1955

Family Law (Survey of Kansas Law)

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FAMILY LAW

Dan Hopson, Jr.*

I. ADOPTION

Consent: The problem of consent in adoption cases is neither new nor settled. Who may or must give consent to the adoption? When is the consent final? State legislatures have used a variety of techniques in an attempt to solve this problem. The courts themselves have reacted in numerous ways to the heart-stirring equities of each fact situation.

The usual conflict is between the new foster parents who might have had the child for some time, and the natural parents who are now claiming that their consent was not freely given, that there was no notice, or that they have now changed their minds. We feel the greatest sympathy for the mother of the illegitimate child who gave consent soon after its birth and now wants her baby returned to her. However, psychiatrists tell us that once the child has found a new home and becomes accustomed to its new surroundings, it is extremely difficult for the child again to readjust to new parents.

After the major revision of our adoption laws in 1939,1 the Kansas Legislature started tinkering with the consent requirements in 1951.2 They made a few technical changes and deleted from part (2), which requires consent from the mother of an illegitimate child, the proviso that "if the father of such illegitimate child has acknowledged paternity and has assumed the duties of a parent, his consent shall also be required."

In 1953 the legislature changed part (1) from "by the living parents of such child" (Emphasis added) to "by the living parents of a legitimate child." (Emphasis added).3 Apparently the 1953 change in the wording of part (1) was required in order to forestall any argument, based on the deletion in 1951 of the father of an illegitimate child from part (2), that consent was required of both the parents of legitimate and illegitimate children. However, we had no Kansas Supreme Court decisions on the meaning of the phrase "such child" during 1951-53.

The legislature also rewrote part (5) of KAN. G.S. 59-2102. It previously had read that consent could be given by the proper authority of any charitable institution or child welfare agency that had custody and legal control of the child during his minority. Part (5) now reads that consent might be given by: "The State Department of Social Welfare, a person, or by the executive head of an agency or association, where the right of the parents has been legally terminated and custody of the child has been legally vested in such person, department, agency or association with authority to consent to the adoption of said child."

The important changes are the addition of the word "persons" and the requirements that these persons or groups not only have custody, but also have legal authority to consent to the adoption.

The rewriting of part (5) corresponds to a change made by the 1953 legislature in our divorce laws.4 This new law revised KAN. G.S. 1949, 60-1510.5 It now states that, when a divorce is granted under KAN. G.S. 1949, 60-15066 or if the court finds at the time of

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1 KAN. LAWS, 1939, c. 180, §22 and 23(8), now appearing as KAN. G.S. 1949, 59-2101 to 59-2104, and KAN. G.S. 1949, 59-2277 to 59-2280.


4 KAN. G.S. 1953 Supp., 60-1510.

5 This section provided for custody of minor children after a divorce.

6 This section allows a court to grant a divorce when the parties are in equal wrong.
or after the divorce that both parents are unfit, the parental rights to the custody of their children shall be terminated. One year after the order becomes final, the person, agency, or association who has custody may consent to the adoption of the child. For the protection of the parents this section provides that before consent is given, permission must be obtained from the district court which had jurisdiction over the original divorce proceedings. The permission is granted only after a hearing. The parents must be given thirty days notice of this hearing. After the court grants its consent, it loses jurisdiction to the probate court where the adoption proceedings are being held. If the adoption is not completed, the district court regains continuing jurisdiction. One or both parents may at any time (except during the period when the district court loses its jurisdiction) be granted a restoration of parental rights.

Note also should be made of the rights of the juvenile court to award custody of dependent and neglected children to some suitable association or individual and the right of those having custody under this procedure to consent to adoption.7

In In re Watson8 the Court held that the juvenile court had jurisdiction to give a probation officer the custody of four minor children and the power to consent to the adoption of these neglected and dependent children. They found jurisdiction in the juvenile court despite the fact that two of her former husbands, each a father of one of her children,9 were never notified under KAN. G.S. 1949, 38-405. The Court says that the record contained no evidence that the fathers’ residences were known, that they were living or even that they were residents of Kansas. Therefore, no notice was necessary. The mother had custody of the children. She was notified as was the father of the one illegitimate child. The juvenile court had appointed a guardian-ad-litum for the child.

The Court cites no authority for denying the father’s right to a hearing. The Court merely says: “See the many cases cited under various sections of the statute.”10

Although the facts of the case show that the mother was neglecting the children and she did have custody, it is hard to see how the juvenile court could consent to the adoption of these children when their fathers had no notice of the proceedings nor was any attempt made to find them. If one of the parents had disappeared, it would be logical to allow an adoption without the consent of the missing parents if the children were neglected. But here there is nothing in the record to show that an effort was made to notify the fathers; yet they lose their children. Of course the fathers are not present or complaining. The mother is seeking to collaterally attack the jurisdiction of the court.11

There is another late Kansas case on the problem of consent. In In re Thompson,12 the Court held that, under the provisions of KAN. G.S. 1953 Supp., 59-2278, the consent to adoption by the mother of an illegitimate child could be withdrawn at any time up to the final order of adoption. The mother had given consent to a Mr. and Mrs. Lane. They started adoption proceedings on April 11th. The hearing was set for May 19th. On April 17th the mother withdrew the consent and gave it to a Mr. and Mrs. Gilbert, the mother’s uncle and aunt. The probate court found that she could not revoke her consent once freely given. On appeal to the district court this ruling was sustained. The Supreme Court reversed on narrow statutory grounds. It felt that part of KAN. G.S. 1953 Supp.,

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7 KAN. G.S. 1949, 38-408.
9 The mother had married several times and, at the time of the hearing, was living with the father of another of her children. This child was illegitimate.
11 A discussion of this case will appear as a case note in a later issue of the Review.
59-2278 which impowers the State Department of Social Welfare, if requested by the court, to check into the consent, must have been intended by the legislature to mean that "there should be no finality or binding force to the consent until after the department has made its report and the court was ready to finally hear and determine the proceedings."

The Court refused to discuss the policy questions involved. "In adoption cases nearly all courts have chosen to play on the heart-strings with a discussion on the welfare of the child and the general circumstances that surround an adoption proceeding." Our Court was not interested. It preferred to rely on analogy to the rule that consent may be withdrawn prior to the final order in consent judgment cases. If consent may be withdrawn in such cases the mother may withdraw her consent to adoption at any time prior to the final order.

We also have had some change in our procedure. Prior to 1951, the court could grant an interlocutory order of adoption only. This order became final after six months. The State Department of Social Welfare was given the power to investigate the new parents during this period. In 1951 the legislature provided that the court should grant a final order at the time of the hearing. In 1953 the legislature changed the notice requirements. The statute now provides that if the petitioner is a step-parent no notice need be given to the State Department of Social Welfare, nor is it mandatory that the department investigate the new step-parent. The statute now reads "may."

II. Bastardy Proceedings

Change of Statute: In 1955 the Kansas Legislature added a proviso to KAN. G.S. 1949, 62-2313. It read that, upon a finding of parenty, a court could provide for maintenance of the child and, if the defendant did not give security for the support payments, that he may be committed to jail. Under the new proviso, the court may parole the defendant, even if he is unable to provide security, upon such terms as will allow the defendant to comply with the judgment.

Apparently the old statute made a jail sentence mandatory. Putting the father in jail, where it would be impossible for him to work and make support payments, did not help the mother.

III. Child Custody

Mother's Mental Capacity: In three cases decided during the period of this survey the Court determined the effect of a mother's unstable mental condition on her right to the custody of her children.

The Kansas Court is solidly committed to the twin doctrines of "What is best for the child" and "When both parents are fit, the mother is to receive custody." Apparently the second of these two doctrines outweighs the first. At least this is true where the danger to the child is from a neurotic or psychotic mother. In all three of our cases the mother received custody. In the first case, Johnson v. Johnson, the trial court granted the
divorce to the wife and awarded her the children. The husband complains that he wanted her psychiatrist to testify that she was a psychopath. At the trial, the defendant objected to such testimony on the grounds that it was privileged, being a communication between doctor and patient. The trial court sustained her objection. The husband argued that the trial court should refuse to grant custody to her until she waived the privilege. It is for the best interest of the child to have full disclosure prior to the grant of custody. The Supreme Court disagreed. It held that to allow such an argument would be to create an exception to our statutory privileges. The mere fact that she has refused is not, ipsofacto, grounds for a finding of unfitness. The statutory privilege is more important than evidence on the mental condition of the mother. The Court then goes on to say that there was evidence in the record to show that she was fit and, as it is a question of discretion, the trial court would not be reversed.

A year later, in Pearson v. Pearson, the Court granted custody to the mother some four years after the divorce. On the original hearing custody had been granted to the father, due to the mother’s “present illness.” At a hearing on the husband’s motion for a new trial, after the court had awarded the mother custody, the husband offered testimony of a psychiatrist that she was still not fit. The wife had showed that, at the hearing on her motion for change of custody, that she was in a hospital for a nervous condition at the time of the divorce, but was later discharged. Both she and her new husband testified that she was now in good health.

On appeal, the husband argued that the psychiatrist’s testimony ought to be controlling. The Supreme Court said that the trial court saw and heard her. She and her new husband said she was fit. The trial court had not abused its discretion.

Finally, in 1955, the Court reversed a trial court’s finding that the mother was unfit due to her mental condition. The wife had asked for separate maintenance and custody, and the husband had cross-petitioned for divorce on the grounds of gross neglect of duty. The trial court gave the husband the divorce and custody of the child. The court based its decision on the grounds that the evidence showed that the wife had been in and out of a mental hospital on three different occasions and had not taken care of the children in a satisfactory manner.

The Supreme Court was not impressed. Not only did the Supreme Court reverse the trial court as to which party should have the divorce, but also said that there was no reason why the wife should not be given custody. She had not been guilty of immorality. She had testified that she would look after the children and her father had offered to help. The Court reminds the trial judge that we have a preference for mothers.

While none of these three cases modified any outstanding principle of custody law, they do indicate that our court is not impressed with the danger of neurotic or psychotic women bringing up little children. Seemingly the love and care of a neurotic is assumed to be as trustworthy as that of a mentally normal mother.

Effect of taking the child from the state: Another reversal of a trial court occurred in Burns v. Burns. The trial court had found the mother unfit because she disobeyed a specific injunction prohibiting the removal of the child from the jurisdiction of the court. It felt that one who would make such mockery of the court's orders could not be fit. The Supreme Court held that this was not a contempt proceeding against the

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23 For a discussion of this aspect of the case, see p. 233, infra.
mother so the court should have taken evidence on her fitness. Otherwise, it would not be able to determine what was best for the child. She might have been able to explain her contempt. Obviously her actions were merely malum prohibita, not malum in se.

Courts usually like to keep the child within their jurisdiction, as in the Burns case, but they are not required to. Judge (Secrolder) of McPherson County was allowed to grant the father the right to take a child to Oregon. At the time the divorce was granted, the child was given to the mother's sister-in-law. Later the father wanted to go to Oregon, so filed a motion asking that custody be given to him. The trial court awarded him custody and gave him the right to remove the child to Oregon. The wife appealed on several grounds but relied mainly on the lack of evidence as to fitness and the ruling allowing the father to remove the child from the state. The Court, as usual, held that it should not upset the trial court's findings of fact. Further, they said that there was nothing wrong in a court giving permission to one spouse to remove the child from the jurisdiction.

**Necessary of Finding of Unfitness:** Apparently there was some feeling among the Kansas Bar that in child custody cases the court could not change custody from one spouse to the other without a finding that the spouse who had custody was unfit. The Supreme Court has emphatically denied this supposition.

In *Pearson v. Pearson* the Court denied defendant's argument that a finding of unfitness was necessary. Frequently, it said, both parents are in fact fit. When this is true, preference is usually given to the mother, but the welfare of the child is the paramount question. A fit spouse may lose custody if it is better for the child.

Even a mother is denied the use of this unfitness argument in the *Collins* case. The mother's plea that she had not been found unfit so could not be separated from her child fell on deaf ears. The court pointed out that at the time of the hearing the child was not with the mother. Therefore, it was not separating the mother and child by the change in custody.

Of course, this leaves open the question of whether a father can obtain a change when the mother has custody unless there is a finding that the mother is unfit. Under the broad language of the *Pearson* case, it would not seem to be necessary. However if an attorney is fortunate enough to induce a trial court to order a change in custody in favor of the father, he had better ask for such a finding.

**Conflicts:** Two interesting cases involving the jurisdiction of a Kansas court to determine child custody were decided in 1954. In neither case was the Court too clear as to what it was holding. In the first case, *In re Heilman,* the Court invoked either a very shaky doctrine of full faith and credit or else merely followed the well-established rule that a change in circumstances permits a change in custody. Briefly, the facts, as recited by the Court, show that the parents were divorced in Clay Center with custody being given to one set of grandparents. Then the parents remarried and took the child with them to California. While in California they obtained another divorce with the mother receiving custody. The grandparents came to California, abducted the child and brought him to Kansas. The mother is now trying to regain custody. The Court

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25 The mother had gone to Alaska and the child's father was seeking custody. The mother's attorney wanted to take a deposition as to conditions in Alaska, but the trial court refused when it discovered that she had left Republic County.


29 In the original divorce proceeding custody had been given to the wife of the defendant's brother.

holds that the District Court of Riley County never lost jurisdiction, so the grandparents still had a right to custody. However, the Court does go on to say that the child is now back in Kansas and that this factor vests jurisdiction in our courts. Whether there was evidence of changed circumstances is not clear. Therefore the actual basis of the decision remains in doubt. The fact that the United States Supreme Court denied certiorari can be given little weight, although it aids the changed circumstances theory.

In the other case, Duffy v. Duffy,91 the Court again held that Kansas had jurisdiction. The father obtained a divorce and custody of the child in a suit based on publication service. Subsequently the wife stole the child away. The fact that the father had to go to Nevada and bring a writ of habeas corpus to get the child back did not deprive the Kansas court of continuing jurisdiction. The wife had argued that since there had been no personal service on her, the Kansas court’s determination of custody rights was invalid for lack of jurisdiction.

One other conflict case was decided by our Court.92 It held that without a showing of change in circumstances a Mississippi decree awarding custody to the father must be given full faith and credit. The mother, who had obtained custody through self-help, cited Wear v. Wear,93 but the Court said that there had been no showing of a change in circumstances.

In none of these cases did the Court cite May v. Anderson94 decided by the United States Supreme Court in 1952. In that case the Supreme Court held that one state was not bound by a custody award of another state when there had been no personal jurisdiction over one of the parents at the time of the first suit.

Upon a casual survey, the first two Kansas decisions95 would seem to be in conflict with the May case. The Heilman case96 might be erroneous since full faith and credit was not given to the California custody award; California having personal jurisdiction over both parents and the child. In the Duffy case97 the argument of the mother that the Kansas court had no personal jurisdiction over her seems to follow the May case.

The Thompson case98 looks correct. The U. S. Supreme Court has held99 that if there is a change in circumstances, the courts may then change custody. In giving full faith and credit to the Mississippi decree the Kansas Court apparently did not depart from the May doctrine since it was not shown that the Mississippi court did not have personal jurisdiction over all the parties.100

This problem is important. It deserves a much fuller treatment than can be given in a survey such as this. Therefore, the Kansas Law Review will publish a comment on this problem in a subsequent issue.

Miscellaneous: There are two other child custody cases decided by our Court during the period of this survey. Neither is of extreme importance. Walker v. Neschke101 was

93 130 Kan. 205, 285 Pac. 606 (1930). This case holds that, if the child is in Kansas, a Kansas court may enforce the state’s right of parens patriae and order a change in custody if they have found a change in circumstances and if it is in the best interests of the child.
94 345 U.S. 528 (1952).
96 In re Heilman, supra, note 35.
100 In re Thompson, 178 Kan. 1, 2, 282 P.2d 440 (1955).
101 178 Kan. 149, 283 P.2d 424 (1955). Several other cases cited in this article under other headings also involve custody awards. They are basically fact cases. E.g., Thornbrugh v. Thornbrugh, 175 Kan. 56, 259 P.2d 219 (1953), where the court found no abuse of discretion.
purely an appeal on the facts and the Court held that the trial court had not abused its discretion in refusing to give the mother custody, even though she was now a fit person to have the children. She had married the man with whom she had been living.

In the other case, Talbott v. Talbott, a couple from Eastborough in Wichita were squabbling over visitation rights and whether the wife had taken too many dinner forks when she left. The trial court had refused to change the husband’s visitation rights and said that it could not be bothered with dinner forks. The Supreme Court found no abuse of discretion.

IV. Child Support

Collection of Back Payments: Most Kansas trial courts, under the case of McKee v. McKee, have been using the doctrine of latches to bar recovery of back alimony. The Supreme Court has now distinguished the McKee case. In Peters v. Weber, the Court, in reversing the trial court, held that special equities were present in the McKee case. In that case the Court had refused to give judgment for a $10.00 a month deficit in the alimony payments since the child was now over twenty-one, and the mother had accepted the $50.00 regular payments instead of the $60.00 ordered by the court. Here the child was fourteen, and the defendant had paid nothing for twelve years. “The child is still a minor and enforcement of the last two payments would accrue to his benefit.”

The Court says that trial courts still may use the doctrine of latches, but must find “special circumstances.”

However, the plaintiff collected for only five years. “Installments decreed in a divorce action for the support of a minor child become final judgments as of the dates due, may be collected as other judgments, and are barred by the statute of limitation.”

Duty to Support Incompetent Adult Children: The Kansas Court has now set at rest any arguments concerning the duty of parents to support an incompetent adult child. It has held that there is a common law duty on the part of the parents to support their children even after they have reached majority, if, at the time of becoming of age, they are in such feeble mental condition as to be unable to maintain and support themselves.

The case arose when the State Department of Social Welfare sued the estate of the parent of the incompetent for the $12.00 a week charge provided for under our statutes for those in state hospitals. The Court held that support money due, prior to the death of the parent, may be collected from the estate of the parent.

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46 175 Kan. 838, 843, 267 P.2d, 481, 486 (1954) The money could also be used to buy the mother a new fur coat.
47 In re Estate of Glass, 175 Kan. 246, 262 P.2d 934 (1953). The court relied on Kan. G.S. 1949, 77-109 that the common law exists in Kansas, but may be modified to suit the needs of the people; Cooper v. Seaverns, 81 Kan. 267, 105 Pac. 509 (1909), that the common law can be changed; 39 AM. JUR. p. 631 and 67 C. I. S., p. 686 that there is a general duty to support; Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923), which changed the common law rule, that illegitimate children as well as legitimate children must be supported; and Theneman v. Manring, 152 Kan. 780, 107 P.2d 741 (1940) and Prosser v. Prosser, 159 Kan. 651, 157 P.2d 544 (1945) that the duty to support extends to an incompetent or destitute adult child. The case concludes: “The decisions show clearly that a rule of common law unsuited to the conditions and the needs of the people of this state will not be followed.” 175 Kan. 246, 247, 262 P.2d 934, 936 (1953).
48 The executor cited to the Court 39 AM. JUR. p. 647 to the effect that there was no obligation to support after death. The Court says that the context shows that the text referred to support after death, not to the liability for support prior to death to be collected from the estate. The executor also argued that Kan. G.S. 1949, 59-2006, which gives to the State Department of Social Welfare the right to collect $12.00
Conflicts: In 1951 the Kansas Legislature passed the Uniform Reciprocal Support Statute. In 1953 Kansas amended the act to conform to the new materials added by the 1952 National Conference of Commissioners of Uniform State Laws.

The procedure, use and effectiveness of this act will not be discussed in this survey since it has been fully covered in a comment, The Uniform Reciprocal Enforcement of Support Act by Fred Six, appearing in 3 Kan. L. Rev. 44. (1954).

One conflict case involving a question of child support arose during the period of the survey. Merely a pleading question was involved. The defendant demurred to the plaintiff's petition. The defendant said that the child was in Washington, that he was illegitimate and that under the law of Washington, the defendant was not liable for his support. The Court held that such facts did not appear on the face of the petition and therefore must be raised by answer and not demurrer.

Revoking of Parole for Non-payment of Support: In Moody v. Edmonson, the Court limited the use of the very effective practice of some trial courts of fixing no limit to the parole granted a father after his conviction under Kan. G.S. 1949, 29-442 to 29-448. The Court held that the non-support statute and not the general parole procedure applied. This means that the trial court must limit the parole to two years and then either turn the father free, or revoke the parole and let him finish out his sentence in jail.

V. Divorce

Attorney Fees: The Kansas Court is going to protect the Bar's right to attorney fees in divorce actions. The district court, under Kan. G.S. 1949, 60-1507, may, at its discretion, "... make such order relative to the expenses of the suit as will insure to the wife an efficient preparation of her case; and on granting the divorce in favor of the wife or refusing of the application of her husband, the court may require the husband to pay such reasonable expenses of the wife in the prosecution or defense of the action as may be just and proper, considering the respective parties and the means and property of each."

In Bennett v. Bennett, the wife, after starting a divorce suit, fired her attorneys. Before the firing, the trial court had granted her suit money, but had reserved the question of attorneys' fees. The fired attorneys filed a motion asking for their fees which the court allowed, but waited until the end of the suit so that it could tax the attorney fees along with the other costs. At the final hearing it taxed the attorney fees to the defendant. The defendant raised several points. He complains that Kan. G.S. 1949, 60-1507 says "during pendency of the action." The Court says "pendency" means anytime up to the final hearing and, besides, the district court has reserved the question of the fees. The defendant argues that the attorneys must start a separate suit. The Court says that the wife had made the request for the fees at the beginning of the law suit, so this issue may be decided in the divorce proceeding. The defendant says that there was a property agreement between him and the plaintiff, which was approved by the court. The attorney

a week support payment, created a statutory right only, and therefore our general survival statute, Kan. G.S. 1949, 60-3201 did not apply. The Court thought otherwise. It held that Kan. G.S. 1949, 59-2006 merely repeated the common law liability and added only the amount and conditions precedent to collection. Therefore, there was survival of the common law liability under Kan. G.S. 1949, 60-3201. The Court cites no authority that at common law such actions did survive. Since our court has created a new common law liability, it would seem impossible to find precedent for survival in earlier cases.
fees are extra. The Court says there was no abridgement since the agreement referred to the second set of attorneys and besides, the parties had no right to contract away the court’s jurisdiction to determine fees.

Going even further, in pure obiter dicta, the court says:  
"Let us suppose the parties in a similar action prior to an allowance of a fee to the wife’s attorneys, effected a reconciliation, would such fact oust the court of jurisdiction to make an allowance for services rendered for the wife? We agree with the Nebraska court it would not."

Conflicts: Kansas has decided two new cases based on our full faith and credit statute. This statute provides that full faith and credit must be given to all sister state divorce judgments, unless service was by publication on a Kansas resident. In that event all questions of alimony, property right, custody and child support "... 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."

In Stricklin v. Snively, the Arkansas court granted the plaintiff wife, a divorce, retaining jurisdiction to settle property questions. The defendant did not appear nor was he personally served. More than two years later the wife sued her husband in Kansas asking for a division of property jointly purchased by her and her husband. The defendant argued that Kan. G.S. 1949, 60-1518 prohibited such a suit unless brought within two years. And, unless the plaintiff was suing under this statute, her right to have property questions settled was foreclosed by the divorce suit citing Calkins v. Calkins. The court rejected each argument. Kan. G.S. 1949, 60-1518 is not applicable. "...[A]ppelee is seeking neither alimony nor a division of appellant’s property... Moreover, she is asking for no part of appellant’s interest in the property described. She asserts only rights to her own interests therein..."

She is suing, says the court, in her separate and individual capacity as the owner of the property.

The Court rejects the second argument on the grounds that the Calkins case is not applicable to foreign divorce decrees. "In this case the Arkansas court could not lawfully adjudicate the interests in property not within its jurisdiction..." Therefore, the Kansas Court had jurisdiction to render a decree since both the property and the persons were before it.

In the second case, Willoughby v. Willoughby, Kan. G.S. 1949, 60-1518 was invoked in order to obtain alimony and property. The husband, defendant here, received an ex parte divorce in Nevada. Within the two years allowed by the statute, the wife sued in Kansas for divorce, alimony and division of the property. The defendant pleads the Nevada decree and asks that full faith and credit be given to it. But he did request that the court make a division of the property.

The Supreme Court admitted that full faith and credit had to be given to the divorce, but applying Kan. G.S. 1949, 60-1518, said that she was entitled to alimony and a

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55 The court cites Kiddie v. Kiddle, 90 Neb. 248, 133 N.W. 181 (1911).
58 155 Kan. 43, 122 P.2d 750 (1952). The Calkins case held that in a divorce action all of the property rights arising out of the marriage must be settled in the divorce action.
60 175 Kan. 253, 256, 262 P.2d 823, 826 (1953).
division of the property. The court cites the U.S. Supreme Court case of Estin v. Estin\textsuperscript{63} to the effect that a divorce granted on constructive service does not dissolve all the incidents of a marriage relationship. Full faith and credit need not be given to all the incidents of a divorce, since divorce is divisible.

The defendant also argued that, under the Kansas decisions, when a divorce was granted for the fault of the wife, the court could not grant alimony.\textsuperscript{64} The defendant even contested the constitutionality of KAN. G.S. 1949, 60-1518. He contended that this statute denies full faith and credit to sister state judgments and is therefore invalid. However, he did not raise this constitutional issue until the appeal, and the court refuses to discuss it.

These two cases raise many interesting problems concerning the effect and constitutionality of KAN. G.S. 1949, 60-1518. Also implicit in these cases is the problem of the extent to which full faith and credit must or may be given to foreign divorce decrees.

Ever since Williams II,\textsuperscript{65} the United States Supreme Court has been vacillating as to the requirements of full faith and credit in re the periphery relationships, alimony, support, child custody, arising out of the dissolution of a marriage.

Space limitations prevent a discussion of these larger issues. It is hoped that a later issue of the Review will carry an article discussing these problems in relation to the Kansas statutes and decisions.\textsuperscript{66}

**Grounds:** Although prior to the period of this survey, the 1951 Kansas Legislature revised the eleventh ground for divorce under KAN. G.S. 1949, 60-1501.\textsuperscript{67} It removed the requirement that one of three doctors, appointed by the court to determine the sanity of the defendant, be a superintendent of a state hospital for the insane and that all three be "recognized authorities on mental diseases." Now three ordinary physicians make the examination. This revision removes any doubt that the doctors must be psychiatrists and alleviates the unnecessary hardship in obtaining the services of a superintendent of a state institution.

We have two cases discussing grounds for divorce. In Lindbloom v. Lindbloom\textsuperscript{68} the Court reversed the district court's ruling that the divorce should be granted to the husband on the grounds of gross neglect of duty. The facts showed that the wife had been a frequent visitor of a mental hospital, that there were three small children in need of care and that the husband had not hired someone to help her nor had he offered assistance. The Court remarked that the husband had only one real complaint—the way she kept house and cared for the children. Divorce is based on fault, and there is no fault when the wife does not do a good job because she is ill, has too many children to look after, and has no help. "When parties are married they take each other for better or worse. If the wife should become ill with tuberculosis, cancer, or any other disease, and be unable to perform her household duties as well as she would ordinarily perform them, we would not be willing to say that the husband was entitled to a divorce because of that situation."\textsuperscript{69}

The trial court was also in error for not granting separate maintenance to the wife on the grounds of extreme cruelty. The husband, not appreciating his wife's troubles, had

\textsuperscript{63} 334 U.S. 541 (1948).

\textsuperscript{64} See Divorce, Property, p. 235, infra, for a discussion of the late cases.


\textsuperscript{66} See p. 240, infra, for a proposed student comment on a portion of this larger problem.

\textsuperscript{67} Now appearing as KAN. G.S. 1953 Supp., 60-1501.


\textsuperscript{69} 177 Kan. 286, 296, 279 P.2d 243, 250 (1955).
told her that she could not see her three children; took them away from her and gave them to his mother to raise; and took her back to her parents prohibiting her from living in his home. The Court says: "It is difficult to think of anything more cruel to a wife and mother of three small children . . ." 

In *Rosander v. Rosander*,71 the plaintiff wife, asked for a divorce on the grounds of fraudulent contract.72 She alleged that the defendant knew and had not told her that at the time of the marriage he was affected with epilepsy. The trial court found that he did not know the cause of his illness nor had he attempted to conceal it. The Supreme Court said there was evidence to sustain this finding. However, by way of dicta, the Court does state that, since such marriages are prohibited by law73 even though not void, one who is induced to marry an epileptic when there is concealment with knowledge74 is entitled to a divorce on the grounds of fraudulent contract.75

**Nature of the Action, Jurisdiction and Service:** In two cases76 the Kansas Court decided several small questions relating to jurisdiction, service and the nature of a separate maintenance action. In *Schaeffer v. Schaeffer*,77 the plaintiff wife filed in the Dickinson District Court an action for divorce and custody. Then, at a later date, the defendant filed for divorce and custody in Saline County. After both courts had awarded custody to the respective petitioners, the husband filed, in the wife's suit, a motion to dismiss. This motion was sustained by the trial court,78 but the court allowed her to amend her petition to state a cause of action for separate maintenance. The husband appealed and the Supreme Court overruled the Dickinson District Court on the grounds that they had no jurisdiction. The Court said that since the Dickinson Court had no jurisdiction, due to the lack of residence of the parties, the Saline District Court obtained jurisdiction at the time of the filing of the husband's suit. The wife argued that the separate maintenance action related back to the original filing. The Court said no. A separate maintenance action is an entirely new and separate cause of action. The usual doctrine of relation back on an amended petition does not apply.

In the other case, *Schooler v. Schooler*,79 the Court was faced with the problem, as in the *Schaeffer* case, of both parties trying to be plaintiff and trying to have the court of their own choosing decide the case. Plaintiff started his action in Wilson County. Then the defendant started her action in Wichita. In the trial of the Wilson County case,80 the
attorney for the wife appeared and contested the service and the jurisdiction of the Wilson District Court.81

It appeared that the plaintiff had not personally served the defendant. The plaintiff had sent the sheriff out for her, but he returned the process, "not found." So the plaintiff obtained leave of court and served her by publication. The defendant argued that this was invalid since she was still within the state. The Court held that KAN. G.S. 1949, 60-2525 (para. 5) allowed service "in all actions" where the defendant has left the county in order to avoid service. A divorce action comes within the phrase "in all actions" despite the fact that the second paragraph of KAN. G.S. 1949, 60-2525, provides for service in divorce actions. The Court felt that the second paragraph was not exclusive.

Property Rights: Several cases have arisen under KAN. G.S. 1949, 60-1511 and 1516. KAN. G.S. 1949, 60-1511 is our property and alimony statute. It provides, inter alia, that if the divorce is granted for the fault of the husband, the wife is entitled to her own property, plus alimony in any amount the court may deem reasonable, while if the divorce is granted for the fault of the wife, she is entitled to her own property, plus, at the court's discretion, a division of property. KAN. G.S. 1949, 60-1516 allows a wife to sue for alimony without first obtaining a divorce.

In two cases decided the same day,82 the Court clears up some ambiguities in these statutes and once again protects our trial courts.

In Mathey v. Mathey,83 the Court held that, under the first part of KAN. G.S. 1949, 60-1511,84 a grant of real and personal property to the wife would be considered alimony even though the court did not designate it as such in its judgment.85 The Court reasons that, since the fault lies with the husband, the trial court could grant only alimony under KAN. G.S. 1949, 60-1511. Therefore it must have meant the unlabeled award to be one for alimony, not property.

Then, in Brayfield v. Brayfield,86 the Court added another pound of insulation protecting the trial courts. They applied the same theory to KAN. G.S. 1949, 60-1516, as they had to KAN. G.S. 1949, 60-1511. The trial court had awarded the plaintiff $1,787.50 in cash and $90.00 per month for so long as they remained husband and wife. The husband did not pay the cash and fell behind in the $90.00 payment. She had him brought in and cited for contempt. The court found him in contempt for not paying the $1,787.50. On appeal, the defendant argued that since the trial judge had awarded $90.00 a month as alimony, the $1787.50 must have been a property award. No, says the Court. "Under existing conditions, and without precedent, since the award in question was made under a statute . . . providing for the recovery of alimony only, and since that was all the trial court could award in the action, we would be inclined to presume that the court followed the statute and hold that such an award was an alimony award, even though it was not expressly so designated. Be that as it may, the question is no longer an open one in this jurisdiction."88

81 He also argued a procedural point of no merit.
82 One was filed on December 12, 1953; one was filed on December 4, 1953. However, the Court states that they were decided the same day. Brayfield v. Brayfield, 175 Kan. 337, 341, 264 P.2d 1064 (1953) (Phrase omitted when printed in the Pacific Reporter.).
84 The first part states the rights of the parties when the divorce is granted to the fault of the husband.
85 Sometime later, after the term was over, the parties discovered certain errors in the memorandum opinion of the judgment. The Court entered a nunc pro tunc order correcting these errors and expressly stated that the judgment was for alimony and not a division of property.
The court then cited the *Mathey* case and said that while that case construes Kan. G.S. 1949, 60-1511, the reasoning is the same and must be followed. In 1955 the Court gives another "last guess" as to what type of an award is allowed under Kan. G.S. 1949, 60-1511. In *Cunningham v. Cunningham*, the Court upheld an award of an $11,000.00 lien on the property of the husband, even though the divorce was granted for the fault of the wife. The defendant had argued that there was no evidence that the property had been jointly acquired. The Supreme Court said, however, that the husband had acquired the property during the time he was living with his wife. Therefore, it was jointly acquired.

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Under our present divorce and alimony statutes, many attorneys are not clear as to the distinction between property awards and alimony. This is understandable. Lawyers consider alimony as money payments for support, while a property division brings to mind visions of partitioning the land. The trouble lies in the wording of our statute. It permits alimony to be paid in real and personal property, while a property division can be accomplished through a payment of money by the spouse who receives a disproportionate share of the property. Further, all of these divisions and payments rest within the sound discretion of the trial judge.

In the last two years the Court has made it clear that it is not going to reverse a trial judge's discretionary ruling on the grounds that he forgot to label a money payment as a property division or a division of real or personal property as alimony.

One theoretical distinction still exists under our statutes. If the divorce is granted for the fault of the wife under the second part of Kan. G.S. 1949, 60-1511, the trial court is free to refuse to grant any property to the wife, although he *may* at his discretion (Emphasis added). If the divorce is granted for the fault of the husband under the first part of Kan. G.S. 1949, 60-1511, the trial court *shall* grant her alimony and a division of the property (Emphasis added).

But the Court continually narrows this distinction. In *Reedy v. Reedy*, where the trial court granted the divorce for the fault of the wife, the Court approved the trial court's division. The Court said that how a trial judge divided the property acquired during the marriage by the joint efforts of the spouses would lay within his sound discretion.

There seems to be no way of claiming that the wife should receive less if she was at fault than if the divorce was granted for the fault of the husband. The trial court is free in either case, and the Supreme Court will not reverse.
Turning from the question of awards under our alimony and property division statutes, the Kansas Court has added another case to those decisions making a distinction between property settlement contracts merged in the judgment and those merely approved by the court at the time of granting the divorce. The Court, in Thoele v. Thoele, held that a wife could sue for the balance due on a note separate and apart from the judgment in the divorce action. At the time of the divorce, the court had merely approved the settlement. It had not made it a part of the decree.

The only other property case deserving mention in this survey is In re Estate of Beiler, restating the well-known rules regarding fraud and overreaching in post-nuptial contracts. The Court found that there was competent and credible evidence to sustain the trial court's ruling that the contract was valid.

Miscellaneous: There are several other Kansas cases discussing various aspects of divorce law. Most are without great importance or general interest and will not be discussed at length. Smeltzer v. Smeltzer, Berndt v. Berndt, Thornbrugh v. Thornbrugh and Rosander v. Rosander are basically fact cases in which the Supreme Court refused to reverse the trial court's findings. Both the Smeltzer and Rosander cases state the general rule that corroboration is needed before a divorce will be granted. They point out that the corroboration must be to facts that would sustain the divorce and not to mere iniquities which alone would be insufficient.

Many of the cases already cited in this section contain questions of practice and procedure. When important, these questions were discussed in connection with the substantive law of the case. Three other cases, Lang v. Lang, Moeller v. Moeller and Peters v. Peters should be mentioned.

The Peters case held that no appeal would lie from an award of alimony when the appellant had not moved for a new trial.

The Lang case involved the interesting question of the time allowed for the appeal from a decree granting a divorce when no property questions were involved. The Court held that the addition in 1953 of a new statute changing the time for appeals, applied only to general actions and not to divorce actions. Divorce actions are controlled by Kan. G.S. 1949, 60-1512, and its provisions are mandatory and imperative.

There is one point to watch. In the Moeller case, the Court, in ruling on the right of a defendant to have a divorce decree set aside for fraud, holds that if a cross-petition does not contain a plea for divorce, the court is not impowered to grant one. "Counsel for appellant say the prayer is not part of the petition and quotes some of our opinions  

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84 E.g., In re Estate of Ehideler, 172 Kan. 695, 242 P.2d 1057 (1952).
86 175 Kan. 190, 262 P.2d 939 (1953).
87 "The law is well settled that the validity of a postnuptial contract will be upheld where the contract, if fairly and understandingly made, is just and equitable in its provision, and is not obtained by fraud and over-reaching." 175 Kan. 190, 194, 262 P.2d 939, 941 (1955).
88 175 Kan. 293, 262 P.2d 826 (1953).
91 177 Kan. 45, 276 P.2d 338 (1954). But see Divorce, Grounds, supra, p. 233, for other aspects of this case.
95 KAN. G.S. 1953 Supp., 60-2314a. This section allows an appeal, when timely perfected, from a ruling on certain motions even though more than two months have elapsed from the date of the ruling.
96 This section provides for certain notices and that appeals must be perfected within four months.
in which that has been said. This statement is not accurate. The statute, 60-704, makes it a part of the petition.107

Most attorneys have always felt, if the facts justified it, that the court was free to grant relief even if the prayer was improperly drawn. Now the attorney must carefully check his prayer. However, if the attorney can show equities, the Court probably would not feel bound by its cavalier statement in the Moeller case. The Court should limit this rule to the facts of the Moeller case.

VI. MARRIAGES

Common Law Wife: One rather uninteresting fact case108 was decided by the court in 1955. The case was the usual one of a man and woman living together, he dying, and she claiming to be his widow without much evidence of a ceremonial or common-law marriage. The trial court found that there had been no marriage. The Supreme Court would not reverse.

Conflicts: Suppose a divorcée goes off to Missouri and marries her boy friend before the expiration of the six months waiting period required under Kansas divorce law. She then returns to Kansas and lives with her new husband. He is killed in an accident before the six months are over. Can she claim Workman’s Compensation? Freeman v. Fowler Packing Co.109 held that if they had lived together past the six months period, a common law marriage resulted, and she was his “legal” widow. Wheelock v. Frewald110 held that the marriage, in such a fact situation, was valid in Missouri. The Kansas divorce was absolute even though the statute required a six months waiting period.

The answer is found in Peters v. Peters111 where the Kansas Court held that she was not the “legal” widow under the Kansas Workman’s Compensation statute.112 Marriages contracted within the prohibited period are made absolutely void by our statute.113 It contains no exceptions. The Freeman case likened them to an incestuous marriage. The Court concludes: “The fact, as is pointed out, the marriage ceremony was performed in Kansas affords no sound basis for distinguishing the fore-going case [Freeman case] from the one at bar. The opinion makes no such distinction. Neither does our statute.”114

Note that the court was merely interpreting the term, “legal widow” in our Workman’s Compensation Law. The court expressly states115 that it is not answering the interesting question raised by the appellant respecting the effect of Kan. G.S. 1949, 60-1512, in other situations where the Workman’s Compensation Act is not involved.

However, from the dicta in earlier cases,116 it is clear that the marriage, if performed in Kansas or in another state to escape the Kansas restrictions, would be void for all purposes.

It is still an open question as to what the Kansas Court would hold if the parties had married outside in a state where the marriage was valid and had not done so in order to avoid Kansas law.

110 66 F.2d 694 (8th, 1933).
112 Kan. G.S. 1949, 44-508(1).
There is a good case note on the conflict aspects of this case in 4 Kan. L. Rev. 122 (1955).

License Requirements: The 1955 Legislature finally brought up to date that part of our marriage licensing law prohibiting the marriage of insane and feeble-minded people. This portion of our marriage statute was originally enacted in 1903. At that time very little was known about mental diseases or their causes. We were barely out of the snake-pit in treatment or understanding. The eugenics movement had gained the ear of many legislatures. Eugenicists argued that, if insane, feeble-minded and epileptic citizens were prevented from marrying, the number of sub-standard children would be reduced. Many agreed with Justice Holmes’ famous dictum: “Three generations of imbeciles are enough.”

Prior to 1955, our law prohibited the marriage of epileptics, imbeciles, feeble-minded people, and those “afflicted with insanity,” unless the woman in question was over 45 years of age. Children of insane parents were also prohibited from marrying. Under our new statute only a person “who is feeble-minded” or who has been adjudicated insane is prohibited from marrying. This means that epileptics may now marry. Removing epileptics from the insanity statute is in line with modern medical findings. Most forms of epilepsy are due to environmental conditions after birth. Those few, whose epilepsy is due to biological factors, do not necessarily transmit these factors to their offspring. If they do, they will transmit only a tendency toward acquiring the disease. Seizures, as such, are not inheritable.

The new statute also leaves out the provisions prohibiting the marriage of the children of insane people. This also conforms to the more modern view that most insanity is due to environmental factors present during childhood and not due to inheritable weaknesses.

However, our statute does not make a clear break with the past. We still have a remnant of the theory that insanity is inheritable. The statute allows the marriage of a woman over 45 years even though insane or feeble-minded. If the legislature had removed this section, they would have adopted a new theory as to the basis for prohibiting marriages; that feeble-minded or insane people should not marry because they are unable to support or maintain a family unit. By leaving that provision in, the theory remains mixed, partaking of both the idea of fear of sub-standard children and of inability to support a family.

The change from “afflicted with insanity” to that of “adjudicated insane” reflects this same view, but clears up the extremely vague word “afflicted.”

This statute also amends Kan. G.S. 1949, 23-121 and 23-122 to conform to the new 23-120.

118 Kan. Laws 1903, c. 220.
121 Psychiatrists classify sub-standard people as idiots, imbeciles, and morons, in that order of ability. All of these groups are part of the general classification, feeble-mindedness. Those who are so classified are not “insane,” but merely do not have sufficient intelligence to handle their wants although morons may be able to do some simple types of work. The old statute, by including both the words imbecile and feeble-minded, was inartfully drawn. The word feeble-minded included the word imbecile. Even though the legislature removed the word imbecile, they surely intended, in using the word feeble-minded, to include all three sub-standard groups.
122 See note 119, Supra, on the question of imbeciles.
123 Fabing and Barrow, Medical Discovery as a Legal Catalyst: Modernization of Epilepsy Laws to Reflect Medical Progress, 50 NW. U. L. REV. 42 (1955).
124 See note 121 supra.
125 These sections refer to the duties of the probate judge in issuing the license and of the official who performs the ceremony.
Probate Court: Under a new statute passed by the 1955 legislature the probate judge may now authorize a deputy clerk to issue marriage licenses under KAN. G.S. 1949, 23-106. However, these clerks are not empowered to give consent to under-age applicants. That right is granted to the probate judge and the new statute expressly states that the new clerk is not to exercise it.

VII. Minors

Contracts: Minors are not always able to escape from their contracts. KAN. G.S. 1949, 38-103 provides that a minor may not disaffirm his contract if he has engaged in business as an adult and the other party has good reason for assuming him capable. This statute was applied in Pottawottamie Airport and Flying Service, Inc. v. Wenger to prevent a 20 year old boy escaping from his negligence. The boy had borrowed an airplane from the plaintiff and then wrecked it. He hoped to escape liability on the grounds that he was a minor and had disaffirmed the bailment before coming of age. The Court held that there was evidence that the boy had acted as an adult in dealing with the Flying Service and they had no reason to assume him a minor.

VIII. Conclusions

In a general survey such as this, an author of an article can do no more in the space allotted him than to give notice that certain cases have been decided by our Court, that certain statutes have been changed, and that certain areas of the law are developing and need watching.

This is all that has been attempted here. Most of the cases decided in the last two years are of relatively little importance beyond their own facts. Family law tends to be a system of unique cases. The reluctance on the part of our Court to overrule either a trial court's finding of fact or the exercise of its discretionary power makes it even harder to predict from one case to the next.

In several areas of family law, especially those involving conflict questions, the Kansas law is quite unsettled and doubtful. It is hoped that more work may be done on this in future issues of the Review.

Cases decided by the Kansas Federal District Court and the 10th Circuit Court were examined for holdings on Kansas Family Law. Only two cases were found and neither raised any new points. One merely interpreted an ante-nuptial contract, while the other decided a question involving the application of a Wisconsin statute of limitations to a suit for alienation of affections.

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126 KAN. LAWS 1955, c. 273.
127 KAN. G.S. 1949, 59-202 provides for the employment of deputy clerks.