000, with approximately $28,000 in assets jointly acquired. After giving the wife an old Cadillac and some household goods, the trial court awarded her $10,000 in alimony payable at a rate of $150 a month. The husband obtained the real estate worth $50,000 and the balance of the personal property.

After pointing out that the old code did not allow alimony to be awarded to a wife who is at fault, the supreme court went on to find no abuse of discretion in awarding her the $10,000. The supreme court said that it would treat it as a division of property, and not as alimony. The court, in its reasoning, however, itself lumped together alimony and division of property by citing cases concerning whether an alimony award was an abuse of discretion rather than whether the division of property was an abuse of discretion.

The court then correctly concluded that the $10,000 represented approximately one third of the jointly acquired property and that an equal division of such property was not necessary. Hopefully, the new code now makes clear that alimony is a support, not a division of property concept.

Having approved the trial court's discretion in dividing the property, the court then felt called upon to tinker with the form of the judgment. It ordered the trial court to make the $10,000 award a lien on the real property of the husband. This tinkering is of some importance in this case and also illustrates, along with the other cases in this section, the tendency on the part of the supreme court to second-guess the trial court's discretion in alimony and division of property matters. This tendency on the part of the supreme court is somewhat surprising in light of its past policy of almost complete abdication to the trial court's discretion.

The willingness on the part of the supreme court to help out the "at fault" wife by creating this lien is, potentially, a decision having considerable ramifications. The supreme court, in awarding the lien, cites three old Kansas cases to the effect that "an allowance of permanent alimony payable in installments does not create a lien upon the husband's property unless the court makes pro-

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38. See _Hopson, supra_ note 6, at 42.
vision to such effect in its judgment." The trouble is, however, that even if the trial court's award was alimony, both the writers and the court itself have considered the "no lien" rule abandoned since *Haynes v. Haynes*. For instance, in *Fangrow v. Fangrow* the court said:

This opinion is not to be construed as any indication or inference that this court is departing from the well-established rule that due and unpaid child support installments decreed in a divorce action for the support and education of minor children of a marriage become final judgments and a lien upon the real estate of the debtor father as of the date they become due, in the same manner and to the same extent as other judgments of courts of record of this state [citations omitted], and may be collected in the same manner as other judgments.

The *Fangrow* case is not cited nor distinguished in the *Preston* opinion. Is then, the *Preston* case a return to the earlier no-lien Kansas rule?

The conclusion is important. The new alimony and child support statute does not specify whether or not the alimony and child support judgment is like other judgments in that it is collectable by levy of execution and is a lien on the property of the judgment debtor. Presumably, the old rule—that it was a lien—was to continue. *Preston* now throws doubt on whether it is a lien unless the trial court specifically so states in its decree.

It is possible to distinguish *Preston* on either of two grounds. First, the attorney for the wife apparently assumed that the old rule continued and that he had to induce the supreme court to grant him a lien. Surely the husband's attorney was not going to argue that she already had her lien. Secondly, and more importantly, the supreme court itself points out that technically the $10,000 awarded the wife was not alimony as she was at fault. Consequently, the award is a division of property. It is consistent to say that a cash award, effectuating a division of property, does not become a lien on the other spouse's real property unless so specified by the trial court. If this is all the court is holding, well and good. However, it is quite unfortunate that they cited the old "alimony" cases as requiring the trial court to make the lien in its judgment.

There is other independent evidence that the court is harking back to the no-lien rule. In *Longo v. Longo*, decided the same day as *Preston*, the court, after increasing the alimony award, closed its opinion by saying: "To effectuate payment of the $18,500 permanent alimony judgment, the district court is

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51 168 Kan. 219, 212 P.2d 312 (1949).
52 The court has never made any distinction between past-due alimony and past-due child support judgments. In Edwards v. Edwards, 182 Kan. 737, 324 P.2d 150 (1958), the court lumps together past-due child support and permanent alimony, as contrasted to alimony pendente lite, when pointing out that the former were final judgments and could be collected in the same manner as other judgments.
53 See, e.g., Cunningham v. Cunningham, 178 Kan. 97, 283 P.2d 405 (1955), where such a division was specifically made a lien.
further directed to make said sum a lien upon the real and personal property separately decreed . . . .”52 The problem was apparently not argued and the lien was gratuitously given by the court. However, it at least appears that the court, in these two cases, is thinking in terms of the old no-lien rule.

If a judgment does not operate automatically as a lien, it will be necessary for the attorney to convince the trial court specifically to create the lien. The problem is that Preston and Longo set out no standard to guide the judge. Preston does cite an old case,83 in which the standard seems to be some likelihood that the husband will dispose of the property. But the facts in both Preston and Longo clearly do not present that strong a case; the court speaks only of “contingencies [which] might well occur in the interim.”54 The court offers no real verbal formula and the facts demonstrate only a rather large property award to the husband with a rather skimpy cash award to the wife. Relative size of the judgment will at least be a point to argue.

In the Longo case, the supreme court merely engaged in tinkering with the trial court’s judgment, although it was actually faced with a rather difficult problem of determining what constituted the separate property of the wife.66 The court did not handle this problem particularly well, but did finally determine that the trial court’s division of property was proper. The court then modified the alimony award by increasing it from $2,500 to $18,500 without suggesting any basis other than an abuse of discretion based on the facts. The between-the-lines impression is that the supreme court felt that the husband obtained too large a share in the division of property, so it equalized the matter by increasing the alimony award to her. In contrast is Darr v. Darr,67 where the supreme court apparently felt that the trial judge had given too much to the wife. It ordered the money award of $17,400 reduced by $5,000 and the rate of payment—$200 a month—reduced to $150 per month. Both cases well illustrate the supreme court’s unsettling practice of second-guessing the discretion of the trial court judge.

Attorneys have been reluctant to advise their client to appeal when the only basis for the appeal was the fact that the trial court seemed to have been out of line in the judgment. Perhaps the court had been almost too reluctant to interfere.67 The cases decided during the last two years, perhaps, tip the balance the other way. It would be fair to predict that there will be more wishful appeals based on the trial court’s abuse of discretion.

In Henderson v. Henderson,68 the court resolved a problem existing under the old code but not under the new code. Since alimony awards had to be for a lump sum amount59 and were not modifiable, it was assumed that a trial court

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52 Id. at 394, 395 P.2d at 308.
57 See Hopson, supra note 37.
was prohibited from increasing the time in which the fixed amount of alimony must be paid as well as from changing the total amount. Henderson affirmed that conclusion. The court pointed out that a final judgment could not be modified subsequent to the term of court in which it was rendered. 60

CHILD CUSTODY

Jurisdiction and Full Faith and Credit

Three cases decided during the survey period involved those ever troublesome problems of jurisdiction and full faith and credit in custody matters.

In Talbott v. Talbott 1 the court, in construing section 60-1510 of the old code, 2 reaffirmed its earlier holdings 3 that the Kansas domicile of the child was a jurisdictional prerequisite to entertaining a motion for change of custody. This domicile requirement, reaffirmed by Talbott, was severely criticized. 4 In the 1963 revision of the code of civil procedure the legislature abolished domicile as the sole jurisdictional base. 5

But even prior to the effective date of the new code, the court in Turner v. Melton, 6 construing the old code, seemingly retreated from its domicile rule, although the case can perhaps be explained upon other grounds. This case involved the custody of a child. An Oklahoma judgment had awarded custody to the father, who then moved his domicile to Wisconsin, taking the child with him. The mother re-opened the Oklahoma judgment, and was awarded custody. The father did not appear personally in the second proceeding; and there was some doubt about the regularity of the appointment of the attorney who appeared for him, and thus about the court's jurisdiction.

The mother "abducted" 7 the child from Wisconsin, and took up domicile in Kansas. The father thereupon sought habeas corpus in Kansas. The Kansas trial court awarded custody to the mother, finding the father "unfit." The father appealed, contending that the second Oklahoma judgment (awarding custody to the mother) was invalid, 8 and that the mother was therefore not empowered to establish the child's domicile in Kansas—thus, he argued, the

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60 Such modification would also violate the rule that alimony must be for a fixed sum. Note here that the modification would have had the effect of decreasing the total amount paid to the wife since, by making the payments less and extending the time for which they were paid, the wife would be forced to pay federal income tax on the alimony she received. See generally 1 P-H 1965 Fed. Tax Serv. § 7701.
67 The court itself puts quotes around the word.
68 He cited Hannon v. Hannon, 186 Kan. 231, 350 P.2d 26 (1960) as authority that the Oklahoma court lacked jurisdiction. This argument is not particularly convincing, since the Oklahoma courts do not necessarily follow Kansas cases.
child not being domiciled in Kansas, Kansas lacked jurisdiction to affect the custody.

The supreme court at first seems to answer this argument by saying that the Oklahoma judgment is not subject to collateral attack—thereby implying that the basis of the decision might be the mother’s lawful custody, empowering her to change the child’s domicile to Kansas. So far, so good, since the court would then be following its established rule that jurisdiction over custody is based on the child’s domicile.

The court goes on, however, with that all too familiar language, “Be that as it may...” and relies on an old case\textsuperscript{68} enunciating the rule in force before adoption of the domicile requirement. The older rule gave the court a \textit{parens patriae} power to affect the custody of any child before it, regardless of domicile. The implication is obvious, therefore, that the court does not entirely adhere to its heretofore well-established domicile requirement.

The \textit{Turner} case, indicating, as it apparently does, the court’s desire to throw off the shackles of the domicile rule foreshadows its rather broad holding in \textit{Lyerla v. Lyerla}.\textsuperscript{70} Despite a trial court’s holding\textsuperscript{71} that the new custody section\textsuperscript{72} did not change the domiciliary rule, the supreme court, quoting at length from Judge Gard,\textsuperscript{73} finds that the new section’s broad language allows the exercise of jurisdiction on the following fact situation.

In 1959 the plaintiff mother was awarded ten months’ custody and the defendant father was awarded two months’ custody during each summer by the Crawford County District Court. The mother, with the court’s permission, moved to Las Vegas, Nevada. After several preliminary skirmishes in a Nevada court, the father there asked for a change of custody in December 1963. This motion was continued. In the meantime, the father obtained custody of his child during the summer and on July 2, 1964, filed a motion in the Kansas district court asking for a change of custody. On July 6, 1964, the Nevada court ruled on the father’s December 1963 motion and continued the old custody order—ten months to the mother and two summer months to the father. On July 28, 1964, the Kansas trial court changed the child’s custody to the father.

The mother appealed, arguing that a Kansas court had no power to change custody since the child was not domiciled in Kansas.\textsuperscript{74} The court concedes that

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\item[$^\text{68}$] Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930).
\item[$^\text{69}$] 195 Kan. 259, 403 P.2d 989 (1965).
\item[$^\text{70}$] Nisi Prius Decision, supra note 65.
\item[$^\text{71}$] Kan. Sess. Laws 1965, ch. 355, § 6 provides:

\begin{quote}
\textit{Care of minor children}. The court shall make provisions for the custody, support and education of the minor children, and may modify or change any order in connection therewith at any time, and shall always have jurisdiction to make any such order to advance the welfare of a minor child if (i) the child is physically present in the county, or (ii) domicile of the child is in the state, or (iii) the court has previously exercised jurisdiction to determine the custody or care of a child who was at such time domiciled in the state. . . .
\end{quote}

\item[$^\text{72}$] Gard, \textit{KANSAS CODE OF CIVIL PROCEDURE} 730 (1963).
\item[$^\text{73}$] It is at least arguable that the child was, in fact, domiciled in Kansas. Although the facts are not too clear, it would appear that at the date of the Kansas district court’s judgment, the father was enjoying his two months’ summer custody of the child. When custody shifts from one parent to the other, the domicile of the child also shifts. See Tompkins v. Garlock, 189 Kan. 425, 370 P.2d 131 (1962). The court and the parties apparently assumed, however, that the domicile was with the mother in Nevada.
\end{itemize}
the prior holdings of the Kansas Supreme Court would so indicate. But, said
the court, the new code changed the rule. The court pointed out that the 1955
amendment provided at least two bases for jurisdiction in this case. First, the
child was physically present in Crawford County when the father's motion was
filed and heard and, second, the Crawford County District Court had exercised
jurisdiction over the custody of the child at a time when he was domiciled in
Kansas.

This whole-hearted acceptance of the two nondomiciliary bases for jurisdi-
cion by the court is indeed welcome. Doubt had been expressed56 as to whether
the court, due to its strong adherence to the domicile rule, would unreservedly
accept the new statute. There was a fear that the court might find it unconstitu-
tional.57 Although no constitutional argument was made, the court in no way
intimated any fear for the validity of the new section.58

The Lyerla case also raised two full faith and credit issues. The mother
argued that since the Nevada action was pending at the time of the Kansas de-
cision, the Kansas district court should have held proceedings in abeyance await-
ing Nevada's action. The court, citing Kirby v. Kirby,89 pointed out that such
rule did not apply to actions in a foreign jurisdiction.

The mother also argued that full faith and credit should be given to the
Nevada decision affirming her custody.79 The court avoided the issue by finding
that the Nevada decree did not purport to determine the issue of whether there
should be a change of custody, but rather that the Nevada decree determined
only the issue of temporary visitation rights.80

The above cases illustrate the impossible situation facing American courts
in the custody area. No acceptable solution has yet been proposed.81 The next
survey will undoubtedly report additional thorny problems of conflict of law in
custody cases.

Basis of Award

On five different occasions during the survey period, the court was faced
with that ever recurring problem of the propriety of a trial court's custody
award. Most appellants are faced with the unenviable burden of inducing the
supreme court to reverse the trial court's discretion. In none of the five cases
was the appellant successful. There was some evidence in the record, in every
case, to sustain the trial court's judgment.

Finding abuse of discretion a difficult point for reversal, appellants also try

56 See Hopson, supra note 65, at 38.
57 Ibid.
58 See Goodrich, Conflict of Laws § 136 (4th ed. Scoles 1964) for a review of the various bases of
jurisdiction used by state courts.
60 The Nevada decision was twenty-two days prior to the conclusion of the Kansas district court
proceedings.
61 The mother also argued that there was no change of circumstances justifying a change in the custody
award. The basis of this argument, apparently, was that there was no change of circumstances since the
prior Kansas award (not since the Nevada award). Thus, the issue of to what extent change of circum-
stances allows a second state to make a new custody award was not at issue. See Harvey, supra note 64.
to claim that the trial court applied improper standards. In *Gardner v. Gardner* the husband obtained the divorce on the grounds of extreme cruelty. He showed that his wife no longer loved him nor desired to take care of the children. Five months prior to the divorce action she had walked out on him and the children, even though the children were sick. She had told the husband she did not want the children. The trial court granted him custody of the children, although it did not find the mother unfit. The mother argued that, in light of "the tender years of the children, and the favored position of the mother in the eyes of the law," a finding of unfitness was a prerequisite to awarding custody to the father. The supreme court pointed out that the mother's argument was confused. In a contest between a parent and a third person, Kansas does require that the parent be found unfit before custody can be awarded to the third person. "Where the issue exists only between the parents, as in the instant case, and no third party is involved, then the primary question to be determined by the court is the welfare and best interests of the children. All other questions are subordinate." So, as between parents, an unfitness finding is immaterial. All that is needed is evidence to show that it would be in the best interests of the child to be awarded to the parent granted custody.

Without detailing any facts, the court in *Bergen v. Bergen* cited *Gardner* and affirmed the trial court's award of the child to the father. The court also pointed out that the trial court had found the mother unfit. Since there was substantial evidence of unfitness, the trial court obviously had to be sustained. A finding of unfitness is not even required by *Gardner*.

In *In the Matter of Stafford* the court applied the rule concerning custody as between a parent and a third person. Here the mother brought a habeas corpus action to obtain her child, who was residing with the mother's parents. The grandparents had had the child since infancy, apparently because the mother had been mentally ill and had been committed to the Hertzler Clinic. The trial court denied the writ, finding the mother an unfit person, and awarded custody to the grandparents. The supreme court reaffirmed the requirement that the mother must be unfit before the grandparents could obtain custody.

The court then turned to the question of whether the evidence sustained the trial court's finding of unfitness. Citing *In the Matter of Vallimont*, the court pointed out that the grandparents had the burden of showing the mother's unfitness. Both a psychologist and a psychiatrist testified that in 1955, the date...
of the examination, the mother had a sociopathic personality and that, from
observation of the mother in the courtroom, it would be their opinion that the
same condition existed. Further, they testified that such a mother would not be
a fit person to have custody of her child. Both experts indicated, however, that
they felt that the mother should be reexamined. This, apparently, was not done.

Although the decision is probably correct, the court is upon somewhat shaky
ground. The experts’ testimony as to the mother’s condition at the time of the
trial was quite weak. Since the grandparents have the burden of proof, the
mother would seem to have a fair argument that the testimony of the experts
concerning her condition at the time of the trial was so weak that the burden
had not been sustained. It perhaps would have been better to have had the
mother reexamined.\(^9\)

The mother also argued that so long as she was physically and morally fit,
her alleged mental illness was not germane to the issue of unfitness. In answer,
the court quoted, once again, from In the Matter of Vallimon\(^1\) to the effect that
“violence of temper or inability or indisposition to control unparental traits of
color or conduct, might constitute unfitness. So, also, incapacity to appreci-
ate and perform the obligations resting upon parents might render them unfit,
apart from other moral defects.”\(^2\)

The other two cases are concerned with the problem of what evidence is re-
quired to obtain a change of custody. In Whitebread v. Kilgore,\(^3\) the child
had been awarded to the mother. Subsequently, both parents remarried. The
father had had difficulty exercising visitation rights and moved for a change of
custody. The day before the hearing, the mother, the child, and the new hus-
band left Kansas. The mother defaulted and the father and his new wife were
the sole witnesses. They testified that they both wanted the child. The trial
court refused to change the custody. The supreme court affirmed, finding that
the trial court had not abused this discretion. The court, quoting from Burns
v. Burns,\(^4\) held that the fact that the mother had taken the child from the
jurisdiction of the court\(^5\) did not necessitate a change of custody order. The
primary test, said the court, continued to be what was best for the child. Under
such a test, the trial court had not abused its sound judicial discretion.

In Lyerla v. Lyerla,\(^6\) the trial court sustained a father’s motion to change
custody to him. Here the mother had had custody for several years and, during
that time, the boy had developed “undesirable traits of character.” The mother

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\(^1\) See KAN. STAT. ANN. § 60-235 (1964) which would probably allow the court to order such an
examination.


\(^3\) In the Matter of Stafford, 193 Kan. 120, 124, 392 P.2d 140, 144 (1964).


\(^6\) In Burns the trial court had ordered the mother to keep the child in Kansas. There had been no
such order in Whitebread.

had been forced to put her nine-year-old son in a military school since she could not handle him. This, said the court, was a sufficient *change of circumstances* to allow the trial court to change its custody order.

In both *Whitebread* and *Lyerla*, the court discusses the requirement that the trial court make a finding that there has been a change of circumstances. *Whitebread* was decided prior to the new code; *Lyerla* was decided afterwards. An argument can be made that section 60-1610(a), due to the change in wording, no longer requires a "change of circumstances" before a trial judge may change custody.77 *Lyerla* would seem to hold otherwise. However, the father did not make that argument and, since he was successful in showing a change of circumstances, didn't need to.

In the survey two years ago it was pointed out that fathers had been faring much better in their custody fights with mothers.88 During this survey period, in the four cases involving fathers and mothers, fathers won three times. In the past, attorneys were forced to advise fathers that their chances of obtaining custody were slim.89 The cases decided during the last four years perhaps indicate that they at least have a "fighting chance."

**Disclosures**

*Olney v. Hobble*100 considers a situation of practical interest to practicing attorneys. Plaintiff and his ex-wife had been divorced in February. In June she had given birth to a child and immediately consented to and gave the child for adoption. The defendant had been the attorney for the prospective adoptive parents.

Plaintiff brought a habeas corpus action against the defendant and others to obtain the child. During the trial, the defendant was asked to give the names of his clients who took the child. He refused on the basis that such information was privileged between attorney and client. The trial court found the defendant-attorney guilty of contempt and the supreme court affirmed. In essence the supreme court said the statute, which provided: "If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer ..."102 was paramount to the attorney-client privilege. The supreme court simply said that since the legislature had said that one with this information should reveal it, the quoted section was controlling. As the only given reason, this is puzzling. The legislature just as certainly states that the attorney is incompetent to testify on the matter. The court seems to be saying that since the quoted section is more
specifically applicable, it should be determinative. There may be a good reason for the result, but this is not it.

The Kansas Supreme Court has frequently said that there was an exception to the attorney-client privilege where the communication was for an unlawful purpose involving either crime or fraud.

In the Olney case, there was no crime nor fraud, at least in the conventional sense. Certainly there was no showing of moral turpitude. The act was simply the taking of a child for adoption without the father's consent. While the parties should have known that consent was required, they were not subject to punishment for proceeding as they did.

There is simply a direct conflict in statutes. To resolve the problem, the court had to write an exception into one statute. Either the attorney-client privilege does not apply in disclosure habeas corpus situations, or disclosure in a habeas corpus situation is not required when an attorney-client relationship exists.

There are arguments available to either viewpoint. If the attorney-client privilege is of sufficient value to protect in matters involving fraud, why not protect it here? On the other hand, the restraint of one's liberty is a situation deeply noxious to our society. Perhaps there is no justification, under any circumstances, for a rule that would foster such restraint.

One wonders if the court was not influenced by the fact that, in such a situation, the attorney plays an active role. Normally, the attorney-client privilege is passive in that the attorney is only told what happened. But in the habeas corpus-adoption situation the attorney is an active participant, often the only one. To allow him silence is to insure that the restraint continues. Perhaps the court felt this too high a price for the sanctity of the attorney-client privilege.

Attorneys' Fees

Two cases during the period touch on the question of attorneys' fees. In Bergen v. Bergen the trial court gave the husband the children, and decreed divorce for the wife's fault. The wife obtained some alimony and $250 in attorneys' fees. One of her complaints on appeal was the small sum for attorneys' fees. The supreme court affirmed, noting that the plaintiff earned only $5,850 a year and that the trial court was in the best position to judge the adequacy of the fee. In Talbott v. Talbott the wife sought and obtained an increase in child-

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104 In In re Estate of Koellen, 167 Kan. 676, 208 P.2d 595 (1949), a client learned of a defect in an instrument through his attorney and then forged a document to replace the defective writing. The court said that the client was perpetrating a fraud involving moral turpitude, and therefore his conversation with the attorney was not privileged. In State v. Wilcox, 90 Kan. 80, 132 Pac. 982 (1913), communications were made to an attorney in furtherance of a conspiracy to commit a criminal libel. They were held not privileged. However, in Emerson v. Western Auto. Indem. Ass'n, 105 Kan. 242, 182 Pac. 647 (1919), a communication involving a question of fraud was held privileged when no moral turpitude was shown. The court said: "It is difficult to draw any hard and fast line; but there would be little left of the privilege if, in a doubtful case, communications between attorney and client relating to the best way to protect the client's interests could be inquired into, although the final conclusion, perhaps on appeal to this court, might be that fraud in law was involved." Id. at 249, 182 Pac. at 650.

105 In 195 Kan. 103, 403 P.2d 125 (1965).

support payments. The trial court awarded $100 attorneys' fees. In affirming the support increase, the supreme court merely said that the attorneys' fee followed as a natural consequence of the order.\textsuperscript{107}

**CHILD SUPPORT**

**Jurisdiction and Full Faith and Credit**

In *Talbott v. Talbott*,\textsuperscript{108} the Kansas Supreme Court was faced with the argument that the same jurisdictional rules applied to both child support and custody. Here the mother had obtained custody in a divorce case and subsequently moved to California. Later she filed a motion to increase the child-support payments. The father moved to change custody. The trial court found that it did not have jurisdiction to change custody,\textsuperscript{109} but did order an increase in child support. The father suggested that if domicile was a jurisdictional requirement for a custody award under the old statute, there was nothing in the act\textsuperscript{110} to suggest that a different jurisdictional base should exist for a child-support award.

The supreme court affirmed the trial court but its "facts and circumstances" opinion seems somewhat ethereal. The court said: "Defendant, who was, and is, the one making the payments, at all times continued to reside in Wichita, and thus was within the court's jurisdiction. Under the facts of this case, therefore, we hold that the district court of Sedgwick county had jurisdiction to make the order that it did."\textsuperscript{111} The court cites no authority for its statement. Courts have uniformly assumed that both alimony and child-support awards required in personam jurisdiction over the husband-father or quasi in rem jurisdiction over his property.\textsuperscript{112} The court also has available the concept of continuing in personam jurisdiction so that renewed personal service is not necessary.\textsuperscript{113} If the language quoted above is merely an inartful statement of the rule of continuing jurisdiction, it is undoubtedly correct. If, however, it is a suggestion that the domicile of the father in Kansas is a jurisdictional prerequisite to a support order, the holding of the court would seem to be a radical departure from established practice. The duty to support may be measured by the law of the domicile of the father,\textsuperscript{114} but surely jurisdiction is not. A child support judgment should not require both in personam jurisdiction over the father and the domicile of the father.

In *Hamilton v. Netherton*,\textsuperscript{115} the mother brought suit in Kansas to obtain a lump-sum judgment for child support based upon a Nevada decree. The


\textsuperscript{109} See also text accompanying note 61 supra.


\textsuperscript{112} See *EHRENZWEIG, CONFLICT OF LAWS* § 82 (1962).

\textsuperscript{113} *Ibid.*

\textsuperscript{114} But see Wahl v. Walsh, 180 Kan. 313, 304 P.2d 525 (1956) where the court uses Kansas law even though the father, mother, and child were all domiciled in Washington.

\textsuperscript{115} 194 Kan. 683, 401 P.2d 657 (1965).
father attempted to relitigate the merits of the Nevada award. The Kansas Supreme Court, citing Fischer v. Kipp,116 pointed out that under the full faith and credit clause of the United States Constitution, such a collateral attack was improper.

The father did obtain, however, a reversal of the trial court as to the amount of interest collectable on this foreign judgment. The trial court had allowed the six percent interest to be compounded monthly. The supreme court, citing Kan. Stat. Ann. § 16-204 (1964), the statute providing for interest on judgments, held that only simple interest was proper.

Obviously, the court assumed that the Kansas interest statute was applicable to foreign judgments as well as judgments of Kansas district courts. No authority is cited and the problem of whether the Kansas or Nevada interest statute applies was not discussed.117 In so holding the Kansas court takes, without evaluation of the proper rule, the minority position that the forum statute was applicable.118

Illegitimate Children

Addington v. Addington,119 was an action, by a mother as next friend, for her illegitimate son, against the father for support. The plaintiff appealed a trial court order for $150 a month, claiming the court erred in, (1) considering a contract between the parents, (2) not giving him a larger sum in view of the wealthy status of his father, and (3) placing the control of the funds with someone other than his mother. The court first cites Wahl v. Walsh120 as authority for an illegitimate child's right to sue for the father's nonstatutory obligation to support. It then decided not to disturb the trial court's judgment, considering the matters raised within the trial court's discretion.

The Addington case does raise a couple of interesting questions. Appellant contended that a contract between the parties should not have been allowed in evidence. The court disagreed. Such a contract has been held not to be binding on the court.121 But this does not mean that the contract must be totally disregarded. It can and should be considered by the court in judging the total situation.122

Juvenile Code

Dependency and Neglect

In Lennon v. State,123 the supreme court approved the judgment of the Meade County District Court which had held, in a trial de novo, that a little girl

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117 It is possible that the Nevada interest statute provides for only six percent simple interest. It was not cited by the court and there is no suggestion in the opinion that the court felt that it should examine the Nevada statute.
118 See EHRENZWEIG, CONFLICT OF LAWS § 195 (1962).
120 180 Kan. 313, 304 P.2d 525 (1956).
122 The court cites no authority for this rule. The court has said, however, that a nonbinding custody agreement may be considered. Leach v. Leach, 179 Kan. 557, 296 P.2d 1078 (1956).
was dependent and neglected and that the parental rights of the mother be severed. The court extensively reviewed the evidence and concluded that it was sufficient to sustain the trial court’s findings. This case is the subject of an extensive discussion appearing in 14 Kan. L. Rev. 117 (1965), and extended comment will therefore be omitted in this survey. Although the decision is perhaps correct on the facts presented, the supreme court was apparently too narrow in its analysis of the problem.

Statutory Changes

The Kansas Juvenile Code was rather extensively modified by the 1965 legislature. In the key change, the legislature amended Kan. Stat. Ann. § 38-802 (1964) to provide that the act would be applicable to all children up to the age of eighteen. The prior act was applicable to girls up to eighteen years of age, but limited jurisdiction to boys to those less than sixteen years of age.

At the same time that the legislature increased the age limit, it added to section 38-808 a provision whereby the juvenile court, after taking jurisdiction of the sixteen- and seventeen-year-old boys, could enter an order that there were reasonable grounds to believe that the boy would have committed a felony if an adult, and that the juvenile court’s facilities were not sufficient to give this boy care, treatment, and training. Upon entering such an order, the court could direct the county attorney to prosecute the boy in the district court. In addition, the juvenile court was granted the authority to commit boys sixteen or seventeen to the State Industrial Reformatory at Hutchinson, as well as to the State Industrial School for Boys at Topeka. However, no sixteen- or seventeen-year-old boys could be committed to the Boys’ Industrial School without prior approval from the Director of the Division of Institutional Management.

In effect, the legislature has said that the juvenile code will extend to sixteen- and seventeen-year-old boys, but when they commit a felony the juvenile judge may have them treated as adults. If the juvenile judge retains jurisdiction over them, he may, although they are guilty only of being delinquent, commit them to Hutchinson. Although the right of a juvenile judge to sentence a “delinquent” to a penal institution may raise serious constitutional problems, such problems will not be discussed in this survey as they will be subject to an extensive comment in a later issue of the Kansas Law Review.

The other changes in the juvenile code were minor. Kan. Stat. Ann. § 38-819 (1964) was amended to allow temporary custody to be given to the County Department of Social Welfare as well as the State Department of Social Welfare. Under Kan. Stat. Ann. § 38-824 (1964), the juvenile court may no

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128 See Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Sheridan & Freer, Delinquent Children in Penal Institutions (Children’s Bureau, Dep’t of Health, Educ., & Welfare, No. 415, 1964).
longer appoint a guardian of the estate (conservator). Since the probate court is given exclusive jurisdiction over conservators, it was felt that the juvenile court should not exercise such jurisdiction. The new amendment provides that the State Department of Social Welfare may file application for the appointment of itself as the conservator for the child, and that the probate court shall forthwith appoint the State Board of Social Welfare as such conservator. Other changes in the juvenile code pertain to the change in language necessitated by the changes in both the guardianship and treatment statutes.

**Legislation Concerning Children**

**Period of Minority**

Kan. Stat. Ann. § 38-101 (1964) was amended by the 1965 legislature. This section was subject to the possible interpretation that although marriage, at eighteen or older, conferred some rights of majority upon the married person, the divorce of that person reconferred minority status. The new section makes it clear that once the minor is married, his majority status continues even though a divorce has been obtained.

**Other Legislation**

The 1965 Kansas legislature passed several other statutes that are of interest to the Kansas practitioner. Kan. Stat. Ann. § 38-904 (1964), which is part of the Uniform Gifts to Minors Act, was amended to make clear that the custodian would not have the power to pledge or mortgage custodial property.

Kan. Stat. Ann. §§ 38-701 to -711 (1964) was extensively revised. This article deals with crimes affecting children. For the first time, jail sentences are provided for anyone who gives or sells revolvers, brass knuckles, or other dangerous weapons to children, and for any minor who possesses such weapons. The penalty for cruelty to children was increased, as well as the penalty for allowing a child to be in a situation where his health is likely to be endangered. The selling or giving of intoxicating liquors to a child under twenty-one years of age was made a crime. The legislature increased the penalty for a minor’s falsifying his age when attempting to obtain alcoholic liquor.

At the same time, the Kansas legislature adopted the so-called “Battered Child” statute. This act requires doctors, nurses, social or case workers, and others, who have knowledge that a child has received physical abuse, to report such information to the juvenile court. The physician-patient privilege is abolished as to such report, and the failure to report is made a misdemeanor.

Kan. Stat. Ann. § 38-120 (1964) was amended to allow recovery from the

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130 Kan. Sess. Laws 1965, ch. 280. This change was made to conform to the new act for obtaining a guardian or conservator or both. Kan. Sess. Laws 1965, ch. 347.
parents, to the amount of $1,000, for any damages caused by a minor under eighteen years of age who lives with his parents. If the jury finds that the act was malicious or willful, the $1,000 limitation is removed. The legislature also entered into the Interstate Compact on Juveniles. This compact will allow Kansas to handle the problem of the runaway juvenile who crosses state lines.

**Family Torts**

The rule was well established in Kansas by *Sink v. Sink,* that one spouse could not recover for the other's torts. In *O'Grady v. Potts,* the court modified this rule in the situation where the cause of action arose and the suit was commenced prior to the marriage. Without discussing the validity of the policy rules underlying *Sink,* the court allowed the suit on the theory that the Married Women's Act allowed a wife to keep choses in action as her separate property. Since this suit was such a chose, she could continue to maintain the suit.

Hoping that this foreshadowed an overruling of *Sink,* another wife brought suit. This time the action occurred during the marriage, but the case was distinguishable from *Sink.* She asked: Does it make a difference if (1) a divorce action is pending between the parties, or (2) the tort is intentional? In *Fisher v. Toler* the supreme court said that it did not. The court reasoned that the filing of the divorce action did not change the marital status and that a personal injury, whether caused wantonly or negligently, was still a tort. Husbands and wives may not sue each other for postnuptial torts. *O'Grady* was merely cited.

Justice Fontron dissented and was joined by Justice Wertz. He felt that both factual distinctions from the *Sink* case should have been controlling. He pointed out that the reason for the rule was to discourage that which would be disruptive of the marital relationship. When the reason for the rule was absent, why enforce the rule? He also felt a distinction should be drawn between negligent and willful acts.

There is a split of authority on both questions. California has recently, without legislative aid, in a tour de force allowed suits between husband and wife for both intentional and negligent postnuptial injury. Kansas has taken the older and more conservative view in each instance.

**Miscellaneous Legislation**

Two statutes, passed by the 1965 legislature, should at least be noted. The legislature enacted major legislation completely revamping the probate code

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sections relating to the treatment of the mentally ill and the appointment of guardians for such persons. Discussion of these acts will not be attempted here, as they are extensively reviewed in an article by Robert Cobean, who was Chairman of the Judicial Council Committee drafting the acts.

The Kansas legislature also reacted to the population boom in two separate acts. One permits the State Board of Health to establish and maintain family planning centers in cooperation with County Social Welfare Departments. Such centers will be allowed to furnish and disseminate information concerning contraceptives. The other act repealed statutes providing, under certain circumstances, for the sterilization of inmates of state institutions. Although it was arguable that this act only applied to inmates of state institutions, there was widespread belief on the part of Kansas doctors that sterilization was unlawful outside the provisions of the act. Thus they declined to sterilize individuals, even with the patients' consent. By repealing this statute, the legislature has now clearly allowed voluntary sterilization in Kansas.

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