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Family Law (Survey of Kansas Law)

Dan Hopson Jr.

*Indiana University School of Law*

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sational headlines to news dispatches which they publish.” For its authority the court found one of the delightfully succinct statements of the Late Honorable Rousseau A. Burch, then an Associate Justice of the Kansas Supreme Court, which reads as follows: “It is the practice of some newspapers deliberately to put poison in a headline and follow it with a weak antidote in the body of the article.”

FAMILY LAW
Dan Hopson, Jr.*

I. Adoption

Consent: The court has now started the retreat from the legal implications of In re Thompson. In the Thompson case, the court held that a mother could withdraw her consent to adoption at any time prior to the final decree of the probate court. The Sedgwick County District Court, in Hawes v. Rhodes, faced the following facts. Two sets of parents had signed contracts surrendering their respective children to the Maud Carpenter Children's Home under the provisions of Kan. G.S. 1949, 38-112, 113, 114. Some four years after both sets of children entered the home, their parents met and married each other. The parents then asked the home to return their children. Mr. Rhodes, the president of the corporation, refused. Later, the parents sent formal notice of the recision of the surrender agreement and brought this habeas corpus action. The trial court, on authority of the Thompson case, held that parents could withdraw consent at any time prior to a final order of adoption and ordered the home to return the children.

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*Assistant Professor of Law, University of Kansas School of Law, A.B., 1951, LL.B. 1953, Kansas Univ.; LL.M., 1954, Yale Univ.
2 For the facts and background of this case see Hopson, Family Law, 4 KAN. L. REV. 225 (1955).
4 These sections provide for a statutory scheme whereby parents are given the right to surrender their children to corporations authorized by Kan. G.S. 1949, 38-112 to receive them. The corporation then assumes the duties of natural guardian and apparently under Kan. G.S. 1949, 38-114 (b) may consent to the adoption of the children. In its decision, the court makes no reference to these sections of the statutes, but it is clear from the brief of the appellant and the nature of the case that the basic statutory authority for the action of the Home is found in these statutes.
The supreme court reversed. It stated that the existence of the benevolent home, which had a duty to care for children accepted by the home, distinguished this case from the Thompson case. The court then says that we have here not only the element of adoption, but other facts and circumstances. Apparently the court is referring to the fact that these homes have "and possess over such children all the rights appertaining to the natural or legal guardian."

The court concludes by saying that no evidence had been presented as to whether it would be better for the children to stay at the home or go back with their parents. "These matters deserve some consideration. . . ."

There is a paucity of decisions on the validity of these surrender contracts. In the only Kansas case in point, Wilson v. Kansas Children's Home, our court protected the right of a twenty-year-old mother to regain custody of her illegitimate child. The court decided the case on the technical grounds that the home had not formally accepted custody as required by the statutes, even though Justice Hoch, concurring, argued that the minority of the mother should invalidate the contract. The case might leave the implication that if the correct procedure had been followed, the mother would have no right to her child, although the opinion suggests that the court is opposed to these contracts.

These contracts present a real problem. The criteria—what is best for the child—requires a looseness of appellate rule and corresponding discretion on the part of the trial court. Certainly the Thompson case allowed the mother too much control too long. Yet, to hold that the contract becomes irrevocable, also defeats the purpose of the rule.

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8 Kan. G.S. 1949, 38-114. The appellants presented this argument in the brief. The court does not quote the statute and merely says that "It would be somewhat more difficult to distinguish between the Thompson case, supra, and the present case. . . . if we were to go on the assumption that only an adoption element is involved, but other facts and circumstances surrounding the . . . children compel us to consider further." 179 Kan. 716, 719, 298 P.2d 276, 278 (1956).

9 179 Kan. at 719, 298 P.2d at 279. The appellant had argued that even though the contract was not binding, the court should not turn over the children without checking into the fitness of the parents. They cited In re Bullen, 28 Kan. 781 (1882), to the effect that such an inquiry could be made in a habeas corpus action.

10 159 Kan. 325, 154 P.2d 137 (1944). This case was cited by appellant, but not mentioned by the court. According to appellant's brief, the only case in point is Galilean Children's Home, Inc., et al. v. Ball, 308 Ky. 319, 214 S.W.2d 403 (1948), holding that the parents could regain their children. The Oklahoma court on July 17, 1956, in In re Sutherland, 301 P.2d 224 (Okla. 1956), decided in favor of the parents and against the home. The Oklahoma statute was different, but the same basic problem is discussed.

11 In 1947, the Legislature amended Kan. G.S. 1949, 38-113 to expressly provide that: "Minority of a parent shall not invalidate such parent's surrender of said child."

See Child Custody, Unfitness Doctrine, infra, for a discussion of several new cases that perhaps limit this criteria.

Children's homes serve a valuable and needful function and must protect the stability of the lives of the children against old and forgotten parents. But, they do not always serve the best interests of the child. Until the time comes when the state acts through social workers instead of judges to determine the future happiness of children, a children's home should not have the final decision nor should the parents be allowed to irrevocably surrender this right by contract. The court is correct in saying that this case is different from an adoption case. The contract technically surrenders custody and the question of adoption would arise later. If the home had consented to an adoption, or if the child had been in a foster home, then the court implies that the rule of the Thompson case would control. The court seems to feel that the further removed the children are from the parents, the greater is the right of the parents to recover.

However, the opinion is not clear as to what the trial court is to do. Apparently, if the trial court finds that the parents are fit, it may, at its discretion, allow the return of the children.

II. Bastardy

Proof: In In re Estate of Case, a fifty-eight-year-old woman tried to show that she was the illegitimate daughter of the deceased Mr. Case. She had to meet the proof requirements of KAN. G.S. 1949, 59-501, but the passage of time ruined her chance. The only direct
evidence she had was one old man who could not remember what Mr. Case had said. All the other witnesses testified that it was assumed in the community that deceased was her father. Commenting on the evidence, the court said: "[I]t must not be forgotten that what the statute deals with is not notoriety of paternity but notoriety of recognition of the child by the father. . . ."19

Finally, the plaintiff attempted to show that the paternity had been judicially established in a justice of the peace court in 1895. All she had was the record of a compromise settlement between deceased and the plaintiff’s mother that for $50.00 the mother would dismiss the suit.20 The court comments that the language is not a judicial determination of paternity nor is it sufficient to be an acknowledgment in writing. Defendant merely bought his peace.

Sympathy lies with the daughter. The deceased had no close relatives,21 and she probably was entitled to the estate. Yet the statute is clear and the danger of fraud great. The statute is worth protecting even where, as here, there might be unfairness. Finally, while the court found that the compromise proved nothing, attorneys should still specifically state in the compromise agreement that the man does not admit paternity.

In *State ex rel. v Hall,*22 another bastardy action, the state’s appeal was denied when it merely showed that some of the jurymen admitted misconduct. This procedural point was handled by the court and no doctrine of family law was decided.

### III. Child Custody

*Contracts:* Some interesting dicta is found in *Leach v. Leach*23 on the right of a parent to surrender custody of the child to the other parent. The mother had signed a "relinquishment" of the child to the father, and she claimed that the trial court could not hold her to this agreement. The supreme court concurred, even though they refused

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20 "On or about Aug. 13 at the earnest request of both defendant and plaintiff, the case was compromised by the payment to plaintiff her own price of $50.00.

Whereupon said plaintiff entered into an agreement to stay all further and any future proceedings against said Charles Lester Case. Defendant paying all costs of the action." 180 Kan. at 59, 299 P.2d at 593.

21 The state was a party claiming that the property escheated. The case does not disclose the relationship of the other heirs.


to set aside the agreement. The court says that the "relinquishment" was not binding, but, as it was freely made and the mother had a right to state to the court what would be best for her child, the trial court could examine it. The court held that the trial court did not abuse its discretion in refusing to award custody to the mother. The court then goes on to say that children are not the subject of gifts and that there are only three ways a parent, by his own act, may escape the responsibility for his own children: (1) a finding of unfitness under Kan. G.S. 1955 Supp., 60-1510; (2) a valid adoption decree; or (3) a finding of neglect in a juvenile court proceeding. Finally, the court says that the district court, under Kan. G.S. 1949, 60-1510, has a continuing duty to make provisions for custody, support, and education, and it is the court, not the parents, that grants or denies custody.

Of course, these statements are dicta as the court found that the trial court did not abuse its discretion in awarding custody to the father independently of the contract. Concerning the custody alone, the statement might stand in future cases even though the court makes no mention of right of a parent to surrender custody to a children's home under Kan. G.S. 1949, 38-112, 113, 114. However, as to contracts and the district court's continuing duty to control child support, see Feldman v. Feldman and Grimes v. Grimes discussed under Divorce, Property Rights, infra.

The dicta is sound and should be followed. While attorneys continually draw separation agreements that provide for custody, surely none advise their clients that the court would be bound to follow it. If we are to protect the welfare of the child, the district court must retain continuing jurisdiction over custody matters.

Unfitness Doctrine: In the 1955 Survey of Kansas Law, the cases of Pearson v. Pearson and Collins v. Collins were noted. In those cases, the court said that there need not be a finding of the mother's unfitness in order to grant custody to the father in a divorce action.

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24 For this aspect of the case, see infra this section, Unfitness Doctrine.
25 This is the child custody and support section of the divorce statute.
26 These sections are discussed supra, under the heading Adoption.
29 This is not to say that the wishes of the parents should be ignored. Trial courts should accede to the contract unless plainly harmful to the child.
Four cases decided during the past year, Selanders v. Anderson, Leach v. Leach, Christlieb v. Christlieb, and Heilman v. Heilman, show the limited nature of the Pearson and Collins cases.

In the Leach case, the court re-affirms, without citing, the holdings of the Pearson and Collins cases. The father was allowed to retain custody of the child even though the court did not find the mother unfit.

Then, in Selandus v. Anderson this question was raised: A father is given custody of his children in a divorce action, later remarries, and then dies. Who is entitled to custody—his first wife, the mother of the children; or his second, their step-mother? The court held that "The mother and father are the natural guardians of their minor children. If either dies, or is incapable of acting, the natural guardianship devolves upon the other." The step-mother had been appointed guardian of the estate of the children, but the probate court made no finding that the mother was unfit. When the step-mother attempted to adopt the child, the natural mother obtained an injunction from the district court restraining the step-mother. In determining legality of the injunction, the court held for the natural mother and said, "She [the step-mother] had no inherent or natural right to the children. They belong with their only remaining natural parent, their mother, unless she is adjudged by some court of competent jurisdiction to be an unfit and improper person to have the children."

In the Christlieb case the actual contest was between the mother and paternal grandmother of the children. The trial judge refused to take the custody from the grandmother even though he did not find the mother unfit. The court, reversing, said:

It is a firmly-established rule in this state that a parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where the question is in
issue, is entitled to the custody of his children as against grandparents or others who have no permanent or legal right to this custody, even though at the time the natural parent seeks their custody, such grandparents or others are giving the children proper and suitable care and have acquired an attachment for them.\textsuperscript{48}

Then, in the \textit{Heilman} case,\textsuperscript{44} the court, citing \textit{Christlieb}, in complete \textit{obiter dictum},\textsuperscript{45} says that without a finding of unfitness, the trial court may not divide custody between the grandparents and the mother.

These four cases point up the basic conflict facing the court in determining custody matters. The court has almost invariably stated that it will be guided by what is best for the child. But, in a contest between a parent and another relative, the parent, if fit, wins even though a psychologist or social worker would say that this would not be for the best interests of the child.\textsuperscript{46}

Space limitations prevent a longer discussion of this problem. However, a few comments are inevitable. First, what is the hornbook law? If the fight is between parents, the trial court has almost complete discretion and no finding of unfitness need be made.\textsuperscript{47} If the fight is between a surviving mother who did not have custody and a step-mother, who did, the mother wins unless she is found unfit.\textsuperscript{48} And, if the contest is between a mother and grandparents, the mother must be given custody unless she is found unfit.\textsuperscript{49}

The results obtained by the present court are consistent with most of the Kansas precedent available to them. There was sufficient authority for the court to say that a parent has preference against all the world unless "unfit."\textsuperscript{50}

\begin{footnotes}
\item[\textsuperscript{46}] The mother's appeal was filed too late. The court, however, closes out the opinion by saying: "Were the case here we would hold . . . only failure of the appeal causes us to withhold making such an order." 180 Kan. at 119, 299 P.2d at 603.
\item[\textsuperscript{48}] The Pearsons, Collins, and Leach cases.
\item[\textsuperscript{49}] The Selander case.
\item[\textsuperscript{50}] Stout v. Stout, 166 Kan. 459, 201 P.2d 637 (1949) is probably the closest on the facts to the Cristlieb case. Prior to this decision, the court had used language seemingly preferring the best interests of the child. See Chapsky v. Wood, 26 Kan. 650 (1881) where the court, even
\end{footnotes}
The opinions in the earlier cases seem to resolve this troublesome conflict in favor of the parents based on one or a combination of the following sociological and psychological beliefs: (1) If the parent is fit, then it will be for the best interests of the child to give the parent custody. (2) The emotional stability of the parent is important and will be helped if he has custody.61

The court also seems reluctant, despite many statements to the contrary, to completely abandon the legal property right concept. The parents brought the children into the world, the mother was in physical danger, and both have to support. Therefore, the state, even though it stands as parens patriae to all children, may not take the child from its parents unless they are “unfit.” The state does not have this power.52

Even if sociologists or psychologists could infallibly discover what was actually best for the child, the court is not and should not be bound by their “best guesses.” As long as it is felt desirable to have “legal” rights in custody matters, the responsibility of decision will rest with a court. Who can say that the reasons for the parents preference are erroneous? But, the approach exemplified in the Selander, Christlieb, and Heilman cases is too restrictive. The court imposes a mechanical test; the finding of “unfitness.” The trouble lies in the meaning of the word “unfit.” On a doctrinal level there are probably three standards. In adoption cases, the new parents must be imminently qualified. In divorce cases, the mother may have some faults and still be “fit.” Lastly, it is only when she falls below a bare minimum that the juvenile court would take custody away from her on a dependent and neglect charge. Yet, in all three types of cases, the court uses some form of “fitness” as a test.58

Even if the court specifies what level of fitness is required, the term is still ambiguous. To require a trial court to find the mother “unfit,” say on the divorce case level, tells him nothing in terms of what the mother has done or not done. Unless the supreme court wishes to at-
tempt to specify just what a mother may do and still be "fit," it is going to have to allow discretion on the part of the trial court.

Under the present mechanical rule, the trial court, if it desires to give the child to a grandparent, must go through the ritual of finding the parent unfit. But should the rights of the parties depend on a matter of form? Granted that the supreme court could reverse on the facts and attempt to establish criteria of fitness, yet, throughout the court's history, it has been reluctant to overrule the trial court's findings of fact. The trial court still has the advantage in that it sees the parties in court. Further, this mechanical rule of unfitness prohibits a trial court from dividing custody between a grandparent and mother. If the mother is adjudged "fit," she is entitled to total custody. If she is "unfit," then the court could not grant her custody at any time. Therefore, it would be better if the court would say that the trial courts should have discretion, though they should give preference to parents. If there is no evidence in the record to justify dividing the time or giving the custody to the grandparents, the supreme court could reverse. There is a substantial difference between saying that mothers are preferred and that mothers must be given custody unless unfit.

IV. Contracts Between Spouses

Antenuptial: In re Estate of Ward restates the hornbook law on the necessity of fair disclosure of the assets of the husband in an antenuptial contract. Kansas, however, does not require full disclosure so long as the contract is fair and no actual fraud is shown. Mere concealment does not raise a presumption of fraud. The plaintiff was not able to show actual fraud, and, even though she bargained away all but a life estate in a home, the court would not reverse the trial court finding of fairness. She knew that the deceased was rich, and she had had her attorney look over the contract. The court would not let her repudiate and claim a statutory share.

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54 Of course, an argument exists that even though "unfit" as to the grandmother, she would be "fit" as to the standard applied in neglect cases. Therefore, she would be entitled to part custody. But from the single use of the word in these cases and under the Heilman case rule, custody could not be divided.

55 See Adoption, supra, for a discussion of this same problem when the conflict is between a child's home and parents.


57 The rule is found at 178 Kan. at 370, 285 P.2d at 1084. See also, In re Estate of Beeler, 175 Kan. 190, 262 P.2d 939 (1953) discussed in Hopson, Family Law, 4 Kan. L. Rev. 224, 237 (1955). The Beeler case covered a post-nuptial contract. The court does not cite it but the rule is the same.
The plaintiff also raised an argument concerning consideration. She was to have a home and the deceased husband had only purchased a trailer house. She claimed failure of consideration. The court found no lack of consideration. It said that marriage was sufficient. From the opinion it is difficult to tell whether the court saw the distinction. This aspect of the case is discussed in the Survey section on Contracts.

Post-Nuptial: In re Estate of Bradley is another of the many fact appeals found in the Kansas Reports. The children of the now deceased husband are claiming an interest in the previously deceased wife's estate. Her children established a postnuptial contract. They showed two letters from the deceased husband in which he mentioned the agreement, an old will, and quitclaim deed that confirms its existence. This was sufficient for the trial court to find that the agreement existed and that there was sufficient "writing" to satisfy the statute of frauds. The supreme court would not reverse.

V. Divorce

Property rights, alimony, and child support: Surprisingly enough, no cases were decided by the court on any questions of the sufficiency of facts to support a divorce decree. But parties are still litigating and appealing the property questions.

Mathey v. Mathey is a near perfect example of the bitterness and protracted litigation that result from marital discord. When the case was first before the supreme court in 1953, the court states that "This was the fourth divorce action. The first was dismissed. The second was tried and a divorce was granted. Thereafter the parties remarried. During the pendency of the third action the parties effected a reconciliation and made a property settlement. They later concluded a further attempt to reconcile their differences was hopeless ... plaintiff [then] filed the instant action." The plaintiff lost in her attempt to upset the alimony award and later in a written opinion, the court denied a rehearing. Plaintiff is now claiming that the husband perjured himself by not telling the full extent of his personal property and that the

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58 Mathey v. Mathey, 175 Kan. 733, 267 P.2d 516 (1954). In this opinion, the court does correct several mistatements of fact in the first opinion. However, none induced the court to change its mind.
judgment should be set aside for fraud.63 The husband demurred. The trial court sustained the demurrer and the supreme court affirmed, pointing out the well-established distinctions between intrinsic fraud, for which you may not upset judgement and extrinsic fraud, for which you may.64

Surely the courts are a poor place to handle this kind of dispute. The fight appears to be personal, not legal. The parties need a marriage counsellor, not lawyers. It is too bad that our legal system allows such protracted litigation.

Then, in Groh v Groh,65 the wife complained that the division of property was unfair. The divorce was granted to the wife but the court allowed her only 25 per cent of the property. The court held that the amount awarded was not an abuse of discretion. The court states that the financial dealings between the parties were “not understandable,” that the wife got a substantial amount and that the parties were worse off than before the marriage.

The decision is correct and is but another example of the discretion lodged in the trial court. However, the court is careless in quoting from the statute. Both the trial court and the supreme court treated the matter as one for division of property under the third sentence of Kan. G.S. 1949, 60-1511, which allows a division of the property jointly acquired. The court, in citing this statute, quotes only from the second sentence which provides for alimony from the husband’s property when the divorce is granted for his fault.66

Finally, there are two cases that raise the question of the validity of contract for child support and alimony. In the first, Grimes v. Grimes,67 a sixteen-year-old high school girl successfully obtained alimony and child support from her “shotgunned” husband. The husband, twenty-six, had seduced her. When her parents found that she was pregnant, they mentioned statutory rape. A conference was held and the boy signed an agreement with the parents that he would marry

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63 See Kan. G.S. 1949, 60-3007 (4th) which gives a court the power to vacate a judgment for fraud.
64 Extrinsic: That which prevents a fair presentation of the issue to the court. Intrinsic: That which prevents a fair determination of the issues, once presented. Perjury prevents a fair determination of the issues.
66 The facts of the case suggest that the property divided was jointly acquired and apparently in this type of case, the result would be the same. However, the quotation is misleading. See Hopson, Family Law, 4 Kan. L. Rev. 224, 235 (1955) for a discussion of other cases where the court has had problems in distinguishing among the four sentences of Kan. G.S. 1949, 60-1511.
the daughter and pay for the hospital bill. They agreed that after the contemplated divorce, they would support the daughter and child. The husband brought suit for a divorce a few weeks after the marriage. But the daughter did not stay "bought." She filed a cross-petition asking for divorce, child custody, alimony and support. The trial court granted her the divorce and the custody of the child, but refused to grant alimony or child support. Over objection of the wife, the contract was introduced in evidence and "considered" by the trial court.

On appeal, the court held that: (1) It was an error to admit the contract in evidence, since (a) "plaintiff could not relieve himself of his common law or statutory obligation to support his child by entering into an agreement with a third person to assume that responsibility. 'It is beyond the power of a father to deprive the court by private agreement of its right to make provisions for the support of the minor children, as the children's welfare requires. The support of children, like their custody, is a matter of social concern. It is an obligation the father owes to the state as well as his children. He has no right to permit them to become a public charge.'" And (b) the defendant wife was not a party to the contract; (2) it was error not to grant child support since Kan. G.S. 1949, 60-1510, says that the district court shall make an order for child support, custody and education and (3) it was error not to grant alimony since Kan. G.S. 1949, 60-1510 says that the district court shall grant alimony when the divorce is for the fault of the husband.

The other case, Feldmann v. Feldmann, was an appeal from an order by the district court that set aside, because of lack of jurisdiction, two previous orders modifying a still previous child support order. In 1946, the parties signed a lengthy separation agreement in which the husband agreed, among other things, to pay "so long as his minor children be living with and in the custody of the wife and throughout their minority... to his wife, as maintenance and support for the wife and children, the sum of... ($340.00) per month..." There were other provisions for modification upon certain contingencies such as the husband changing jobs. The wife then obtained a divorce from the husband and the contract was presented to the court and apparently

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179 Kan. at 342, 295 P.2d at 648.
made part of the decree. Some time later, the husband moved to strike all portions of the decree except that relating to the divorce on the grounds that it was for the payment of alimony in an indefinite amount and so void. The court denied the motion and on an appeal, the supreme court held in the first *Feldmann* case\(^71\) that the original decree was not void. The court admitted that there were two lines of cases: \(^{72}\) one holding that indefinite awards were void,\(^73\) the other allowing contracts between parties that were for an indefinite sum if approved by the court and not merged into the decree.\(^74\) The court then distinguishes the first line of cases and holds that they apply only in cases where it is for alimony. They do not apply where the money is paid upon obligations to support the children, even though she was to participate therein. Therefore, it makes no difference that this semi-support contract\(^75\) was made a part of the judgment. After this decree was handed down, the husband attempted to obtain a modification of the decree by reducing the amount of the child support payments. The trial court granted the reduction and then later reversed itself upon motion made by the wife. From this reversal, the husband appeals in the instant case.

The court apparently held two things: First, that the decision in the first *Feldmann* case decided the issue in favor of the wife and was res judicata and, second, that upon fresh examination, the rights and liabilities of the parties were governed by the contract and not by the statutory authority in divorce cases.\(^76\)

How are we to interpret these two cases? What effect do they have on the previous law? The *Feldmann* case can be interpreted as merely holding that any question arising out of the law suit was res judicata since the original decree was not appealed from. However, the court states that it re-examined the problem of the right of the court to modify semi-support contracts. Something of the history of these cases is necessary to the understanding of the problem. Frequently, the court was faced with the problem of what effect to give to a separation

\(^{71}\) *Supra* note 70.
\(^{72}\) See *note 1* KAN. L. REV. 199 (1953).
\(^{73}\) See e.g., Conway v. Conway, 130 Kan. 848, 288 Pac. 566 (1930).
\(^{74}\) See e.g., Petty v. Petty, 147 Kan. 342, 76 P.2d 850 (1938).
\(^{75}\) The word “semi-support” will be used hereafter to refer to those contracts where the money is to be paid to the wife both for the support of the children and for her own support. Notice the language of the contract in this case quoted, *supra* at note 70 in the text. The word “alimony” will be used to designate contracts for the support of the wife alone.
\(^{76}\) The court cites *In re* Estate of Shideler, 172 Kan. 695, 242 P.2d 1057 (1952) and French v. French, 171 Kan. 76, 229 P.2d 1014 (1951) as authority in the second alternative holding.
agreement between divorcing spouses. Many such contracts provided for payments to the wife. Some talked in terms of alimony, some in terms of child support. These contracts were given to the court at the time of divorce, and if fair, were either approved or were made the basis for the judgment. But, the court was bothered by the so-called merger doctrine, i.e., a contract that was made part of a decree became merged in that decree and ceased to exist, and, under KAN. G.S. 1949, 60-1511, the alimony had to be of a fixed amount and frequently the contracts provided for an indefinite amount. Therefore, if the court found a merger, both the contract and the decree were void. The court then started talking in terms of "approval" rather than merger and so gave validity to the contract. The holdings of these cases allowed the parties to circumvent the fixed alimony provisions of the KAN. G.S. 1949, 60-1511 and still not run afoul of the rule of the Calkins case requiring all property questions to be settled in a divorce case. In the first Feldmann case, the parties had an indefinite agreement that had been made a part of the decree. The court, desiring to uphold separation contracts whenever possible, found that the contract was valid and distinguished the earlier cases on the grounds that this contract provided for payment to the wife for support of the children. It made no difference that she would, incidently, receive some of the benefits. Then, in French v. French, the court held that this semi-support agreement probably was not merged, but it made no difference since the money was to be paid to the wife for both her and the children. The trial court had held, in a suit to reduce payments, that the contract was void and ordered payments reduced under authority of KAN. G.S. 1949, 60-1510. This statute, providing for child support, custody, and education of the children, unlike the alimony statute, states that the court shall have continuing jurisdiction and may modify any award. The supreme court, therefore, was forced to decide the validity of a reduction in payments which contravened the agreement. Citing three earlier cases, the court held that the trial court could not reduce the payments. Actually, the three earlier cases merely held that an agreement made after the decree had been rendered that a fixed amount to be paid

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77 See Note, 1 KAN. L. Rev. 199 (1953), where the two lines of authority are set out.
81 KAN. G.S. 1949, 60-1511.
82 Dutcher v. Dutcher, 103 Kan. 645, 175 Pac. 975 (1918); Miller v. Morrison, 43 Kan. 446, 23 Pac. 612 (1890); and Walrath v. Walrath, 27 Kan. 395 (1882).
would relieve the father from the extra amount required by the decree. These cases did not hold that once a contract was made, the court lost its power to modify support payments. In *In re Estate of Shideler*, the other case cited in the second *Feldmann* case, the court, in a purely alimony, not semi-support, case, held that the contract had not been merged and that the wife could still sue on the contract. The court cites both the support cases, says it sees no distinction and concludes that the language of the trial court shows only approval not merger.

In effect, what has the court held? The second *Feldmann* case follows the *French* case, but the *French* case misconceived the problem. Starting out with the need to circumvent the alimony statute, the court first held that merger did not void the indefinite judgment in semi-support cases. Then, the court held that the contract was not extinguished even though merged, and since the contract existed, the court's jurisdiction to modify child support orders was superceded. In theory, at least, if there is a merger, the contract disappears and only the judgment exists; a judgment that may be modified under KAN. G.S. 1949, 60-1510. Therefore, we must conclude that either (1) the doctrine of merger no longer exists in semi-support cases or (2) a judgment fixing semi-support may not be modified even though KAN. G.S. 1949, 60-1510 says that it may. From a legal theory point of view, neither conclusion is tenable. From a policy point of view, the results are questionable. The Legislature plainly stated that in alimony cases it wanted fixed amounts, while in child support cases, it wanted the court to be free to later change those amounts. To these policies, the court has added a third: that it favors contracts between spouses settling property, alimony, and support rights. Perhaps this is a good policy, but by its adoption, the court has allowed the parties to contravene the policy of the Legislature. By contract, an attorney may now provide for variable alimony and fixed support.

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85 But, in both support cases, there has been mergers and the court said it made no difference since the contract was for support. And, see Thoele v. Thoele, 176 Kan. 655, 272 P.2d 1082 (1954), an alimony case, where the court allows a wife to sue on the contract since it had not been merged.
86 The first Feldmann case. This argument is maintainable since support, under the statute, does not have to be for a fixed amount.
Practically speaking, it means that attorneys should be careful in agreeing to contracts containing child support provisions. Once the parties agree to pay a certain amount, changed conditions will not let them out. The contract itself should better provide for a change in payments based upon changed conditions.

However, an attorney must be careful. Neither the legal reasoning nor the policy basis of these decisions will carry over into other areas. The court has no qualms about throwing out a support contract made by the future husband and the parents of the future wife. As the court said in the *Grimes* case:88 "It is beyond the power of a father to deprive the court by private agreement of its right to make provisions for the support of the minor children, as the children's welfare requires."89 Granted that the contract was not with the wife, but should that make any difference? An enforceable contract with a wife defeats a child's rights as much as a contract with the grandparents. But, there is a partially valid difference in the two types of cases. Some support is agreed to in the *Feldmann* case, none in the *Grimes* case. However, changed conditions in the *Feldmann*-type situation might render an adequate amount in 1946 inadequate in 1956. Yet the contract binds the court.

The court also has little patience with contracts that attempt to fix the custody of children.90 The court says that in custody cases Kan. G.S. 1949, 60-1510 controls. This statute also controls support. Yet, the court holds that support contracts are valid while custody contracts are not.

The *Grimes* case also held that it was error not to allow any support nor any alimony. Both statutes, Kan. G.S. 1949, 60-1510 and 60-1511, use the word *shall*, although there are many cases where the court did not render an alimony decree when the divorce was granted for the fault of the husband.91 The court cites adequate authority to hold that in a case where the wife has nothing and the husband is working, the trial court abused its discretion in not making an award.

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89  *Id.* at 343, 295 P.2d at 648.
91  *E.g.*, *Stanton v. Stanton*, 166 Kan. 386, 201 P.2d 1076 (1949). The argument was over the amount of the property division, not the fact that *no* alimony as such was awarded.
VI. Marriages

Common Law Wife: Two more fact cases were added to the Amerine case. In the first, Whetstone v. Whetstone, the court held that the plaintiff's own testimony showed that they had neither a present consent nor a holding out of marriage. Therefore, plaintiff's divorce petition should have been dismissed by the trial court. In the other case, Hineman v. Hineman, Executor, the court held that there was enough evidence, under the hornbook rule of the Amerine and Whetstone cases, presented to the trial court that it would not disturb the finding that no common law marriage existed.

VII. Conclusion

It was said at the conclusion of the survey article last year that "Family law tends to be a system of unique cases." The fifteen or so cases decided this past year re-affirm that statement. Precedent works poorly. Apparently the court views each set of facts on the merits and then decides the case. Usually, they arrive at the correct result, but the language of the opinion must be restricted to the narrow facts presented.

Two areas, the unfitness doctrine in custody and the separation agreement in divorce, will bear watching. In this article, the problem has been outlined only. The decisions are not clear and future litigations will result. After these new cases are decided, an article should be written on each problem.

The cases decided by the Kansas Federal District Court and the Tenth Circuit Court of Appeals were surveyed. No family law cases were found.

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94 He flatly stated at the trial that he had never held the defendant out as his wife and that they did not consider themselves legally married.
95 Interestingly enough, the plaintiff "won" anyway. The trial court granted the divorce but denied the wife's cross petition for separate maintenance. She appealed. The plaintiff now has a judicial determination that he is single. This is certainly as good as a divorce.
97 See note 92, supra.
99 There was evidence that she had held herself out as the wife of deceased, but there was evidence that she also held herself out as the wife of another man and had used her own name for most business purposes.