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Family Law (Survey of Kansas Law)

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FAMILY LAW

John Brand, Jr.* and Dan Hopson, Jr.**

As in several other survey sections, the obviously key development in the past two years was the enactment of the new Code of Civil Procedure.\(^1\) Although family law is usually not considered a procedural subject, the old provision covering such matters as divorce, alimony, division of property and custody all appeared in Chapter Sixty.\(^2\) Consequently, the Judicial Council included the heart of family law in the revision. The changes, while not revolutionary, are extensive. They are treated at length in a separate article appearing in the first issue of this year’s Law Review.\(^3\) That review will not be repeated in this survey article.

The new revision was not, however, so extensive that the case law of the last one hundred years and more particularly of the last two years is irrelevant. Certainly some of the cases decided during the survey period are no longer controlling, as of January 1, 1964, but a surprisingly large number are still valid or at least must be considered so by the attorney when practicing under the new code.

The cases and a few other short statutes of the last two years produced little that could be called unique or startling. In a few areas the court seemed to reach for the solution that the Judicial Council ultimately adopted. In one major area the court was impolitely reversed by the new code, while in a couple of areas the Council, probably inadvertently, reversed the court.

MARRIAGE

Although more properly a question of the proper drafting of a separation agreement, the court in Johnson County Nat'l Bank & Trust Co. v. Bach,\(^4\) had to define the word “remarriage.” The Bachs, at the time of their divorce, had agreed to a division of property. The agreement provided that the bank, as trustee, should pay the income to Mrs. Bach. Upon her “remarriage,” however, she was to receive a reduced percentage of the income with the bank to pay the difference to the children. The trust agreement also provided for a remainder to the children on the death of Mr. Bach.

Two years after the divorce Mrs. Bach remarried. She notified the bank and

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it stopped sending her the trust income. Six months later, an Arizona court declared Mrs. Bach's second marriage void on the grounds that the second husband already had a wife. Consequently, Mrs. Bach's second marriage was bigamous. Even though notified of the annulment, the bank refused to pay the income to Mrs. Bach, and subsequently filed a petition asking for a declaratory judgment.\(^5\)

The Kansas Supreme Court held that the word "remarriage," as here used, meant the status of marriage and not the ceremony of marriage. Consequently, a bigamous marriage, being void even without a decree of annulment, created no marriage status. The court distinguished a mere voidable marriage, leaving the question open as to whether it would apply the doctrine of "relation back." The court pointed out that there was evidence that the parties intended the payments to be for the support of the wife and that if in fact she had no second husband to support her, she would need the trust income.\(^6\)

The decision is reasonable although it presents certain problems to both the scrivener and to the bank. First, unless defined otherwise, the word "remarriage" will probably not include a void marriage, but may or may not include a voidable marriage. In terms of the ease of administration, the parties drafting such a trust agreement may wish to define remarriage as entering into a marriage ceremony. This would eliminate the possibility that a void or voidable marriage could lead to litigation. Or as an alternative, they should state whether a "voidable marriage" would be a "remarriage."

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By the same token, district court judges, now that they are authorized to enter alimony decrees providing for payments until death or remarriage,\(^7\) should spell out what they mean by "remarriage." It will save future litigation.

The bank was, understandably, most unhappy with the decision. It argued that annulments might occur years after a "remarriage." What was it to do with the money? The court pointed out that in this case, the bank had held onto the money. In dicta, the court added that if the bank had, acting in good faith, paid income to the children, the court would protect the bank through the principles of estoppel, laches and other equitable doctrines.

The dicta, while better than nothing, is probably little consolation to the bank. At best, it means a law suit and banks have not fared well when the courts apply equitable doctrines. The bank might protect itself, however, either by requiring that the agreement define remarriage or that it contain a

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\(^5\) The court held that the bank had retained the income during this period. Although it had established accounts for the children, it had not actually paid any income into them.

\(^6\) The court alluded to the fact that a void marriage does not entitle the wife to receive alimony. \textit{But see} Kan. Sess. Laws 1963, ch. 303, § 60-1610 which allows the court to order alimony as part of an annulment decree.

clause absolving the bank from liability. The bank could also obtain a waiver from the wife at the time of remarriage.

**Children**

**Adoption**

*Neal v. Gleason*\(^8\) considered a trial court's order giving approval to an adoption. The trial court previously had declared both parents unfit and had given custody of the child to a juvenile court probation officer as authorized in Kan. G.S. 1959 Supp., 60-1510. The natural mother challenged the trial court's granting of permission. In affirming, the supreme court was interested only in the trial court's conclusion that the consent was in the best interest of the child. Kan. G.S. 1959 Supp., 60-1510 explicitly gave trial courts the power to do what was done here. The statute provides that the original finding of unfitness, "shall terminate the paternal [parental] rights, subject to the right of appeal by either parent." Subsequently, the same section states, "Parental rights terminated under the findings authorized by this section may subsequently be restored to either or both parents by the district court in the exercise of its continuing jurisdiction, except during the time when such jurisdiction is suspended by the adoption proceedings."

The *Neal* case raises an interesting procedural point. From this case and the above-quoted portions of the statute, there appear to be three times that the fitness question can be raised. First, at the original hearing, second at the consent hearing, and finally whenever the parents petition for restoration. The statute may leave doubt as to whether the question of fitness can be raised at the consent hearing, but the *Neal* case resolves this question. In *Neal* both the trial court and the supreme court, in effect, refound the mother unfit. The issue upon which the guardian's right to consent was tried was the fitness of the parent, despite the fact that the mother offered no evidence of her fitness. Fitness of the parent and the best interest of the child are inextricably entwined. Yet, as a practical matter the most important point here is probably the question of when the parent can seek the return of the child. This problem must be answered in terms of fitness.

The provisions of the new code are substantially the same with one exception. The new code appears to have eliminated the parent's right to raise fitness at the consent hearing, and overruled the approach taken in *Neal*. Kan. Sess. Laws 1963, ch. 303, § 60-1610(a) provides, in part, "If the court finds that both parties are unfit to have the custody of such minor children, their parental rights may be terminated. . . ." Then the last sentence of 60-1610(a)(3) states: "If the adoption proceedings do not result in final adoption, the jurisdiction

of the district court shall be immediately restored, and parental rights which have been terminated under the provisions of this subsection may be restored on application of either party by order of the court in which they were terminated and on such reasonable notice to all parties affected as the court may require.” The language seems clear that parental rights may be restored only if adoption proceedings have been instituted that do not result in final adoption. The Judicial Council may have intended this result. Perhaps, their philosophy was that once parental rights were severed the child should be free for adoption without the possibility of harassing parental attempts to regain custody. However, we feel that this change was inadvertent. Amendment of this section may be necessary.

Illegitimacy

At common law the marriage of the parents of a child, after the birth of the child, did not legitimize that child. They had to have their vows prior to birth. All but two or three states passed legislation legitimizing the children in this situation. Kansas was one of the minority states. Although Kan. G.S. 1949, 59-501 provided that the word “children” included an illegitimate child when the father had notoriously or in writing recognized the child or when paternity was established by court decree, this section only covered inheritance problems. It did not make the child “legitimate.” The Uniform Vital Statistics Act, adopted in Kansas in 1951, had one section providing that upon legitimation of a child, a new birth certificate should issue. Yet, Kansas had no provision for legitimation. The 1963 legislature remedied this. In a short statute, the legislature made the child legitimate upon marriage of the parents and allowed them to show this fact by affidavits before any probate judge. The probate judge then affixes his jurat to the affidavit and forwards it to the state registrar of vital statistics. The probate judge keeps no record of the request.

Although of no great moment, this new provision is a welcome addition to our law. Certainly most lay people assume that marriage legitimizes the child. The law should reflect this assumption.

As decided, State, ex rel. Connor v. Irvin is a procedure case. An appeal from a bastardy proceeding under Kan. G.S. 1949, ch. 62, art. 23, was dismissed

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9 Note that Gard, Kansas Code of Civil Procedure, Annotated 730-31 (1963) states that the new section is substantially the same as the old. Judge Gard then suggests, “If the custody order has been in force for a year or more the custodian may be given permission to consent to an adoption of the child or children, and the consent of the parents is dispensed with, subject, however, to their right to be heard in opposition and to request to have their parental rights restored as provided by statute.” This would be a request at the consent hearing. This was what was done in the Neal case. We do not believe the new code provides for requesting restoration at that hearing.
11 Id. at 840.
because of appellant's failure to specify the trial court's dismissal of the action as error. The court, after observing that the proceeding was a civil action, invoked Supreme Court Rule Five and dismissed the appeal.

Custody

Fights over the children at the time of or after a divorce continue to produce a large number of unsuccessful appeals to the Kansas Supreme Court. As usual, the trial court's discretion sinks most appellants, although there are occasions when a technical defect is used to upset a lower court's ruling.

In *Tompkins v. Garlock* and *Leverette v. Tomaselli*, the court reiterated its earlier position that, lacking a Kansas domicile for the child, the trial court has no jurisdiction to determine custody. This restrictive approach had its critics and the Judicial Council saw fit to greatly expand the basis of jurisdiction in custody matters in the new code. These new provisions are discussed at length elsewhere and merely noted here.

In *Kimbell v. Kimbell*, *Merriweather v. Merriweather*, and *Hazelwood v. Hazelwood*, the trial court's discretion was upheld. The cases are unique only to the extent that in all three cases custody was granted to the father. Mothers have fared exceptionally well in Kansas, but these cases may indicate that trial judges, with the approval of the supreme court, are willing to consider granting to the father the custody of the children in a larger percentage of the cases.

The cases themselves seem sound. They contain only minor points of interest. In *Hazelwood*, the court found that a proper factor in determining the "best interest" of the child (here custody to the father) was the fact that the mother was going to take the son to Utah with the result that the boy would be unable to see his father and his friends in the local community where both parents had lived.

In *Merriweather* the court approved the trial court's changing custody from a "wayward" mother to a respectable father who had remarried. The fact that

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Ibid.


Ibid.


In *Merriweather* and *Hazelwood*, the trial court had even modified its original decree to change custody from the mother to the father.

Ibid.

the father was behind in child support payments did not require a different result. In Kimbell, the court found that the mother had not shown a "change of circumstances," so the court was under no duty to change custody to the mother. There is some doubt that under the new code, a showing of "change of circumstances" is necessary.\[^{26}\]

The other two custody cases, Anderson v. Anderson\[^{27}\] and McGuire v. McGuire,\[^{28}\] reiterate the now well established rule that as between a fit parent and a grandparent, the parent is entitled to custody since it will be for the best interest of the child.\[^{29}\] In McGuire a grandmother lost custody when a father asked for the change. The court in an almost bored manner, pointed to the rule that when the father is fit, he has the right to custody as against grandparents. Anderson presents the other side of the rule. There a step-mother obtained custody against a father, but the father was found to be unfit. Consequently, it was proper, under the welfare of the child rule, to award the custody to her.

The Anderson case may have a broader interpretation, however. The court relied on State v. Taylor to hold that a step-mother was in loco parentis and consequently the child was "of the marriage."\[^{30}\] Perhaps, but only perhaps, the step-mother could have obtained custody even without a finding that the father was unfit. The court says that Christlieb v. Christlieb (the leading case giving the parent the absolute right to custody unless unfit) is not applicable but does not say why. The most obvious reason is that the father was unfit. A second possibility was that the court treated the step-mother as a mother and as between parents, the "best interest" rule controls.\[^{33}\] The custody provisions in the new code drop all reference to "of the marriage." With the help of Anderson the court may treat step-parents as "real" parents under the new code both for purposes of custody and of child support.\[^{35}\]

Family Torts

Hoffman v. Dautel is a case of first impression and interesting result. Can minor children maintain a cause of action against one who negligently injures

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\[^{30}\] 125 Kan. 594, 264 Pac. 1069 (1928).
\[^{31}\] The "of the marriage" language comes from Kan. G.S. 1961 Supp., 60-1510, which authorizes the trial court to award custody.
\[^{35}\] See the discussion in Hopson, Divorce and Alimony Under the New Code, 12 Kan. L. Rev. 27, 40 (1963).
their father, causing an indirect injury to them for loss of consortium? The
court pointed out that the plaintiffs had an actual loss, that natural justice was
on the children's side, that the common law should grow with the times and
that courts should be alert to widen the circle of justice. However, nine states
had passed on this question, all holding against such recovery. The Kansas
court regretfully said “no” in a unanimous opinion. The possibility of multi-
plicity of actions and double recovery in the absence of statutory control was
persuasive.37

In *Criqui v. Blau-Knox Co.*,38 the United States District Court for the Dis-
trict of Kansas held that a wife had no right to recover for the loss of con-
sortium of her husband. Judge Stanley relied on *Hoffman v. Dautel*. This
question has never been passed on by the Kansas Supreme Court. In the *Criqui*
case, the court pointed out that a wife could not sue under the English
common law; that the common law remains in force in Kansas in aid of the
general statutes,39 that a wife’s cause of action in Kansas therefore must rest on
express statutory authority and that there is no statutory authorization for a
wife to recover for loss of her husband's consortium. Since *Hoffman* indicated
that the Kansas Supreme Court did not feel free to extend the common law in
this area, Judge Stanley, following *Erie R.R. v. Tompkins*,40 also felt bound
to deny the plaintiff's suit.

*Ellis v. Sill*41 also presents a novel question. A father brought an action for
the wrongful death of his fourteen year old son. The mother was living, but
her whereabouts were unknown and she did not join as a plaintiff. The de-
fendant demurred, arguing that the mother was an indispensable party and
that she had a right to share in the recovery. If she did not join as a plaintiff,
the defendant argued, the father’s right to recovery should be limited to one-
half the statutory maximum or 12,500 dollars. No personal representative had
been appointed, but the court held that the father was authorized to bring
the action for “the exclusive benefit of the next of kin.” Three justices dissented,
pointing out that the mother could have been joined as a defendant.42

In one final tort case, *Wroth v. McKinney*,43 the court held that it was
negligence to have a loaded revolver in plain view and accessible to a four
year old infant.

**Divorce**

**Grounds**

Only on rare occasions is the Kansas Supreme Court faced with the prob-

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37 See Note, 11 KAN. L. REV. 186 (1962), for a full discussion of this case.
40 304 U.S. 64 (1938).
42 See Note, 11 KAN. L. REV. 552 (1963) for a full discussion of this case.
L. REV. 345, 352 (1963) for a full discussion of the case.
Problem of the interpretation of the grounds for divorce, particularly when unencumbered with a fight over the children or the property. Three cases decided during the past two years, while apparently involving widely divergent "legal" problems, all exhibited the same underlying socio-psychological problem and the practicing lawyer's response to that problem.

In two cases, *Carter v. Carter* and *Hammack v. Hammack*, the court gave the appearance of merely determining a couple of routine legal problems. In *Hammack* the court found that there was sufficient evidence to sustain a finding of gross neglect of duty and extreme cruelty, and in *Carter* it held there was sufficient corroborative evidence to sustain a charge of extreme cruelty. Certainly neither case seems to present a novel legal problem.

In the third case, *Katz v. Katz*, the court rather liberally construed the eleventh ground for divorce found in Kan. G.S. 1961 Supp., 60-1501. The eleventh subsection provides that insanity is a ground for divorce if certain conditions are met—"for a period of five (5) years, the insane person having been an inmate of any state ... institution for the insane ... and affected with any incurable type of insanity ..." The petition alleged that the defendant's wife had been in and out of an institution for more than five years and that she was incurable. She had not, however, been confined for five continuous years. The defendant demurred and, on appeal, the supreme court found that the petition stated a cause of action. The court pointed out that the original version of the eleventh ground contained the phrase "for such period" after the word "insane." The language was changed in 1947 and the key phrase was dropped. This meant, said the court, that the defendant need not have been a patient "continuously for the five years." The tests were whether the defendant had been insane for five years, was a patient in the hospital, and was incurably insane.

Leaving aside the wisdom of this statutory interpretation, the case is probably correct despite the assumption of most lawyers that five years continuous residence in the hospital is a condition precedent to a divorce based on insanity. But even though correct, the case may not remain law for very long. The Judicial Council, in re-writing the grounds for divorce as part of the new code, re-worded the insanity provision. It now reads: "(7) Confinement in an institution for five years because of insanity ... ." It is extremely doubtful that the Council meant to change the law but it certainly appears

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49 191 Kan. at 502, 382 P.2d at 334.
50 The court took judicial notice that hospitalization was no longer a test of incurable insanity, as many patients are treated on an "out-patient" basis.
that under the new wording, the court would have difficulty in following Katz.52

The Katz case directly involves the problem of mental illness and its relations to a divorce, and illustrates that the legislature feels that if a spouse is "incurably insane" and the five years' requirement really only goes to the problem of proof, the other spouse should be free. But what if the spouse is not "incurably insane" but is nevertheless mentally ill? What relation should this fact have to the right of the "sane" spouse to be free? In Crosby v. Crosby,53 discussed at length in the last Survey, the court allowed the testimony of a psychiatrist to show that the wife's gross neglect of duty was the product of her mental illness. Therefore, said the court, there were no grounds upon which to grant a divorce. Here then the court was saying that if a wife is sick, you may not have a divorce. Inferentially, it was saying that only when the wife is incurably insane, under the eleventh ground, may the other spouse be free.

In the other two cases mentioned earlier, Hammack54 and Carter,55 the problem of the mentally ill spouse is present but not handled as a legal problem by the court.

In Hammack, which purports to merely decide the legal issue of the sufficiency of the evidence to sustain a finding of extreme cruelty and gross neglect, the court relied on the testimony of a "marriage consultant psychologist" (who was not a medical doctor) that the wife, whom he had interviewed, was:

obsessively preoccupied with suspiciousness which she projected into her husband's actions and relationships; that she showed evidence of some severe disturbance in her sexual responsiveness, and that she busied herself with obsessive repetitive thinking, preoccupied with the suspicious things which rendered her most unhealthy to live with. Unquestionably the wife's course of conduct resulted in a substantial impairment and threat to the husband's physical as well as mental health. . . .56

Here then, testimony concerning the mental condition of the wife was used offensively—to sustain the divorce—rather than as a defense. But Crosby was not cited, nor did the court acknowledge that the wife's mental illness might be a "legal" problem. The court handled the testimony as a mere "fact" problem. Note, however, that the psychologist's testimony included a statement that her actions produced an effect upon the husband's health. In other

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52 The problem of the Katz case and the new wording will be discussed at greater length in a student Case Note appearing in a later issue of the Review.
56 189 Kan. at 510, 370 P.2d at 94.
words, the court is, in effect, saying that mental illness is evidence to substantiate a claim of gross neglect and extreme cruelty.

In *Carter*, the psychological problem is buried even deeper. The supreme court's opinion merely recites the rules about conduct destroying the legitimate objects of matrimony and that corroboration need not be extensive. Although the court's opinion is silent, a reading of the record and the briefs show that the defendant husband, was claiming that the wife's testimony was a product of her mental illness, an illness caused by the fact that she was going through a medically produced menopause brought on by a hysterectomy. Here then, a defendant was not attempting to use the mental illness of himself as a defense, à la *Crosby*, nor the mental illness of his wife to show her cruelty, à la *Hammack*, but was attempting to use her mental illness as a defense.

The trial judge was not impressed with the husband's evidence and commented, on granting the divorce to the wife, that the husband had more of an "emotional" problem than did the wife. The trial judge pointed out that: "there is no evidence before the court to which I can base a finding that the plaintiff is mentally sick and needs treatment."87 The appellee in her brief88 cracked: "No one testified appellee's actions and behavior in the things she complained of against the appellant all stemmed from her 'forced change of life.' Amateur psychiatry and amateur diagnosis of human stimuli is as dangerous a pastime as the amateur practice of law!"

There are at least two basic problems presented by the above series of cases, both of which are left unanswered by the court's opinions. First is the substantive problem of what is to be the effect of mental illness on the right of a spouse to obtain a divorce. A clear answer, and that given by the legislature, exists in only one relatively rare situation—when the defendant is incurably ill for five years. In the vastly more common situations where the actions of either the plaintiff or defendant, or both, are a product of a "mental illness" and where those actions normally would constitute grounds for a divorce, the legislature has not spoken and the court has only touched on the problem on an ad hoc basis. There are no simple answers, but with increased knowledge of human motivation and with the increased availability of expert witnesses to discuss those motivations, the court and legislatures are going to have to realize that they are faced with an extremely difficult and complex policy issue. One answer is, of course, to merely handle the problem on the "fact" level and allow each district court judge to decide the case on the "equities." We doubt if the court will do this, however. *Crosby* indicated that when properly presented, the court will attempt to lay down some ground rules. It now behooves the attorney to properly present the issue for his client.

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88 *Id.* at 28.
The second problem concerns the use of expert witnesses in these types of cases. In *Hammack*, the court accepted without question, the testimony of a "marriage consultant psychologist." In *Carter*, the record shows that the trial judge allowed a minister, who held himself out to be a marriage counselor, to testify\(^{60}\) that he thought the plaintiff wife to be mentally ill.\(^{61}\) On the other hand, he would not admit the testimony of a high school guidance counselor and probation officer to the effect that a child of the parties would be better off if these parties remained married.\(^{62}\) These are complex evidence problems and cannot be covered in a survey article on Family Law. However, the court must recognize that it not only is faced with the substantive problem of the effect of mental illness on divorce but the procedural problem of who is an "expert" that can testify about these problems of mental illness.

**Pleading and Practice**

In *Dick v. Dick*,\(^{63}\) the court held that a trial court's failure to specify grounds was not reversible error where the wife was awarded separate maintenance. Kan. G.S. 1949, 60-1516 provides that a wife may obtain alimony from the husband without divorce for any of the causes for which a divorce may be granted. Three justices felt that this language required the trial court to specifically name grounds, but the majority held otherwise. They applied the old adage that a general finding for the plaintiff imparts the findings of fact necessary for the decision. Kan. Sess. Laws 1963, ch. 303, § 60-1610 provides that divorce or separate maintenance may be granted "for any of the following causes . . . ." The court should reach the same decision under the new code.

*Goertz v. Goertz*\(^{64}\) is an interesting commentary on the jurisdictional ability of a trial court to frustrate a stealthy effort to obtain child custody. A wife filed suit for divorce in Harvey County. The husband answered and the trial court entered a temporary custody order giving the husband custody and providing that the wife could visit with the children if they were returned in the evening. On July 10, 1962, the wife's counsel called to say that he was dismissing the action. During that day the wife took the children. She failed to return them in the evening. On the eleventh the husband refiled in Harvey County and the wife filed for divorce in Sedgwick County. Subsequently, in term, the Harvey County District Court vacated, on its own motion, its order of dismissal in the first suit. This left the first custody order in effect and the wife in violation. The wife appealed. In affirming, the supreme court noted that a court can vacate its own order in term on its own motion.

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\(^{60}\) Abstract for Appellant, p. 120, *Carter v. Carter*, supra note 55.

\(^{61}\) However, the judge apparently gave no weight to his testimony. See text accompanying note 58 supra.


\(^{64}\) 190 Kan. 75, 372 P.2d 268 (1962).
Two cases considered wives’ attempts to upset property settlement agreements. *Ward v. Ward* is an appeal from a trial court order refusing to revise and vacate a post-nuptial agreement. The wife had obtained a divorce and submitted the agreement to the court. In the agreement certain real estate was appraised at 108,000 dollars. At the rehearing a different appraiser placed the value at between 161,000 and 195,000 dollars. Appellant’s counsel relied on *Crosby v. Crosby*. The supreme court observed that it would be impossible to even draw a reasonable comparison between the two cases. We agree. In *Crosby* the court upset a post-nuptial agreement, made when the wife was mentally ill. *Hodge v. Hodge* might seem a more relevant case. There, with similar facts, but after the term of court had expired, a wife who had presented the agreement to the court prevailed on the grounds of fraud under *Kan. G.S. 1949, 60-3007 Fourth*. In *Hodge*, the husband had misrepresented the value of a corporation. The court found that this was extrinsic fraud, thus allowing a collateral attack.

The differences between *Ward* and *Hodge* illustrate the difficulty with appellant’s contention in the *Ward* case. In *Hodge* the petition that was upheld had alleged that the husband prevailed upon the wife to consult with his attorney and to by-pass independent advice. In *Ward* the wife had able and experienced counsel.

In the second case, *In re Estate of Gillen*, a man and woman had executed an ante-nuptial agreement in which the woman waived everything except a life estate in the homestead. The husband died a year after the marriage and the wife attempted to upset the agreement. Mrs. Gillen did not have independent legal advice, contrary to the urgings of her husband’s attorney. The court found that the agreement was understandingly made and therefore should be upheld. They cited language from *In re Estate of Cantrell* to the effect that such contracts (both ante-nuptial and post-nuptial) will be upheld if they are fairly and understandably made, are just and equitable in their provisions and are not obtained by fraud or overreaching.

*Gillen* was not a “close” case in that the wife could not show a concealment or misrepresentation of value. In *Ward* the wife did introduce evidence to show values different than those agreed on at the time the agreement was signed. But she had independent legal advice. These cases demonstrate once again, the necessity that the husband’s counsel, when negotiating a property settlement agreement, insure that the wife have independent legal advice.

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*191 Kan. 404, 381 P.2d 347 (1963).*
*188 Kan. 274, 362 P.2d 3 (1961).*
*186 Kan. 361, 349 P.2d 947 (1960).*
*191 Kan. 254, 380 P.2d 357 (1963).*
*154 Kan. 546, 119 P.2d 483 (1941).*
That the wife was urged to obtain an attorney would seem to be an absolute minimum requirement. With the additional powers passed on to the parties in Kan. Sess. Laws 1963, ch. 303, § 60-1610(d), separation agreements may become more prevalent, and an understanding of the proper technique for collaterally attacking them more vital.

The marital differences of Ray and Rosella Hodge have two more chapters. The latter is final. When the original case was remanded, plaintiff's attorney was dissatisfied with the trial judge assignment. In losing a request for a change of assignment, he was told that the case would be heard or that he could dismiss without prejudice. He dismissed. Defendant-husband appealed the order of dismissal. The supreme court held that this was not an appeal from a final order and therefore not appealable. Plaintiff-wife then refiled her petition alleging fraud. In addition, she alleged that she brought the action under Kan. G.S. 1949, 60-311, which allows the action to be brought within one year after a reversal. The defendant demurred, alleging that Kan. G.S. 1949, 60-3007 to -16 were complete and exclusive remedies and that an action to vacate a divorce decree had to be commenced within two years after the original decree. Defendant's demurrer was overruled by the trial court, but the supreme court reversed. It held that the provisions of the general statute of limitations had no application to a proceeding to vacate a divorce decree. Even after two successful supreme court cases, Rosella Hodge's petition was never heard on its merits.

**Child Support**

The court decided several child support cases of more than passing interest. However, the new code of civil procedure renders several of the more pressing problems moot after January 1, 1964.

In *Allison v. Allison*, a father obtained a modification of a child support order, although the supreme court sustained a rather unique portion of the decree. The trial court, in a rather complicated decree, attempted to assure the daughter of a college education. The court ordered the father to establish a savings account payable to the girl when she started college and to make her the beneficiary of his life insurance policy until she reached twenty-five or graduated from college.

The court was faced with the rule of *Emery v. Emery* to the effect that property of a parent may not be transferred to the child for his permanent

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72 This was the petition that was upheld in 186 Kan. 361, 349 P.2d 947 (1960).
75 104 Kan. 679, 180 Pac. 451 (1919).
benefit since the duty to support ceases when the child reaches majority. Under this rule, the court found the savings account proper since it would be exhausted if the child went to college before she was twenty-one and if she did not go, the fund was to revert to the father.

The court had more difficulty with the insurance policy. The court agreed that the order keeping it in effect until she was twenty-five was improper and modified this portion of the decree to order the father to keep it in effect until she reached twenty-one years of age. However, the court admitted that if the father died prior to the time she reached twenty-one, the effect of the decree would be to give her a permanent fund. The court said that in light of the modern necessity for a college education, such a contingency did not violate the Emery rule.

Surely, the result held proper in Allison, does not square with Emery. The court does not overrule Emery, but the distinction is at best difficult to find. Allison must be taken as an indication that under certain practical and limited situations, the court will allow the establishment of a permanent fund for children.

Clark v. Clark discussed at more length below, returns, in approach at least, to the Emery case. The trial court had ordered support “until otherwise ordered by the court.” Some two years after the boy had turned twenty-one, the father, who had quit paying when the boy reached that age, moved to modify the order so that he would not have to pay the past amount nor any future amount. The trial court, in a not too clear opinion, granted the motion as to future payments only and in effect held that the father had to support until the prior decree was modified. The supreme court found, citing Allison, that the father was under no duty to make support payments; therefore, that part of the judgment purporting to extend the duty to support beyond the age of majority was void.

The new code of civil procedure has added some new statutory authority for the kind of order the court made in Allison. Kan. Sess. Laws 1963, ch. 303, § 60-1610(a) provides in part: “[T]he court may set apart such portion of the property of either the husband or the wife, or both of them, as may seem necessary and proper for the support of all the minor children of the parties, or either of them.” The new code apparently enacts the pre-Allison rule, that the property may be “set apart” for the support of the child only until the child reaches majority. In other words, property may be “set apart” for the child, but title may not be given to the child since the phrase “minor child” still appears in the statute. The court’s decree will have to provide that upon

77 Or so the supreme court said the trial court had found.
78 For a discussion of this new section, see Hopson, Divorce and Alimony Under the New Code, 12 Kan. L. Rev. 27, 39 (1963).
the child reaching majority the "set apart" property reverts to the former owner. Even if the trial court does not include such language in its decree, the Clark case would seem to say that the portion of the decree purporting to extend the duty beyond majority is void and might, with impunity, be disregarded.

Actually this basic position was taken by the court, without the aid of a statute, as far back at 1919 in Kelly v. Kelly. There a trial court gave the wife a house and lot to hold as trustee for the children with power to sell or rent and use the proceeds for the support of the children. The supreme court approved the decree with the notation that if the property was not exhausted during the children's minority, title would automatically revert to the husband.

It is possible to argue, of course, that if the decree in Allison was proper under the old statute, it surely would be proper under the new provisions which purport to be broader. To what extent imaginative trial judges can use Allison to provide for permanent funds for children remains to be seen.

Contractual Control

Two more cases were added to the growing body of opinions severely limiting the efficiency of any contractual control over child support. In Clark v. Clark, discussed above, the mother contended that the duty of the husband to support beyond the twenty-first birthday of the son rested not only on the court decree (which the supreme court found to be void), but also on a valid contract which provided that, until the parties otherwise agreed, the father would continue to pay one hundred dollars a month for the education of the son. The court never really answered her contention. It found that the trial court, while it "made the contract a part of its decree," did not base its support order on the contract but on its statutory power to award support; and that power did not extend beyond the twenty-first birthday. But what of the contract? Does the mother still have a cause of action on the contract, or has it become merged into the decree? If it became merged, the issue is then presented as to whether the court could ignore the agreement in entering a different decree. Here the trial court did ignore the agreement, but there was no appeal from that order.

It might be logical to assume that the trial court could ignore the contract. Likes v. Likes, decided shortly after Clark, lends support to this view. There the court re-affirmed the rule of Grunder v. Grunder that a trial court, when asked to modify the original decree, is not bound by a separation agreement
which purports to determine the amount of child support. The court again points out that the power of the court is established by KAN. G.S. 1961 Supp., 60-1510 and the parties have no contractual control. Yet it seems strange that if the court’s power under the statute only exists during the minority of the child, which Clark emphatically holds, the parties would not have the right to contract concerning the payment of support money after the child reached majority. Would this not be just a third party beneficiary contract?

If the parties wish to try to set up such an agreement, they probably should have the contract approved only; it should not be merged. In fact, it would probably be better for counsel to have the parents sign two separate agreements. The first would purport to establish the support obligation during minority and would not be binding on the court. The second could cover support after minority. This agreement will have to be presented to the court, since all property rights between the parties must be presented at the time of the divorce or they will be lost. But it should be binding on the court since all it purports to do is to provide for a third party beneficiary contract among three adults. Surely the court would uphold such a contract.

Another problem arises out of the Likes case. As suggested in an earlier article, the court in Grunder arrived at a good result, but failed to distinguish the second Feldmann case. Feldmann II allowed a contract which provided for a support payment to both the wife and child to control the court when the court was asked to modify the payment. In Likes the court also fails to distinguish Feldmann, although discussed at length by appellant in his brief. Consequently, it is still possible to argue that if the agreement provides for one payment to both the wife and child, the court is bound by the agreement.

Kan. Sess. Laws 1963, ch. 303, § 60-1610(d) provides that a separation agreement is binding on the court except as to clauses covering child custody and support. This provision, plus the attitudes of the court in Grunder, Likes, and Clark leave little chance that the court would, in the future, uphold Feldmann.

Post Judgment Collections

One problem presented in the last survey—that of how to handle excess child support payments—re-occurred, this time in a slightly different setting. In Koons v. Koons, the trial court had ordered sixty dollars a month child...
support payments. The father was in the Army and the Class Q allotment was seventy-seven dollars and ten cents a month. After discharge from the Army, the father failed to pay and the mother had him cited for contempt. The father argued that he had seventeen dollars and ten cents a month credit coming. The court said "no." There was nothing to suggest, said the court, that the Class Q allotments were considered to be or were payments on the court order. They were paid under Army regulations independent of the court order. The money paid had not been withheld from the husband's military pay. While the payments would satisfy the court order, they did not build a reserve. The extra money paid each month was in effect a gift.93

Division of Property

In Dikeman v. Dikeman94 the court held that where both spouses worked and the wife placed her earnings in a separate account in her name, this was jointly acquired property properly awardable to the husband under Kan. G.S. 1949, 60-1511. Under Kan. Sess. Laws 1963, ch. 303, § 60-1610(b) this case would no longer be litigated. It reads: "The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts . . . ."

Attorney Fees

There are three interesting cases in the survey period discussing attorneys' fees. In Murray v. Murray,95 the court announced that a divorce was granted to the wife, but continued the proceedings to hear argument on suggested findings of fact, conclusions of law and to enter judgment on support, division of property, alimony and attorney fees. Before these matters were determined the parties were reconciled. The court made a substantial allowance for attorneys' fees. The supreme court stated that the fact of reconciliation was not a valid argument against the allowance of attorney fees since the court had announced its intention to grant a divorce. The court felt that Kan. G.S. 1949, 60-1507 applied. This section states "on granting a divorce in favor of the wife." Was a divorce granted? Under the new code there is no problem. Kan. Sess. Laws 1963 ch. 303, § 60-1610(f) reads: "Costs and attorneys' fees may be awarded to either party as justice and equity may require."

A detective brought an independent suit against a divorced man for services furnished his ex-wife in preparation for the divorce suit in Chipp v. Murray.96 The detective argued that Kan. G.S. 1949, 60-1507 warranted the inclusion

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93 See Latum, The United States Armed Forces and the Family Support and Court Orders, 2 J. Fam. L. 1 (1962), for a short review of the approach taken by the military forces.
of detective fees as necessities since they were as necessary as attorneys' fees. He urged that Paul Drake was as important as Perry Mason. Our supreme court didn't think so. The court held that such services were not necessaries for which a husband would have been deemed to have pledged his credit. The detective relied on *Gossett v. Patten*,\(^97\) as authority that a request for such services need not be brought in the divorce action. In the *Gossett* case, the husband had brought a divorce suit and then dismissed before the court made an order for suit money. The wife's attorney was allowed to recover in justice court, for the value of his services. The court did not actually distinguish between *Gossett* and the detective's claim. It did observe that his services were retained more than one year before the divorce decree and some time before the suit was filed. And it held that Kan. G.S. 1949, 60-1507, relied on by the plaintiff, authorized an allowance only in divorce cases.

In *McGuire v. McGuire*\(^98\) discussed more fully above, father and maternal grandmother engaged in a post-divorce custody fight. The court held that attorney fees were not allowable in such a proceeding.

Can an alimony judgment debtor receive credit for payments made for the benefit of the judgment creditor when a dormant judgment is properly revived under Kan. G.S. 1949, 60-3221? The court answers affirmatively in *Weber v. Weber*.\(^99\) Three different types of payments were involved. The debtor had paid a 3,000 dollar Las Vegas hotel bill. He had paid 1,000 dollars on the decedent's funeral bill. And decedent had surreptitiously taken two checks, one for 270 dollars and the other for 250 dollars, belonging to him. Can personal debts of the administrator be set off against the judgment? Since the administrator cannot obligate the estate for the administrator's personal debts, the answer is no. The court states that these questions are novel. In *Bourman v. Bourman*\(^100\) not cited by the court, the rule that an alimony judgment may be revived was established. The *Bourman* case reasoned that alimony judgments were final in character, even though sometimes payable in installments, and therefore were on the same footing as other judgments. In allowing the debtor credit for the first three types of payments, the court reasoned that the trial court could sit as a court of equity and therefore had authority to consider such payments. A contrary holding would have done an obvious injustice. Other jurisdictions have held that a court of equity can decree that a judgment has been satisfied in a manner other than originally designated by the court.\(^101\)

\(^{97}\) 23 Kan. 240 (1880).
\(^{100}\) 155 Kan. 602, 127 P.2d 464 (1942).
\(^{101}\) See, e.g., Powell v. Van Danselaar, 162 Neb. 96, 75 N.W.2d 105 (1956).
In addition to the major changes occurring in the new code of civil procedure, the 1963 legislature enacted a couple of other statutes of at least minor interest to the "Family Law Lawyer." The Kansas Uniform Vital Statistics Act\textsuperscript{102} was amended in several respects by Kan. Sess. Laws 1963, ch. 319. Of special interest is Subsection Eight of the new law which amended KAN. G.S. 1961 Supp., 65-2433 regarding the reporting by the Clerk of the District Court of divorces and annulments. Under the old section the clerk was forced, apparently, to get the information needed to fill out the form on her own. The new section requires the prevailing party or his legal representative to give the information to the clerk.

Under Kan. Sess. Laws 1963, ch. 252, two or more counties are authorized to establish and maintain a joint detention home or juvenile farm. Juvenile detention homes are in exceedingly short supply in Kansas, but their cost makes it impractical for most of the Kansas counties to establish one by themselves. The Probate Judge's Association pushed for such authorizing legislation and was successful. Whether any homes will now be built depends on the willingness of two sets of county commissioners to agree on a location of the home. This may prove difficult to obtain.