Property Rights in Divorce and Separate Maintenance Cases

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Property Rights in Divorce and Separate Maintenance is an almost hopelessly confused subject. I would suggest that actually the title of this article is a misnomer. There are no "rights," just hopeful guesses as to what the trial judge and, if there is any "property" involved, the Supreme Court might do. However, it is hard to blame the trial judge. The Supreme Court gives him few consistent guides. Yet the Supreme Court also has its problems. The casebooks in family law indicate that most State Supreme Courts are having trouble in working out solutions to these complex problems.

Despite this confusion, trial judges have to decide cases and lawyers have to advise clients. But no "final" or "correct" answers are available. This short article only intends to raise a few current issues, suggest a few guesses as to a proper course, and offer a small hope for the future.

The article is divided into three sections. First, there is the problem of the power of a trial court under 60-1510 and 60-1511. These two sections set out the rights of the court in dividing up the property and providing for support at the time of a divorce. The second problem concerns the power of the spouses to set their own rules by entering into a so-called "separation agreement" or "property stipulation." Third, and probably least, is the power of the court under 60-1516 to grant alimony when a wife does not ask for divorce and under 60-1506 to divide the property when the trial judge denies the divorce.

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1. Kan. Supp. 1961, 60-1510 and Kan. G. S. 1949, 60-1511. Section 60-1510 reads: "Preceding as to minor children. When a divorce is granted the court shall make provision for the guardianship, custody, support and education of the minor children of the marriage, and, except as by this section limited, may modify or change any order in this respect whenever circumstances render such change proper." The rest of the section covers custody matters.

Section 60-1511 reads: "Restoration of maiden name and property of wife; permanent alimony; division of property. When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden or former name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before her marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony as the court shall think reasonable, having due regard to the property which came to him by marriage and the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by deeding to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before, or by her separately acquired after such marriage, and not previously disposed of, and also the court may award the wife such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seized. And to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. But in case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may in its discretion set apart such a portion of the wife's separate estate as may seem proper for the support of the children, issue of the marriage. When a divorce shall be granted on account of the fault or aggression of the wife, the wife may be restored to her maiden or former name."

2. Kan. G. S. 1949, 60-1516: "Action for alimony only, defense of husband; divorce granted, when. The wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. The husband may make the same defense to such action as he might to an action for divorce, and may, for sufficient cause, obtain a divorce from the wife in such action."

3. Kan. G. S. 1949, 60-1506: "Parties in equal wrong, orders concerning children and property; effect of divorce of property. When the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce, and in any such case or in any other case where a divorce is refused, the court may for
But first there is the problem of property, alimony and child support when the parties are unable to agree and they leave it to the court. A quick reading of 60-1511 indicates five basic propositions.

One: That the wife is to have her separate property set aside to her. This property may be "owned" prior to the marriage or received as a gift afterwards.

Two: That the granting of alimony is based on a fault concept, i.e. "alimony" may be awarded only when the divorce is granted for the fault of the husband.

Three: That alimony may come out of the real and personal property of the husband and is to be awarded in gross.

Four: That when the court grants the divorce for the fault of the wife, the judge may award her a share of the husband's real and personal property.

And five: That the court is to divide jointly acquired property.

Although there might be a slight duplication or two and perhaps one inconsistency, the statute is relatively clear. There should be few problems. Yet we have had enumerable cases construing 60-1511 with the Supreme Court shifting grounds as to just what the section means. Wherein lies the problem and where do we stand today?

It lies, apparently, in the realm of theory. The court, faced with some historical concepts of alimony, plus the wording of the statute, was unable to make up its mind as to the statute's basic thrust. Alimony came to us from the practice of the English ecclesiastical courts. These courts granted support after a divorce mensa et thoro. Since such a divorce was not absolute, the marriage relation continued and the husband's duty continued. But with modern absolute divorce the parties were no longer married. Consequently there was no duty to support. Thus, the power to provide "alimony" came only from the statute and was based, theoretically, on forcing a husband to support if it were his fault that the marriage relation ended. Also, early in the development of alimony, state legislatures adopted the dictum of the canonists that alimony "is a proportion of the husband's estate." So legislatures allowed the court to set aside property of the husband or provided for alimony "in gross."

There were other factors. One was the development of married women both in social fact and in legal rights. The husband no longer controlled all of the property and, later on at least, married women began to work and could acquire property in their own right. In addition, society became more concerned with minimum standards of health and welfare. If the father and husband did not provide the support, the state would have to assume the responsibility.

Here in Kansas, in addition to the theoretical and social change factors, the history of our Kansas alimony statute helps explain its current wording and the difficulties facing the court. Without going into detail, Kansas by 1859 had what good cause shown make such order as may be proper for the custody, maintenance and education of the children, and for the control and equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties, and in such case the order of the court shall vest in the parties a fee-simple title to the property so set apart or decreed to them, and each party shall have the right to convey, devise and dispose of the same without the consent of the other."

5. Id. at 750.
was probably one of our better worded statutes. It said "When a divorce is decreed, the court may make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper. Subsequent changes may be made by the court in these respects where circumstances render them expedient."

But a year later the legislature passed a new and lengthy divorce code. Here it added morality and it is this statute that provides much of our current language. The alimony section took the position that if the divorce was for the husband's fault, she should get her property, plus alimony, out of her husband's property, to be awarded her in property or in money, payable in gross or in installments, plus the right of dower in his lands when he died. If the divorce be for her fault, she was not to get dower, but the court was to set aside her property and "such share of her husband's real or personal property, or both, as to such court may appear just and reasonable."

However, by 1868 in the General Statutes, Kansas went back to a simple gross alimony statute based upon the husband's fault. But this statute only lasted until 1870, when, in a general revision of the Civil Code, the legislature returned to the basic language of the 1860 statute. Thus, the wife once again got her property, gross alimony and dower if her husband was at fault, and her own property plus a share of his property when she was at fault.

In 1883 in *Crane v. Fipps*, the court kicked out the dower provision as being meaningless, and in 1889 the legislature once again changed the statute. It took

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7. Kan. Terr. Laws 1859, Ch. LXIV, Sec. 10. An even earlier statute took much the same approach, but was more wordy. Kan. Terr. Statute 1855, Ch. 62, §§ 6, 10.
8. Kan. Terr. Laws, 1860-61, Ch. LVII, § 7. The section reads: "That, where a divorce shall be granted by reason of the aggression of the husband, the wife shall be restored to all her lands, tenements and hereditaments, not previously disposed of, and to her maiden name, if she so desires, and shall be allowed such alimony, out of her husband's real and personal property at the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate, at the time of said divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable; and, if the wife survive her husband, shall, also, be entitled to her right of dower in the real estate of her husband, not allowed her as alimony, of which he was seized at any time during the coverture, and to which she had not relinquished her right of dower; but, if the divorce shall arise by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not; and the court shall order to her restoration of the whole of his lands, tenements or hereditaments, not previously disposed of, and, also, such share of his property's real or personal property, or both, as to such court may appear just and reasonable."
9. Kan. G. S. 1868, Ch. 80, § 646.
10. Section 646 reads: "When a divorce is granted for the fault of the husband, the court may adjudge to the wife a reasonable sum as alimony, to be paid by the husband in gross, or in installments, out of his estate; any such allowance shall have the same effect, and may be enforced, as any other money judgment." However, the next section, § 677, said that the decree would be a bar to any claim of the party for whose fault it was granted in the real property of the other.
11. Kan. Laws 1860, Ch. 87, § 27. In *Crane v. Fipps*, 29 Kan. *585* (1883), the court said that this language of the 1870 amendment was borrowed from Ohio and does not mention that we had such language in Kansas in 1868. Section 646 reads: "When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to all her lands, tenements and hereditaments not previously disposed of, and restored to her maiden name, if she so desires, and shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of said divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court may deem just and equitable; and, if the wife survive her husband she shall also be entitled to her right of dower in the real estate of her husband, not allowed her as alimony, of which he was seized at any time during the coverture, to which she had not relinquished her right of dower; but, if the divorce shall arise by reason of the fault or aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not; and the court shall order restoration to her of the whole of her lands, tenements or hereditaments, not previously disposed of, and also such share of her husband's real or personal property, or both, as to such court may appear just and reasonable."
13. 13. Kan. Laws 1899, Ch. 107, § 5. The statute reads: "Section 646. When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and shall be allowed such alimony out of the whole of the lands, tenements, hereditaments owned by her before her marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage and the value of his real and personal estate at the time of said divorce; which
out the dower language and added the sentence that gave the Kansas courts so much trouble all through the years: "And as to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both . . . , the court shall make such division . . . ." So by 1889 Kansas basically had its present statute; although, the legislature did pass a couple of subsequent amendments, neither vital. In 1923 the legislature took out, in the first part of the section concerning alimony, the phrase "of the husband's real and personal property." In 1941 the legislature changed "shall" to "may" in the sentence on the right to give the wife some of the property of her husband when she was at fault.

This is the background to the current language. I am not sure why these various changes were made, but I want to mention three or four older cases which may explain some of the changes and will provide setting for the recent cases and the practical problems now facing Kansas lawyers.

The early key case was Mitchell v. Mitchell. There the court, construing the 1870 amendments that had added a fault concept and had used the language of gross alimony, pointed out that the Kansas divorce was unlike the English bed and board divorce. Since, in Kansas, divorce was absolute, there was no inherent power to modify an alimony award. The power could only come from the statute. The court pointed out that Sec. 645 of the statute provided for later modifications in child support but Sec. 646, the alimony section, had no similar language. Consequently, the court had no power to modify. This approach froze in the concept that alimony was for a fixed amount despite the language about installments. Basically, the court took the position that statutory alimony was akin to dividing up the property of the husband at the time of the decree.

The case of Crane v. Fipps, in 1883, probably accounts for one of the changes in the 1889 statute. In Crane the court found that the language in the 1870 statute, allowing the wife dower, could not be construed to mean inheritance and since the legislature had abolished dower in 1868, this section of the statute would become operative only when dower rights were again provided.

Snodgrass v. Snodgrass in 1889 may account for the other, unwelcome, addition by the 1889 legislature. In Snodgrass, the husband had turned over to his wife title to all of his property. Subsequently, she kicked him out. The trial court, granting him a divorce, let her keep the property, but made her pay some money in

alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. If the divorce shall be granted by reason of the fault or aggression of the wife, the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before, or by her separately acquired after such marriage, and not previously disposed of, and also such share of her husband's real and personal property, or both, as to the court may appear just and reasonable; and she shall be barred of all right in all the remaining lands of which her husband may at any time have been seized. And as to such property, "whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. But in case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may in its discretion set apart such a portion of the wife's separate estate as may seem proper for the support of the children, issue of the marriage."

16. 20 Kan. 665 (1878).
17. Consequently the court has, on many occasions, held an indefinite award invalid. See e.g., Catren v. Catren, 130 Kan. 884 (1933); Conway v. Conway, 130 Kan. 849 (1930). 18. 29 Kan. 585 (1883).
19. 40 Kan. 494 (1889).
installments to him. The Supreme Court, without citing the statute, said that it did not think she should have more than half of the property, but it would not reverse the trial court. However, it would modify the award to make her pay one-half of the income from the property to him during his lifetime. The court probably rendered a fair decision, but there certainly was nothing in the alimony statute to authorize it. The division of property language occurred in the third sentence of our current statute; the sentence added in 1889, follows the dicta in the Snodgrass case. Thus, I would suggest that the "division of property" sentence was enacted to protect the husband as against the right of the wife to have her property set aside to her.

Another basic case is Nixon v. Nixon decided in 1920. There the court held that the future earning capacity of the husband could be used in fixing the amount of alimony. The husband argued that the statute read that alimony should be allowed "out of his real and personal property." The court agreed that a literal reading would indicate that earning capacity was irrelevant, but indicated that, historically, alimony was paid out of future earning capacity. The court suggested that the language "out of his real and personal property" was included to warn the court that the husband’s share of the property was to provide the alimony. The court said: "It should be deducted from his share of the property . . . after it had been divided and not from the common fund before division." The "out of his real property" language was then omitted two years later in the general revision of 1923.

Before I turn to the late cases like Garver v. Garver, which try to straighten out the existing confusion, I want to point out a few, of the many possible, examples of this confusion. For instance, in two 1945 cases where the court points out that the legislature changed "shall" to "may," in the 1941 amendment of the sentence on giving the wife some of her husband's property when she was at fault, the court talks about "division of property," but does not cite the next to the last sentence of 60-1511 concerning jointly acquired property. The second and third sentences are different!

Another example is Savage v. Savage decided in 1935, which tends to combine the first and second sentences. The court points out that by adding the sentence giving the wife some of the husband's property even if she was at fault, the legislature intended for her to get "some substantial provisions" and, citing an earlier case, said "the statutory allowance to which she is entitled is not to be precisely characterized as alimony, but the distinction in terminology is not important." Actually the case cited had reversed a trial court that had awarded "alimony"

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20. Kan. G.S. 1949, 60-1511. The sentence reads: "And to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof."
22. Id. at 512.
27. 141 Kan. 851 (1935).
when the wife was at fault. The court said that there was a difference, but admitted that the court had in the past used "alimony" and "division of property" interchangeably. In a note at 1 K.B.J. 169 (1932), the writer points out four such cases and says that hereafter, no more confusion need result. Yet within three years, in the Savage case, the court said that the terminology was not important. The court, in other words, views both the first and second sentence as a grant of power to the court to provide maintenance to the wife by dividing up the partnership assets.

In 1955 in Cunningham v. Cunningham,\textsuperscript{31} the court again mixed up the second and third sentences. The trial court awarded the wife an $11,000 lien on the property the court had given the husband. He complained that since she was at fault, there should be no alimony and that there was no evidence that the property was jointly acquired. The Supreme Court disagreed on the grounds that the property was jointly acquired! But surely that issue was irrelevant. The court is not limited to jointly acquired property. Under the second sentence, it can award her his property, even when she is at fault.

Confusion among the three sentences also exists when the divorce is granted for the fault of the husband. Take the late case of Groh v. Groh,\textsuperscript{32} a 1956 case, where the divorce was granted for the fault of the husband and the trial court divided up the property. The wife argued that she had only been given 25% of the jointly acquired property plus her own property. The court set out and discussed that sentence of 60-1511 relating to alimony and did not even mention the sentence concerning jointly acquired property. Yet it went on to say that the trial court did not abuse its discretion in the above "division of property." Or take Mathey v. Mathey,\textsuperscript{33} a 1953 case, which was later overruled in part, where the court said that the grant of property to the wife when she got the divorce had to be alimony since alimony "should not be confused with the latter part of 60-1511, which pertains to a division of property when a divorce is granted to the husband by reason of the fault ... of the wife."\textsuperscript{34} But query—was the court here referring to the sentence giving her part of his property or the sentence allowing the court to divide the property jointly acquired?

In the last three or four years the court has purported to clear up part of these problems. The lead case is Garver v. Garver.\textsuperscript{35} The actual holding of the case, even though it may be wrong, is not difficult. The trial judge awarded a wife certain property in a divorce action where the husband was at fault. The wife complained that she did not receive alimony. The judge remarked that alimony and division of property were one and the same thing. On appeal, the Supreme Court admitted that some of the earlier cases had used faulty language, but said that alimony was different from a division of property. The court made no analysis of the reason for the addition of the division of property language in 60-1511, and as authority, cited a couple of irrelevant cases\textsuperscript{36} construing 60-1506, the section allowing division when a divorce is denied. Going on the court discovered the

\textsuperscript{31} 178 Kan. 97 (1955).
\textsuperscript{32} 179 Kan. 353 (1956).
\textsuperscript{33} 175 Kan. 446 (1953).
\textsuperscript{34} Id. at 451.
\textsuperscript{35} 184 Kan. 145 (1959).
word "shall" in both the alimony and division of property sections and concluded that a trial court, in cases where the husband was at fault, was required to do the following three things.

1. Restore all of the wife's property owned prior to or acquired in her own right after marriage.
2. Grant reasonable alimony—in money or property.
3. Divide the property acquired jointly during the marriage.

These rules seem clear, but I would suggest at least two problems. First, is the insistence in the case that alimony must be awarded every time the husband is at fault. Does the court mean it? Prior to Garver, and apparently still believing as he had in the Garver case, the trial judge handed down another opinion in which he awarded the wife a farm as "a division of property and in lieu of alimony." On appeal, in Bunch v. Bunch, decided ten months after Garver, the Supreme Court affirmed! The court cited some earlier cases where it had approved the "in lieu of" language and said that, while not in the best form, the trial court must have meant to give the farm "as a division of property and as an allowance of alimony." Apparently, the court equates "in lieu of" and "and." Now, will a trial court be reversed if he says: I award X property as a division of property and, although I have considered alimony and realize that there is a difference, I don't think that in this case she is entitled to any?

No one knows. The court has frequently said that the amount of alimony or division of property is within the sound discretion of the trial judge, but the court has also, in late years, talked in other cases about the word "shall." Surely proper discretion does not require a $1.00 alimony award. To be on the safe side, though, the attorney better have the court label part of his award alimony and a part a division of property.

Of course, the whole thing is silly. As pointed out by the editors of a 1961 casebook on family law, in their comments on Garver: "It is clear that where the plan of the authorizing statutes is to secure maintenance of the wife, and they are so viewed by the courts, one has to do with a distinction without a difference as respects the award itself. The case makes mandatory the labeling of the items." What we have is this: the legislature said that when the husband is at fault, the court should give her her property and alimony—in gross, out of husband's estate, in property or money. In other words, alimony was the splitting of the partnership assets, a division concept. The court later added and the legislatures agreed that the trial court could look to future earnings in figuring the gross amount. On the other hand, the legislature first said that when she was at fault, she should get nothing. Later, when it was worried about her support, it added that even if she were at fault she was to get hers, plus some of his property. As the court pointed out in the Savage case, this award was not labeled alimony, but

40. Bunch v. Bunch, 185 Kan. at 545.
was intended to provide the same function. Still later, when faced with a situation where the wife held title to all the property, the court wanted to divide it up and the legislature quickly approved by putting in the sentence about jointly acquired property being divided no matter where title was held. Actually, the sentence about joint property probably was intended to apply only in the situation where the wife was at fault and held title to the property as was hinted at in Mathey. The court in Garver argued that the division of property sentence had to also apply when the husband was at fault, or else he would be better off. This is a false fear. Under the alimony section the court could give her just as much at it can under the division of property section. The cases cited by the court that made a distinction were either construing 60-1506 or had, themselves, relied on such cases. Mixing up the division language of 60-1506 and the division language of 60-1511 has been an all too common practice of our court and some commentators.

While the division sentence is not needed to protect the wife, it might be argued that the husband needs it. When he is at fault, and if he has conveyed most of his property to her, she is entitled to have all this property set aside to her in the beginning. He can get it back only through the division sentence.

I will admit that there is language suggesting that as to a division of property, the trial courts should treat the marriage as a partnership. Does this suggest that there is, in part at least, a real difference between alimony and division? Actually, under the Kansas statute, I do not think so. The current alimony sentence is broad enough, and was intended, to include the partnership concept as well as that of support.

This quick survey shows, I think, that the legislature and courts have never quite been satisfied with the basic concepts behind the alimony statute, but they have never quite been able to make up their minds as to where they should go. If the above analysis of Garver, et al., is correct, the district judges, with their wide discretion, still have considerable ability to adjust the property rights of the parties, both present and future. So long as they properly label what they do and award nominal alimony they will not be reversed. There are only two basic limitations. One is the requirement that they guess now, instead of in the future, the needs and abilities of the spouses. This is to be contrasted with 60-1510 which allows the court to worry about child support throughout the minority of the child and adjust the award as the needs of the child and the ability of the parents change. The other is that, if the wife be at fault, there is no way to give her more than the spouses currently own. The court could not order support out of his future earnings.

The next area is that of the role of the private agreement in settling the property,
alimony, and child support rights of the parties. These agreements can materially change the situation as it exists under 60-1511.

There is no need to discuss at length the rules concerning fairness, disclosure, fraud, and overreaching. The two late cases of Hoch v. Hoch51 where the contract was upheld and Bremer v. Bremer52 where it was upset, restate the rules. However, I do want to call attention to the so-called Crosby II case,53 decided in the spring of 1961. Mrs. Crosby had had psychiatric care, but had never been declared insane. On the first appeal,54 the Supreme Court allowed her to use her mental condition as a defense to a charge of gross neglect. At a subsequent hearing to divide the property under 60-1506, the trial court approved a prior separation agreement. The Supreme Court on the second appeal reversed again. Although the opinion leaves many questions55 and Chief Justice Parker in his opinion indicates that the Justices themselves were not agreed as to why the court should upset the agreement, there is certainly a strong implication that the wife’s mental condition was a factor in releasing her from the separation agreement. Even if she has independent counsel and even if she is stable enough to make a deed or will, the court might protect her. If, at any time, an attorney has an unstable wife in the picture, he should be extremely careful. The separation agreement may be worthless.

Now, assume you have a fair contract, what kinds of control over the power of the court granted 60-1511 can the spouses exercise? Actually they can do a surprisingly large number of things if they are careful, even though separation agreements were originally frowned upon by the courts as promoting divorce. We have no statutory authority for such an agreement in Kansas, but back in 1900 in King v. Mollohan56 the court allowed such an agreement to bar a wife from a statutory share in her husband’s property after he died. The court took the position that so long as the parties had separated, whether from necessity or not, there was no reason why the parties could not settle their property rights. The administrator argued that the parties had had an understanding that they were to get a divorce. Even this did not render the agreement collusive, said the court.

Then in 1918, in Ross v. Ross57 the court found an agreement fair and reversed a trial court that had in its decree added $1,000 alimony. The court said that since the contract was valid, the husband’s property could not be depleted further by a court order of alimony.

I point up this Ross case because I have heard attorneys suggest that even if a separation agreement is fair and understandingly made, the trial court still has the power to modify the agreement. Sometimes the argument is made that the court can not change the “property” aspects, but can change the alimony, i.e. support arrangement. Sometimes they argue that the court can change any part of it. Probably the “general rule” in America still is that courts are free to make a dif-

52. 187 Kan. 225 (1960). For further discussion of these cases, see Brand and Hopson, Family Law, 10 Kan. L. Rev. 219, 236 (1961).
55. For a discussion of some of these questions, see Brand and Hopson, Family Law, 10 Kan. L. Rev. 219, 237 (1961).
56. 61 Kan. 453 (1900), rehearing, 61 Kan. 692 (1900).
57. 103 Kan. 232 (1918).
farent award, although many states now say that the court is bound, sometimes even by statute. The cases come up in many ways but most frequently in terms of a motion to later modify the amount of support. Of course, here in Kansas, a later modification would be impossible since the court can order only lump sum alimony. In Kansas the problem arises at the initial hearing. In concrete form the issue is this: The lawyers present an agreement to the court. The agreement divides the property and gives the wife $200 a month until death or remarriage. The trial court says: "The agreement was understandably made, no fraud, no overreaching. I can't say that $200 a month is unfair. But I think that it would be more fair to give $10,000 lump sum to be paid at $250 per month." Can the attorney appeal this ruling and get a reversal in Kansas? I would guess yes. In looking over the cases since Ross, I find no case allowing a trial court to so act and many cases have broad language saying that a fair contract is enforceable. In some, like Perkins v. Perkins and Shaffer v. Shaffer, the language is pretty specific. Of course, if the contract does not purport to cover support, I would assume that the trial court could act.

While in Grunder v. Grunder, decided in 1960, the court did emphatically hold that a separation agreement setting child support payments could not bind the court and prevent it from making a subsequent change in amount, this holding does not seem to be a big change in basic policy. Here the court was concerned with 60-1510 which specifically allows the court to subsequently make changes. Besides, children's support is an issue which always invokes special consideration. The problem is similar to that occurring in those states that allow modification of alimony. With lump sum alimony Kansas is not faced with the same problem.

But, this carries us to the next area in which by contract you can control the court. The court, through a long and troubled history, has allowed the parties to provide for variable alimony despite the statute saying that it should be for a fixed and definite amount. Without going into the history, although the jump from precedent to precedent is intriguing and not always reconcilable, the court arrived at the position that a property agreement, if merely "approved" by the court at the time of the divorce, will continue as a contract and that the parties are "by judgment bound by the terms of the contract." The court has said "There is a distinct difference between what the court has authority under the statute to do with respect to alimony in a divorce case and what the parties may agree upon." On the other hand, if the attorney has the agreement "merged" into the judgment of the trial court, the agreement disappears and all you have is the judgment. If the judgment then provides for variable alimony, the judgment is void. So the attorney is left with nothing. What language in the journal entry

59. 154 Kan. 73 (1941). The court said: "The parties have made a comprehensive contract, fair and reasonable in its terms and neither the trial court nor this court may make a new one for them." Id. at 77.
60. 135 Kan. 35 (1932).
shows merger and what shows mere approval is not always easy to determine and I suspect that the court tends to find either way depending on the dictates of justice. However, I see no problem in making your language clear once the attorney decides what to do. Language saying that the agreement is to be approved only and not made the judgment of the court should be sufficient.

To allow the parties to agree to variable alimony is excellent policy although the legislature has decreed otherwise. The parties can adjust their support rights in light of their needs, particularly on death or remarriage. However, the agreement fixes the amount and if the amount is to be changed if the husband’s finances improve or are reduced, the agreement itself will have to so provide. For clients that are worried about this problem and to whom certainty is not as important, I have often wondered if a private commercial arbitration clause might not be inserted. I have not seen this done, but with the increased respect for arbitration, the court might enforce it.

The use of the “approved” separation agreement has another advantage over the gross alimony provision of the statute. For attorneys with rich clients the income tax provisions on alimony can become extremely important. I do not pretend to be an income tax expert, but apparently under the 1954 income tax code, payments under a Kansas lump sum alimony award could only be deducted if they were spread over ten years and then only up to 10% of the total in any year. If by agreement you provided for variable alimony, for any length of time, the husband could deduct all payments while the wife counted it as income.70 If the husband was in a 40 or 50% bracket and wife down in the 20’s, it would save both parties money to set up, by agreement, variable alimony. Of course, as to child support, the husband is out of luck. He can not deduct, and the wife does not have to pay on it, whether it is variable or not.71

Before I leave separation agreements, I want to again mention the Grunder case72 which held that an agreement as to child support was not binding on a trial court in the face of 60-1510 which allowed the court to modify them. The result is probably good, since children should be protected by the court. But in so ruling, the court did not discuss or even cite the first or second Feldman case.73 In Feldman I the court found a merger of a variable amount separation agreement.74 Yet the court held the judgment good on the grounds that the payments were not alimony, but support payments for both the wife and children. Not being alimony, it made no difference that it was for an indefinite amount. Later in Feldman II,75 the wife complained when the trial court subsequently reduced these payments. On appeal, the Supreme Court told the trial court it did not have this power. The Syllabus reads: “In this jurisdiction, where a husband and wife have entered into a marriage settlement whereby they agree upon a division of property as between themselves and payments to be made by the husband to the wife for the care and

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68. For a good survey of the cases, see 1 Kan. L. Rev. 109 (1953).
69. See e.g., P-H Fed. Tax, Vol. 1, § 7701 et seq.
70. See e.g., 39 Taxes 797 (1961).
71. However, in Commissioner v. Lester, 368 U.S. 299 (1961), the court held that if the payments to the children were not separated from those to the wife, the total amount might be deducted.
support of their children, including maintenance of the wife while such children remain in her care and custody, and thereafter such agreement is approved by the trial court in a divorce action and made a part of its judgment and decree, the rights and liabilities of such parties are governed by the terms of the contract, not by the statutory authority of the court in divorce cases."

Surely that syllabus sounds as if the spouses can bind the court. But Grunder says that they cannot and does not cite Feldman. At first I assumed that Feldman was overruled even though not mentioned. But there is a way to distinguish Feldman. Feldman involved one amount for both the wife and children. What might be called a semi-support agreement. Consequently, there may be three types of contract clauses covering support:

1. Alimony: Are binding, even if variable, so long as it is "approved" only.
2. Straight child support: Are not binding.
3. Semi-support: May be merged, even though indefinite and if Feldman is not overruled,77 are binding on the court and cannot be modified.

If anyone has the courage to try a semi-support agreement, it obviously has a lot of advantages,78 but even though the attorney has a non-overruled case allowing them, he had better pray for good luck when he gets to the Supreme Court.

Finally, I should have a word on suits for alimony without a divorce under 60-1516. Actually, there is not too much to say, either from a theoretical or practical point of view. We have had few cases on it and I doubt that the section is used very often.

There are, however, a couple of problems. In theory, such an action is a suit for divorce a mensa et thoro, although the court has said, in dicta, that such an action does not exist in Kansas.79 Lawyers, and the court itself, call this action a suit for separate maintenance which is probably proper, but it is not a statutory civil action for nonsupport since the wife can and must prove one of the 11 grounds for divorce. But once she so proves what award may a trial court make? The word alimony is not defined. Is it the same as alimony in 60-1511? If so, then real property could be awarded in fee to the wife, but the amount would have to be a lump sum. In Osman,80 Wohfort,81 and as late as 1953 in Brayfield82 the court specifically held that real property can be awarded as alimony under this section. In the 1912 Osman case,83 the first to consider the problem, the court went to great length to say that her right to property should not depend upon whether in her prayer she asked for a divorce and alimony, or just alimony. The court argued that alimony was not used in its "strictly technical sense," which it had earlier defined.

76. Ibid. For a fuller discussion of these cases, see Hepson, Family Law, 5 Kan. L. Rev. 268 (1956).
78. See note 77, supra.
as a right to “an allowance out of the husband’s estate, . . . not a transfer of title . . . “.84

To be consistent, the court should probably say that alimony in 60-1516 and in 60-1511 is the same. If it is, then variable alimony should not be allowed. I can find no case where the court even discusses it. In Brayfield85 in 1953, the trial court awarded a lump sum of $1,700 plus $90 per month until death or until the parties got a divorce. On appeal from a contempt order for not paying the $1,700, the husband complained that the trial court had not labeled the $1,700 as alimony and it was an illegal division of property. The Supreme Court said that since alimony was all the court could award, the lack of a label was immaterial. The court also referred for authority to an alimony case under 60-1511 and specifically recognized that it was a case under 60–1511. The court said that the two sections were “analogous.” Yet you had a trial court order, of which no mention was made, giving her $90 a month for an indefinite period.

I do not know what the trial courts are doing under this section. If they are making an award of variable alimony, an appeal might obtain a reversal. Apparently no one has ever argued the point to the court. When the parties are still married, a lump sum award seems silly. But it is only a guess as to what the court would do.

The State Bar Association now has a special committee on family law and its one order of business is to look toward a rewriting of 60-1511 and probably 60-1506 and 60-1516. Besides the general complaint as to the existing confusion, there have been several suggestions as to desired changes. First, all seem to agree that Kansas should go along with the huge majority of states and allow the trial court the power to modify an alimony award in the same manner as a child support award. All seem to agree that almost complete discretion should be left in the trial court as to the amount and that the word “shall” be changed to “may.” No one seems particularly interested in “fault” as a pre-requisite to alimony, and most would be willing to let the husband have support where he needed it and the wife had sufficient income. In other words, the statute would just provide that alimony, using that term in its narrow support meaning, may be granted to either party upon the granting of a divorce.

When it comes to dividing up the property, which probably should be kept separate from an alimony-support concept, the committee seems to have some major disagreements. There are three classes of property: (1) separately owned and acquired by the husband prior to marriage or by gift or inheritance after marriage, (2) separately owned and acquired by the wife prior to marriage or by gift or inheritance after marriage, or (3) acquired by the spouses out of their own labors after their marriage. Some of the committee suggest lumping all of the property together and allowing the trial court almost complete discretion in dividing it up. Others say that one spouse should have no interest in the separate property of the other and title to the separate property be set aside to each party with the court having discretion on dividing the property earned by the parties after

84. Id. at 521.
marriage. I have even heard a suggestion that Kansas should adopt, as a few states have, a specific percentage division on the property, i.e. one-half to each, or two-thirds to the husband and one-third to the wife. The complaint was that with the wide discretion in the trial court, the attorney could not advise his client on how much she was going to get. And in turn this meant he had very little to go on in negotiating a settlement.

Mentioning settlements raises the final point of disagreement. All agree that Kansas should allow separation agreements, but how much power should the court have in upsetting them and should there be specific legislation covering such agreements? Assuming the contract is basically fair, there is a three-way split. Some argue that it should be all binding except child support; some say property should be binding, but not alimony or child support; and some say that the trial court should have complete discretion.

We lawyers are under sustained attack from social scientists on the way we handle the problems of marital discord. Perhaps we do not have the training necessary to handle the sociological and psychological problems. But property and support rights are at the heart of our competence. We have no excuse for allowing the existing confusion. I hope that Kansas lawyers can come up with some suggested changes to the statute that will eliminate some of our problems.86

86. If any attorney has any comments concerning the proposed changes, please write to the author, Chairman, Special Committee on Family Law, University of Kansas School of Law, Lawrence, Kansas.