FAMILY LAW

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During the two years since the last Survey of Kansas Law[1] there have been several important developments in Kansas family law. For purposes of convenience these developments will be discussed in topical categories.

ADOPTION

No legislation affecting adoption was enacted by the Kansas legislature during the survey period. An amendment to the Juvenile Code[2] empowered the state department of social welfare to assume the guardianship of the person and estate of minors under 16 years old committed to it by the juvenile court, *whether or not* the minor's parents had been deprived of parental rights. However, the amendment left intact the provision which empowered the department of social welfare to place for adoption only those minors committed to it under an order depriving the child's parents of their parental rights.

In *In re Thornton's Adoption,*[3] the court held that an order of adoption could be set aside by the mother of the child who did not consent to the adoption and was not served with notice or otherwise informed of the adoption proceedings, and was entitled to the child's custody under a foreign divorce decree.

BASTARDY

Two cases dealing with the subject of bastardy were decided within the survey period. One of these, *State ex rel. Mayer v. Pinkerton,*[4] merely affirmed the position taken by the court in the earlier case of *State ex rel. Williams v. Herbert*[5] in holding that the defendant in a statutory bastardy action is not entitled to a jury trial as a matter of right. The defendant, Pinkerton, urged the court to reverse the earlier interpretation of the bastardy statute under which it was held to grant no right of jury trial to defendants prosecuted under its provisions. The court reaffirmed the reasoning behind the earlier interpretation, holding that the determination of whether the case is to be tried before a court alone or by a jury rests in the trial court's discretion.

The other case, *Grayson v. Grayson,*[6] involved a non-statutory bastardy action, brought in the name of three minor children by their mother as next friend

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[1] 6 KAN. L. REV. 181 (1957).

[2] KAN. G.S. 1957 Supp., 38-824, as amended, Kan. Sess. Laws 1959, c. 199.

[3] 184 Kan. 551, 337 P.2d 1027 (1959).

[4] 185 Kan. 68, 340 P.2d 393 (1959).

[5] 96 Kan. 490, 152 Pac. 667 (1915).

[6] 182 Kan. 285, 320 P.2d 803 (1958).

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against their putative father. The issues actually submitted to the supreme court, however, related solely to the validity of the charging lien asserted by plaintiff's attorney against the recovery.

The attorney had entered into a written contingent fee agreement with the plaintiff's mother whereby the attorney was to receive as his fee one-third of the amount of the recovery, if any. He perfected a lien in accordance with this contract, insofar as he could do so by compliance with the provisions of KAN. G.S. 1949, 7-108 and 7-109. The trial court ordered judgment for plaintiffs and set the support payments at $15 per week "until said bastard children . . . become of majority."

The exact terms of the order are not clear from the opinion. If it meant that the entire weekly amount should be paid until the youngest child should reach majority, then the total amount of the recovery could exceed $11,000 if the youngest child (six years old) and the father both should survive for the period. If the order meant that payments were to be $5 per week per minor child, the total amount still could exceed $10,000 if all parties should survive.

The trial court, obviously reluctant to grant a charging lien for an amount that might be in excess of $3,000 for the attorney's services in the case, denied enforcement of the lien. The attorney perfected an appeal from the ruling which was heard by the supreme court without arguments or briefs in support of the trial court's determination.

The supreme court reversed the trial court's ruling on the lien. It had previously been determined that an attorney could have a lien for his fees in accordance with a contingent fee contract in a statutory bastardy action.[7] No reason appeared to the court which would require a different rule in the case of attorneys fees in a non-statutory action. The supreme court apparently considered the possible analogy of the rule which denies an attorney a lien for a contingent fee against an alimony award,[8] but decided that the two cases were not properly analogous. The public policy factor that underlies the latter rule—namely, the fact that agreements for contingent fees based upon alimony awards are thought to inhibit reconciliation of the parties—is not present in a case where the fee relates to child support payments.

The case went back to the trial court for a rehearing. At that time the trial court ordered the payment of one-third of the weekly support amount to the attorney, but only until a total of $350 had been recovered by the attorney. Since the supreme court, in its opinion, had noted that "the reasonableness of [the fee] is not before us," the trial court apparently thought that it was empowered to determine the reasonable value of the attorney's services. It concluded that

[7] Costigan v. Stewart, 76 Kan. 353, 91 Pac. 83 (1907).
[8] Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940).

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the agreed fee was unconscionable and unreasonable and that a reasonable fee would be $350. The attorney appealed again.[9]

The supreme court again heard the case without argument or brief in support of the trial court's ruling. It reiterated its ruling that the parties are free to contract on the matter of fees. The attorney's lien should be enforced for the amount agreed upon unless the agreement was champertous or otherwise unenforceable. The court recognized unreasonableness of amount as one of the grounds on which the agreement might be attacked as unenforceable, but based its decision upon an independent finding that the amount of the fee here was not unreasonable.

It is always easy for those of us who do not have the judges' job of hearing and deciding upon a crowded docket of cases involving real people with real problems to sit back calmly and reflect upon the work of the judges and characterize it as "good" or "bad." But sometimes detached study can disclose things about a case that were not brought to the judge's attention by the adversary lawyers. In this case, of course, there were no adversary lawyers; only one side was presented to the court. The court then cannot be held blameworthy if a significant point which apparently was not considered by the court is discovered by a later commentator reflecting upon the meaning of the decision. Nevertheless, a significant point was missed in the *Grayson* cases which might have produced a different decision had it been presented. This is not to say that the ultimate decision should have been different, but that the implications of the decision would have been more thoroughly considered and a more illuminating opinion would have resulted.

It is not at all clear that the trial court was bound to order the attorney's lien for the full amount of the contingent fee over the whole payment period. The language of the lien statute is susceptible to an interpretation that would give the trial court some latitude in determining the amount of the lien—even when the parties have agreed upon a contingent fee arrangement. True, the court had previously said that where there was an enforceable agreement between the attorney and plaintiff which called for a contingent fee, the trial court's "determination" of the amount of the lien under the statute, was simply a process of ascertaining what the agreement called for and ordering the lien accordingly. In such case the trial court would not have to determine the reasonable value of the attorney's services as though he were deciding a suit on a quantum meruit; the parties themselves by agreement had already set the proper amount.[10] But this rule was developed in cases involving suits by plaintiffs who were sui juris, contracting with an attorney who was justifiably reluctant to undertake the burdens and hazards of litigation to recover an un-

[9] Grayson v. Grayson, 184 Kan. 116, 334 P.2d 341 (1959).
[10] See Carter v. McPherson, 104 Kan. 59, 177 Pac. 533 (1919).

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liquidated tort or contract liability. If contingent fee arrangements were not permitted in such cases and enforced by the statutory attorney's lien, attorneys would have to demand a healthy retainer of any plaintiff before undertaking his case, and this would effectively bar some persons from access to the courts. But should this principle be extended to non-statutory bastardy cases, where the action per force is brought for minor children, and where the award granted is supposed to be a balance between the children's needs and the father's ability to pay? In such cases we invest a court with power to strike this subtle balance, but under the ruling in *Grayson v. Grayson,* we permit the balance to be upset by the agreement of two non-parties, the mother and the attorney. Conceding the salutory purpose of the attorney's lien in most cases, should a prior contingent fee agreement between attorney and mother be allowed to tie the hands of the court that must adjust the equities as between father and children? I, for one, must sympathize with the trial court which twice sought to limit the attorney's lien in the *Grayson* case so that it would not completely upset the balance established between father's ability to pay and children's needs.

The supreme court's opinion gives no indication that this problem was given serious consideration in the court's deliberations. Rather, the court seemed to feel bound by the prior case of *Costigan v. Stewart,*[11] which upheld a lien to secure a contingent fee in a statutory bastardy action. In the first *Grayson* opinion the court said, "[W]e know of no reason why the rule there announced should not apply in an action brought for the same purpose to enforce a non-statutory liability, as was done here."[12]

It may be questioned whether *Costigan v. Stewart* is a "good" decision. But conceding that it is, two reasons appear which could absolve the court from obligation to follow it in the *Grayson* case. In the first place, the cause of action in the *Grayson* case belonged to the children. The equitable action was brought in their names by their mother as next friend. But a statutory bastardy proceeding involves the right of the mother alone. It is brought on her relation and the payments it directs are payable to her. This fact, that the cause of action belonged to the mother, not the children, was the principal factor in the court's decision in *Costigan v. Stewart.*

> The fund recovered is hers for any and all purposes, and the child has no legal claim upon it or direct interest in it. . . . The pecuniary interest of the mother and her right to begin, direct, control, settle or dismiss the proceedings are not shared by her with any other person; it would seem to follow necessarily that she may contract for the employment of an attorney to assist the county attorney in prosecuting the action and provide for his payment out of the fund. [H] er right to do this . . . is incidental to the right to institute and control the action . . . . But, as we have seen, her right to institute control or compromise the prosecution is without reference to any supposed right of the child in the fund.[13]

[11] 76 Kan. 353, 91 Pac. 83 (1907).
[12] 182 Kan. 285 at 287, 320 P.2d at 805.
[13] 76 Kan. at 356, 359, 91 Pac. at 85.

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The fact that the mother's rights *only* were involved was the ratio decidendi in *Costigan v. Stewart.* Absent this factor, it would seem that that case would not be controlling.

In *Myers v. Anderson,*[14] the Supreme Court of Kansas drew the distinction urged here between statutory and non-statutory bastardy, specifically referring to *Costigan v. Stewart* in holding that the mother of an illegitimate child could not, by settlement of a statutory bastardy action, bar the child's rights to a non-statutory recovery. If the mother cannot settle between herself and the putative father her child's rights to support, how can she contract them away by an agreement with an attorney? By the contingent fee agreement she, in effect, binds the children to accept two-thirds of what the court determines is a just and reasonable amount. An agreement between the mother and father of the children to limit the amount payable for the children would be ineffective to bind the children. But if the court should enforce the contingent fee agreement according to its terms, the children would be bound to accept a certain amount of support money not because the court determined that amount to be "just" but because the mother and an attorney made an agreement.

This is not an easy problem. It is unfortunate that the supreme court did not have argument on both sides. But it seems clear that the court was not bound to follow *Costigan v. Stewart* in this case, particularly so since it had already been ruled that the *Costigan* case was not authoritative in a non-statutory bastardy case.[15]

The second reason that the Supreme Court of Kansas need not have felt bound by *Costigan v. Stewart* is the fact that the trial court, at the second hearing, found as a matter of fact that the fee agreed to by the mother was unconscionable and unreasonable. The supreme court does not deny that this would be grounds for denying enforcement to the lien. Rather, the court found that the trial court was wrong in its determination of the facts. If the supreme court had left the trial court's fact findings alone, the *Costigan* case would have presented no problem.

Never let it be said that this writer is opposed to the attorney's lien. An attorney is entitled to some assurance of payment. If his non-statutory bastardy clients cannot be bound to a fee contract as we have suggested, then the state should provide some other method whereby he can expect a satisfactory payment for his services. Unless this is done attorneys will be increasingly reluctant to represent such clients. Believing he was not bound by any common law precedent and feeling that the attorneys' lien statute provided him sufficient latitude, the trial judge in *Grayson v. Grayson* tried to work out a solution to this dilemma in the common law tradition. Perhaps his solution was not a good

[14] 145 Kan. 775, 67 P.2d 542 (1937).

[15] It is probable that Myers v. Anderson, *supra* note 13, was not brought to the attention of the supreme court in the *Grayson* case.

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one in this case. But he saw the problem which the supreme court ignored, although no blame can be placed on the supreme court for its failure. This is one of those rare cases where our adversary system of litigation completely fails us. The supreme court heard only one side of the case.

Whatever may be the reasons for the failure, a judge-made solution to the dilemma posed in the *Grayson* case is now impossible. The legislature will have to act to resolve it if it is to be resolved. Perhaps the simple expedient of expressly conferring power upon the trial court to set a reasonable fee to be paid by the father in such cases would solve it.

CUSTODY

In *In re Vallimont*[16] the Supreme Court of Kansas affirmed the almost universal rule[17] that upon death of the parent who has held custody of a minor child under a divorce decree the right to custody automatically inures to the surviving parent unless he is shown to be an "unfit parent." The case was not a difficult one. The children, both under three years old, were awarded to the father upon his writ of habeas corpus filed promptly after the death of the children's mother. The maternal grandparents of the children, who claimed to be worth $500,000, contested the right of the father, an Air Force sergeant, to custody. The record was completely devoid of any substantial evidence of the father's unfitness, and the trial court decided the case upon the petitioner's demurrer to the respondents' evidence. The supreme court ruled that it was error to decide the case upon demurrer here, asserting that the evidence was technically sufficient to withstand the demurrer. The supreme court affirmed the custody award, however, on the very same ground, that the evidence would not support an order depriving the parent of custody of his children.

In this case, of course, since the burden of proof was on the respondent to show parental unfitness, and since the case was tried to a court sitting without a jury it really made no difference whether the court purported to rule upon the sufficiency of the evidence on a demurrer or on a motion for judgment. The respondents having rested, there was no procedural reason why the court should have required the petitioner to put in more evidence, if all of the respondents' evidence failed to warrant judgment in their favor. However, cases of this sort are not the kind that should be decided coldly on motions or procedural rulings. Probably the court should consider all the evidence available, even though one party's attorney may be a little remiss, procedurally, in getting his case before the court. Probably the supreme court acted wisely in indicating its disfavor of deciding custody cases on demurrers.

In *Goetz v. Goetz*[18] the court affirmed the continuing jurisdiction of a trial

[16] 182 Kan. 334, 321 P.2d 190 (1958).
[17] See Annot., 39 A.L.R.2d 258 (1953).
[18] 184 Kan. 174, 334 P.2d 835 (1959).

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court that originally granted custody of a child to reconsider and change its order whenever a change of circumstances would warrant it. However, in *Leach v. Leach,*[19] the court recognized a limitation upon the principle of "continuing jurisdiction"—it is operative only so long as the child is domiciled in Kansas. In that case the court that had initially granted the divorce and custody order modified its order to change the custody of the child from its father to its mother. This modifying order was made after the father and child had moved to New Mexico. The mother sought enforcement of the order in New Mexico. The New Mexico court refused to accord the order full faith and credit on the theory that the Kansas court lost its continuing jurisdiction when the child became domiciled in New Mexico.[20] The father later appealed the Kansas court's order. The Supreme Court of Kansas agreed with the New Mexico court in holding that the Kansas court had lost its continuing jurisdiction.

Authority among the states is divided on the question of whether a decree may be modified by the court granting custody when a new domicile has been established for the child. In the *Leach* case Kansas has aligned itself with one of the two principal views.[21]

DIVORCE

Adjustment of Economic Interest

Alimony and Support.—In *Edwards v. Edwards*[22] the court had to examine the nature of the award of temporary support money pendente lite under KAN. G.S. 1949, 60-1507. The plaintiff had secured an ex parte order for support pendente lite when she instituted a divorce action against defendant in 1956. The order provided for specified monthly payments, which were never made. The parties became reconciled shortly after the order was made, but within six months plaintiff filed a supplemental petition alleging the same grounds as in the initial petition. No new order for temporary support pendente lite was made at that time. Later plaintiff caused execution to issue against some stock owned by defendant in enforcement of the past due installments under the earlier support order. Defendant then moved for the vacation of the earlier order, and the corporation upon which it was served refused to comply with the execution. Plaintiff moved to require the corporation to comply with the execution. She appealed from rulings adverse to her on both her motion and defendant's motion. Defendant contended that the court's order vacating the ex parte support award was not an appealable order.

[19] 184 Kan. 335, 336 P.2d 425 (1959).

[20] The child has the same domicile as the parent having custody by operation of law.

[21] See GOODRICH, CONFLICT OF LAWS 423-24 (3rd ed. 1949); Goodrich, *Custody of Children in Divorce Suits,* 7 CORNELL L.Q. 1 (1921); Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW & CONTEMP. PROB. 819 (1944).

[22] 182 Kan. 737, 324 P.2d 150 (1958).

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It had previously been held[23] that an order *allowing* alimony pendente lite is not an appealable order. Plaintiff contended, however, that the order *vacating* the ex parte award was appealable since the unpaid installments were final judgments upon which execution could issue. The order vacating and discharging defendant's liability upon those past due installments was a final judgment of their invalidity and therefore was appealable. Plaintiff also urged, as an alternative basis for appeal, that the ex parte award pendente lite was entered as a "provisional remedy."

The supreme court concluded that the order vacating the ex parte award was not an appealable order. In the course of the opinion the court also concluded that the past-due installments of support allowed pendente lite under KAN. G.S. 1949, 60-1507, unlike past due installments of support or alimony under a final decree, did not become final judgments upon which execution could issue.

Property division.—The inartful wording of the statutory provision pertaining to alimony and property division[24] caused three cases to be brought before the Kansas Supreme Court during the survey period. The language of the statute leaves some doubt as to whether both alimony and a division of property acquired during the marriage are to be granted in cases where the divorce is obtained for fault on the part of the husband, or whether alimony is to serve in lieu of property division in such cases. It seems always to have been assumed that property division and alimony both were proper in a divorce where the husband was at fault,[25] but until the court decided the case of *Garver v. Garver,*[26] in January of this year, it was not clear that both were *mandatory*.

The supreme court has been very reluctant to disturb trial courts' awards of alimony and property divisions. This policy undoubtedly is wise, but the fact that such great latitude to adjust the economic relations of the parties has been permitted probably stimulated the misconception that no express distinction between alimony and property division was necessary so long as the ultimate effect of the order was equitable and reasonable. In *Meads v. Meads,*[27] the trial court awarded plaintiff a home "as a division of property and in lieu of alimony."[28] After examining the record the supreme court concluded that this award was a division of property *and* alimony in the form of property. The supreme court advised that the journal entry should have identified the portion set aside as alimony and the part allowed as a division of property. The failure to specify a definite division was not regarded as reversible error, however, it being clear that alimony was included in some degree. Again in *Matlock v.*

[23] Earls v. Earls, 26 Kan. 178 (1881).
[24] KAN. G.S. 1949, 60-1511.
[25] See Hardesty v. Hardesty, 115 Kan. 192, 222 Pac. 102 (1924); Putnam v. Putnam, 104 Kan. 47, 177 Pac. 838 (1919). *But see,* Mathey v. Mathey, 175 Kan. 446, 264 P.2d 1058 (1952).
[26] 184 Kan. 145, 334 P.2d 408 (1959).
[27] 182 Kan. 361, 320 P.2d 830 (1958).
[28] *Id.* at 362, 320 P.2d at 831.

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Matlock,[29] the court ruled that an award of "the sum of Ten Thousand Dollars ($10,000.00) for and in lieu of all property rights and permanent alimony" was proper in the face of the contention that the judgment must set out the elements separately.

In *Garver v. Garver*,[30] however, the trial court ordered a specific division of the property, but made no mention of alimony in the decree. Plaintiff moved for a new trial on the ground that both alimony and property division are mandatory in cases where divorce is granted for reasons of fault on the part of the husband, and that the alimony award must be a definite sum. The trial judge denied the motion, indicating in his denial that he had tried to make an equitable adjustment of the property, and that it really made no difference what it was called. "[Y]ou can call it property division or alimony, it is one and the same thing under the statute . . . ."[31]

The supreme court reversed the ruling of the lower court and ordered the entry of judgment in her favor for alimony in a definite amount *and* equitable division of property acquired during marriage. In the course of the opinion the court spelled out its understanding of the statutory provision in clear language:

> It is clear to us that when a divorce is granted the wife for the fault of the husband she is entitled to three things: (1) restoration of all the property owned by her prior to the marriage or acquired by her in her own right after the marriage, (2) such alimony as the court shall deem reasonable, and (3) a division of the property acquired jointly by the parties during the marriage. While the mentioned statute is not a model of clarity, it is apparent the legislature intended that the sentence dealing with division of jointly acquired property to apply both to cases where the divorce is granted the wife for the fault of the husband and to cases where the husband is granted the divorce for the fault of the wife.
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> This court has repeatedly held it is mandatory where the wife is granted a divorce for the fault of the husband that the trial court award her such alimony as it shall think reasonable, with the allowance to be made in real or personal property, or both, or in money. . . . Similarly, it is mandatory that the court make an equitable division of the jointly acquired property.[32]

In support of this interpretation the court expressed a willingness to overrule so much of a particularly vexing earlier case[33] as might be inconsistent with the rule now announced.

It is significant to note that in its order the supreme court directed the trial court to enter an award of alimony in a definite amount *and* property division. Distinguishing the two in the order was regarded as desirable but not crucial in the *Meads* and *Matlock* cases. Perhaps the court has repented of its laxity in

[29] 182 Kan. 631, 323 P.2d 646 (1958).
[30] 184 Kan. 145, 334 P.2d 408 (1959).
[31] *Id.* at 146, 334 P.2d at 410.
[32] *Id.* at 149, 334 P.2d at 411, 412.
[33] Mathey v. Mathey, 175 Kan. 446, 264 P.2d 1058 (1953). Although the tenor of the *Mathey* case is somewhat inconsistent with the rule announced in Garver v. Garver, there may be no actual repugnancy in the holding.

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those cases. Trial courts probably will do well to distinguish between the elements in future decrees, just to be on the safe side. In theory alimony and property division are quite different, and rest on different reasons. The *Garver* opinion is a helpful one, for we will now be better able to recognize the distinctions between the two elements. However, it is probable that trial courts will continue to adjust the actual economic interests of parties to divorce actions in the same old equitable way, but being more careful to label the various elements included in the final award as "alimony" or "property division." Apparently any particular item of property can be classified either way, so long as something definite and reasonable is included in each category.

In considering the adjustment of the economic interests the court is not to be influenced by the fact that the defendant is the only son of wealthy parents. Such evidence is properly excludable as irrelevant according to *Leverenz v. Leverenz*,[34] a case decided within the survey period.

In *Chapman v. Chapman*[35] it was held that a property division order is a judgment which can be revived by the personal representative of a deceased party.

Is an order of property division proper in dissolving a void marriage? It has generally been assumed that the remedial incidents of the divorce statute—alimony, support, and property division—are not applicable in cases where there has been no valid marriage. Equitable adjustment of property rights of the parties to an annulment proceeding has always been regarded as appropriate, independently of any statutory authority,[36] but a valid marriage has usually been considered a prerequisite to the invocation of the statutory provisions for property division. In *Benewiat v. Benewiat*[37] the plaintiff sought a divorce from a common law marriage and a division of property. The defendant denied the common law marriage and alleged some new matter. In her reply plaintiff denied the new matter contained in the answer and stated the position that if the marriage were held to be null and void she still would be entitled to an equitable division of the property. The defendant moved to strike the reply on the ground that it changed the issues originally set forth in plaintiff's petition. The trial court sustained the motion to strike and plaintiff appeals.

The supreme court reversed the trial court. The reply was erroneously stricken. No other result could be reached reasonably, it would seem, since it was defendant, not plaintiff, who changed the issue from "divorce" to "annulment." Plaintiff's reply merely asserted an alternative right to property division in the event she should be unsuccessful in proving the common law

[34] 183 Kan. 79, 325 P.2d 354 (1958).
[35] 184 Kan. 319, 336 P.2d 407 (1959).
[36] Werner v. Werner, 59 Kan. 399, 53 Pac. 127 (1898); Fuller v. Fuller, 33 Kan. 582, 7 Pac. 241 (1885). This equitable division is sometimes spoken of as a "quasi partnership" accounting. See Whitney v. Whitney, 192 Okla. 174, 134 P.2d 357 (1942).
[37] 181 Kan. 621, 313 P.2d 251 (1957).

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marriage.[38] The interesting thing about the supreme court's opinion is not the result reached but the route which apparently was taken to arrive there. The court apparently based its decision that plaintiff was entitled to property division even if it were held that there was no marriage on KAN. G.S. 1949, 60-1506, which provides *inter alia,* that where the parties are in equal wrong "or in any other case where a divorce is refused," the court may order an "equitable" division of the property of either of the parties. Since divorce was refused, the court said the statute applies. As indicated above, this ruling, if actually based upon the provisions of the statute, departs from the traditional notion that the incidents of statutory dissolution are applicable only to cases wherein a valid marriage can be proved. In *Werner v. Werner*[39] the court indicated its opinion that the statutory provision relied upon by the court in the *Benewiat* case was not applicable to cases wherein no valid marriage could be shown.

> Even in cases *where the marriage is valid,* the court may adjudge an equitable division and disposition of the property of the parties. Civil Code § 643 [now 60-1506]. But independently of the statute, we think the court had authority to decree, not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. (Emphasis supplied.)[40]

Whether this change in the theory of property division in void marriages will have any far-reaching consequences is speculative. Under the previous doctrine it was assumed that the property division allowable in such cases could relate only to property jointly accumulated by the parties. Under the statute the trial court has authority to make an "equitable division and disposition of the property of the parties, *or either of them.*" (Emphasis supplied.) This might ultimately lead to divisions of property based upon such previously irrelevant considerations as comparative culpability of the parties, for the court is given much more latitude to consider "personalities" under the statute than would have been true under the equity doctrine. Moreover, if this statutory provision is now construed to apply to void marriages, the door may be opened to applying other sections of the divorce law to provide new remedies in annulment cases.

It may be questioned whether the court really intended to depart from the orthodox doctrine in this case. The opinion gives no indication that the court thought it was making a new departure, and the language is sufficiently ambiguous that the court can, if later pressed, rule that it was applying only the traditional equity doctrine, not the statutory remedy, in the *Benewiat* case. It is submitted that the ambiguity of the term "equitable" is responsible for

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[38] *Cf.* Lawrence Building & Loan Ass'n v. Taylor, 148 Kan. 331, 81 P.2d 15 (1938), where plaintiff sued to quiet title, defendant claimed an individual interest in the land, and plaintiff replied asking for partition in the alternative. The reply was proper.

[39] 59 Kan. 399, 53 Pac. 127 (1898).

[40] *Id.* at 402, 53 Pac. at 128.

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the confusion that may lay behind this decision. KAN. G.S. 1949, 60-1500 obviously uses the term "equitable" in a non-technical sense to mean "fair," "just," or "reasonable." When the word appears in earlier judicial discussions of the remedy, such as the *Werner* case alluded to above, the term means "a remedy formerly cognizable in courts of equity."[41]

In *King v. King*,[42] plaintiff sued for divorce and defendant cross-filed. Both parties asked for property division. The trial court denied the divorce because the parties were in equal wrong. No property division was ordered. Plaintiff attempted to perfect an appeal of the trial court's refusal to grant property division as an abuse of the discretion allowed the court under KAN. G.S. 1949, 60-1506. Since both parties had asked for property division, plaintiff contended the court abused its discretion in not ordering it. Unfortunately the supreme court refused to decide upon this significant question. Although the plaintiff had moved for a new trial and had specified as error the trial court's refusal of the new trial, her notice of appeal failed to contain the magic words which are all important in invoking the supreme court's jurisdiction to review trial errors. Owing to this technical defect in the appeal procedure, the supreme court refused to consider the merits of the case.

KAN. G.S. 1949, 60-1511 provides in part, that where a divorce is granted by reason of the fault of the wife, "the court shall order restoration to her of the whole of her property, lands, tenements and hereditaments owned by her before. . . ." It was held in *Kelso v. Kelso*,[43] that this statute does not mean that the wife must be restored to all realty, title to which was held by her before marriage, free and clear of liens if improvements were added to the premises by the joint efforts of the parties. Even though the statute prescribes that she be restored to all "lands," the court says her right to restoration is subject to reasonable adjustment where the husband has added value to her property. This interpretation of the statutory language is clearly preferable to the strictly technical construction urged by the plaintiff. The purpose of the provision for restoring the wife to the full ownership of real and personal property held by her in her own right before marriage manifestly is to protect the wife from economic exploitation by her husband and to place the parties, so nearly as may be, in the same relative economic position after the dissolution of the marriage as they held before marriage. The restoration to an identical *title* interest should not be important enough to interfere with the proper adjustment of the *economic* interests of the parties.

A very interesting case involving the question of whether a minister's wife may be given the parsonage as part of the property division incident to a divorce

[41] See generally, Evans, *Property Interests Arising From Quasi-Marital Relations*, 9 CORNELL L.Q. 246, 254 (1924).
[42] 183 Kan. 406, 327 P.2d 865 (1958).
[43] 182 Kan. 665, 324 P.2d 165 (1958).

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came before the Supreme Court of Kansas during the survey period. In *Dawkins v. Dawkins,*[44] the defendant husband was minister of an independent church. It appeared that his control of church policies, finance and properties was absolute, although title to the church realty was held by himself and two other persons as trustees for the congregation. The church was joined as a party in plaintiff's suit for divorce. The trial court found from the evidence that the church was not a church at all—it was an enterprise operated by defendant for profit. All income of the church went to him and all property of the church was purchased by him. The transaction placing the church property in the hands of trustees, the trial court found, was a mere sham, executed to show colorable compliance with the requirements of the Reconstruction Finance Corporation after the 1951 flood. Accordingly, the trial court treated the parsonage as the private property of the defendant and ordered the trustees of the church to convey it to plaintiff. From this order the church appealed.

The legal issues in the case really are not properly questions of family law. When all the side issues were stripped away the basic question involved in the case was whether property apparently held in trust for an unincorporated religious association, where the association was formed and operated by its minister as a profit-making enterprise, belonged to the association under orthodox principles relating to religious associations or to the minister under the peculiar facts of the case as the sole proprietor of an enterprise.

The supreme court held that the parsonage belonged to the church and as such it could not be decreed to the minister's wife as part of the property division in her divorce suit. In spite of the natural desire to give the wife something tangible by way of property division, the supreme court ruled that her husband's sham dealings do not provide a basis for giving her property which must belong to the congregation. Admittedly, the husband's sham dealing prejudiced the wife, but the remedy does not lie in recompensing her at the expense of third parties who likewise have suffered at the husband's hands.

The issues in the case are not so simple as the brevity of this treatment of it might indicate. However, the issues are not primarily "family law" questions, and so they fall outside the scope of this article. The *Dawkins* case is mentioned here as an interesting case that arose in a divorce context. The decision is only an ordinary one in its significance to family law.

Jurisdiction

Perhaps the most significant family law cases to be decided in the survey period were two cases involving questions concerning the residence of the plaintiff for jurisdiction purposes.

In *Irvin v. Irvin,*[45] the parties had lived in Emporia in a housekeeping apart-

[44] 183 Kan. 323, 328 P.2d 346 (1958).
[45] 182 Kan. 563, 322 P.2d 794 (1958).

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ment. When the wife became a patient at the Topeka State Hospital, the plaintiff-husband abandoned the Emporia apartment, stored the couple's furniture on his father's farm near McCracken, and took a sleeping room in Topeka to be near his wife. He got a job in Topeka and remained in Topeka for about six weeks before filing his action for divorce in Shawnee County. The defendant, now living with her parents in Ellis County, moved that the action in Shawnee County be dismissed on the ground that the plaintiff was not a bona fide resident of Shawnee County. The only evidence adduced was plaintiff's own testimony. He stated that he intended to keep on working in Topeka, but that he desired to return to school, either at Manhattan or Wichita, to get an engineering degree the following fall. The trial court granted the motion to dismiss, and plaintiff appealed.

The supreme court reversed. The case is a very close one. If the supreme court had based its reversal upon its finding the facts to be contrary to the trial court's conclusion, we could not quarrel with it. But the court, following the case of *Gleason v. Gleason,*[46] said it would not set aside the conclusions of the trial court on the question of residence in divorce cases if the trial court's ruling was supported by substantial evidence. Accordingly, the supreme court, in this case, is not saying that the trial court is wrong on the facts. The supreme court is saying there is no substantial evidence to support the trial court's ruling.

The requirement of "residence" in our divorce laws[47] as interpreted in the light of KAN. G.S. 1949, 77-201 *Twenty-third,* means the same thing as domicile, and the concept of domicile is quite well expressed in *Ford v. Peck.*[48] The physical presence in the alleged domicile must be accompanied by the intention of remaining there permanently or indefinitely. Until a new domicile—a place where the requisite physical presence and intent concur—is acquired, a person's former domicile is retained, even though he has abandoned his former home never intending to return. This is hornbook law that the court recognized in the *Irvin* opinion.[49] There was no doubt of plaintiff's physical presence in Shawnee County. The only fact in controversy, then, was whether his presence there was accompanied by the intent to remain permanently or indefinitely. If he did so intend, Shawnee County was his domicile. If he did not so intend, Lyons County was his domicile by *operation of law* since he had not yet acquired a new domicile of choice after abandoning his home in Emporia. The question of what his intent actually was was a matter to be determined from all of the evidence.

The only evidence offered was plaintiff's own testimony. His testimony, as related in the supreme court's opinion, quite clearly contains evidentiary matter

[46] 159 Kan. 448, 155 P.2d 465 (1945).
[47] KAN. G.S. 1949, 60-1502.
[48] 116 Kan. 74, 225 Pac. 1054 (1924).
[49] 182 Kan. at 566, 322 P.2d at 797.

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from which inferences could be drawn either supporting or refuting his contention that Shawnee County was now his domicile. He expressed his desire to return to school at Manhattan or Wichita. While this would tend to show that he did not intend to remain in Shawnee County permanently, this fact alone would not necessarily defeat his contention of domicile in Shawnee County. If he planned to return to Shawnee County whenever he was not in school, then his intention to go to school outside the county would not defeat a Shawnee County domicile.[50] But on the evidence presented, since he had only a sleeping room in Topeka and no family ties there, a conclusion that he would always "intend to return when absent" would seem to be an unreasonable inference. There is, then, evidence in plaintiff's own testimony which would support the trial court's finding that plaintiff was not domiciled in Shawnee County.

On the other hand, the plaintiff's own direct testimony as to his subjective intention to remain indefinitely in Topeka tends to support the supreme court's conclusion that plaintiff was domiciled in Shawnee County.

The evidence presented by plaintiff then permits inferences to be drawn either way on the issue of domicile, depending upon the weight attached to the various items by the trier of fact. An interested party's statements of his subjective intention, where that intent is the main issue in the case, is obviously inherently weak. Also weak, however, is testimony relating to the party's subjective intentions for the future. There is, then, no strong evidence on either side of the question. The trial court determined that the evidence preponderated against the Shawnee County domicile. The supreme court felt otherwise.

It cannot be said that the supreme court's decision as to plaintiff's domicile is wrong. Perhaps the domicile is in Shawnee County. But some conclusions drawn by the court in the course of the opinion quite clearly are wrong. The court attempts to justify its refusal to follow the *Gleason* case,[51] which would require that the trial court's ruling be left undisturbed, by saying that the rule of the *Gleason* case applies only where there is conflicting evidence, but that in the *Irvin* case "there is no conflicting evidence."[52] That this conclusion is mistaken has already been demonstrated. There were no conflicting *witnesses,* but there was, within plaintiff's own testimony, evidence which would tend to prove both conclusions. There was, then, conflicting evidence in plaintiff's own testimony. This fact is sufficient to distinguish the *Irvin* case from *Gibbs v. Central Surety & Ins. Corp.,*[53] the case relied upon by the court as its basis for disregarding the trial court's findings.

In the last paragraph of the opinion the court says, "He had abandoned his apartment in Emporia and he no longer lived there. Surely his domicile was not

[50] See Strackeljohn v. Campbell, 136 Kan. 145, 12 P.2d 829 (1932).
[51] 159 Kan. 448, 155 P.2d 465 (1945).
[52] 182 Kan. at 567, 322 P.2d at 798.
[53] 163 Kan. 252, 181 P.2d 520 (1947).

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there."[54] This, of course, is a non sequitur. The court itself, only one page earlier, had said, "[W]hen a home is abandoned, the domicile continues until a new domicile is acquired."[55] The fact that plaintiff abandoned his Emporia home does not mean that he thereby lost his Emporia domicile. His domicile continued to be Emporia until a new one was established. The question to be decided in this case was whether, on the facts, plaintiff had acquired a new domicile of choice in Topeka.

Irvin v. Irvin presented the court with a set of facts upon which some really significant law concerning residence for divorce purpose could have been elaborated. The court's analysis of the domicile problems in this case is simply erroneous. Still, the ultimate finding that plaintiff is domiciled in Shawnee County may well be the better result.

While the *Irvin* case actually dealt with the question of "residence" for venue purposes, *Fincher v. Fincher*[56] concerned the question of residence for purpose of establishing jurisdiction of the subject matter. In the latter case plaintiff-wife and defendant had been residents of Kansas before moving to California. Plaintiff remained in California only a few months before marital difficulties led her to return to Kansas. She and the two children of the marriage went to stay with plaintiff's parents in Leavenworth County. Within two months after her return she commenced the divorce action in Leavenworth County.

Although defendant continued to reside in California, he happened to be present in Kansas trying to effect a reconciliation when he was personally served with process in plaintiff's suit. Defendant returned to California and did not answer or otherwise plead in the matter. A default decree of divorce was granted to plaintiff.

Sometime after the time for appeal had expired defendant engaged counsel to secure the vacation of the decree. A petition was filed under KAN. G.S. 1949, 60-3007 and -3008 to vacate and set aside the decree on the ground that it had been obtained by fraud, plaintiff not having been an actual bona fide resident of Kansas for one year next preceding the filing of her petition. Plaintiff had perjured herself in making the allegation of residence in her verified petition, defendant contended. The trial court heard the evidence and apparently conceded that plaintiff was not a bona fide resident for one year before bringing her action. Nevertheless the trial court denied defendant's petition to vacate the decree since the fraud shown was "intrinsic" not "extrinsic." Only "extrinsic" fraud, the court said, would justify vacation of the decree under KAN. G.S. 1949, 60-3007 *Fourth.*

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[54] 182 Kan. at 567, 322 P.2d at 798.
[55] *Id.* at 566, 322 P.2d at 797.
[56] 182 Kan. 724, 324 P.2d 159 (1958).

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The terms "extrinsic" fraud and "intrinsic" fraud, of course, are merely symbols used to identify cases wherein the fraud does or does not so vitiate the proceeding as to render it subject to attack. To say that the proceeding is not void because the fraud is "intrinsic" is a circumlocution. Whether fraud will provide the basis for avoiding a judgment depends upon whether or not the fraud prevented a fair submission of the issues.[57] Defendant was personally served within the boundaries of Kansas in the *Fincher* case. There was nothing to prevent him from challenging the jurisdictional allegations of plaintiff's petition directly. The fact that the fraudulent assertions relate to "jurisdictional" facts rather than to evidentiary facts has been said to make no difference in the application of the rules relating to avoidance of judgments for fraud.[58] In *Fincher v. Fincher* the Kansas Supreme Court, in affirming the trial court's ruling, has now given us a direct holding to that effect.

Whether the divorce decree in the *Fincher* case would be entitled to recognition in the courts of other states is a speculative question that is beyond the scope of this article.[59] But the decision does drive another nail into the coffin of the in rem theory of the nature of a divorce. That doctrine is no longer very vital in Kansas courts. It is sometimes thought that residence or domicile within the state for a specified length of time is a sine qua non to jurisdiction of the subject matter in divorce cases. As a matter of theory, this statutory residence requirement is supposed to limit the court's power to dissolve marriages. But the theory and actual practice are not identical as the *Fincher* case illustrates. The *allegation* of domicile for one year still is required, but the actual fact of domicile for the statutory period is now more nearly a matter of affirmative defense than a jurisdictional requirement.

The decision in the *Fincher* case itself surely was proper in the present state of our law. If we are going to permit "consent" divorces by dispensing with the domicile requirement, we must prevent defendants like Fincher from gambling upon the outcome of an ex parte divorce, only to challenge it later as fraudulent if he does not like the decision.

Two cases involving the continuing nature of the jurisdiction of the court granting a divorce were presented during the period. Both cases were directly concerned with matters of child custody, and were discussed above in the "custody" section of this article.[60]

Parties

In most divorce proceedings, the husband and wife are the only parties. There are cases, however, when the joinder of third parties may be proper.

[57] See Blair v. Blair, 96 Kan. 757, 153 Pac. 544 (1915).
[58] *Ibid.*
[59] See Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948).
[60] See accompanying text to notes 17 and 18 *supra.*

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If a third party claims an interest in property allegedly belonging to one of the spouses, it is clear that the third party's rights must be settled before an equitable property division between spouses can be effected. Thus it may be proper to join the third party in an appropriate case.

In *Dawkins v. Dawkins,*[61] plaintiff-wife was permitted to join as defendant the church in whose name legal title to the parsonage was held. Equitable property division required the prior determination of whether the husband had any property in the parsonage.

In *Edwards v. Edwards,*[62] the joinder of defendant's mother, to whom he had transferred certain properties allegedly in the attempt to defeat plaintiff's suit for divorce and who was president of a small corporation in which defendant held a substantial block of stock, was held to be proper. The court indicated the corporation itself could be restrained from transferring any of the defendant's stock pending the determination of the case under the authority of KAN. G.S. 1949, 60-1507.

In *Breidenthal v. Breidenthal*[63] the members of a family partnership of which defendant-husband was a partner were properly joined, even though defendant apparently had sold his interest in the partnership to the other members in consideration of a credit to remain on the books of the partnership for five years before it could be withdrawn. The plaintiff's initial petition joining the other partners sought to include them both to enable the court to determine the extent of defendant's partnership interest and to restrain the other partners from altering the partnership interests until plaintiff's rights could be determined. The other partners moved to dismiss the action as to them on the ground that the defendant had sold his interest in the partnership, and moved to vacate the restraining order on the ground that KAN. G.S. 1949, 60-1507 did not give the court power to restrain them under the circumstances. Plaintiff then filed a supplemental petition alleging that the purported sale of defendant's interest was not a good faith transfer. The trial court ultimately dismissed the action as to the other partners and dissolved the restraining order. Plaintiff appealed.

The supreme court, relying primarily upon *Wohlfort v. Wohlfort,*[64] reversed the order dismissing the other partners and also reversed provisionally the order dissolving the restraining order. Plaintiff's petitions alleged facts sufficient to state a cause of action against the partners. If the transfer of defendant's interest to them was in good faith, there still remained a large indeterminate credit in favor of defendant in their hands, and their presence in the action was necessary to determine the amount. If the transfer was not in

[61] 183 Kan. 323, 328 P.2d 346 (1958).
[62] 182 Kan. 737, 324 P.2d 150 (1958).
[63] 182 Kan. 23, 318 P.2d 981 (1957).
[64] 123 Kan. 142, 254 Pac. 334 (1927).

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good faith defendant was still a partner and the other partners were necessary and proper parties. As for the restraining order, the statute gives the trial court considerable latitude of discretion to order or refuse such a restraint. However, the trial court's reason for dissolving the order was not disclosed in the record. If it was dissolved because the other partners were dismissed, then the reason was improper and the order should be reinstated, but if the trial court decided independently of the questions of joinder to dissolve the order the supreme court did not mean to order its reinstatement.

SEPARATE MAINTENANCE

In *Paul v. Paul*[65] the supreme court ruled that a trial court could not make an award of separate maintenance when a divorce is refused unless the wife plead and proved grounds for divorce. Thus if the husband sues the wife for divorce but is unable to sustain his case in a contested action, the trial court may make an award of property division and child maintenance under KAN. G.S. 1949, 60-1506, but no order of separate maintenance for the wife can be made unless she has brought an action for that purpose and has established grounds for divorce.[66]

GUARDIANSHIP

The only significant development in Kansas law relating to guardianship during the survey period was the amendment to the Juvenile Code which makes the state department of social welfare the guardian of the person and estate of children committed to its care by order of the juvenile court, whether or not the child's parents have been found to be unfit. The department, however, can place the child for adoption only if the child's parents have been found and adjudged to be unfit.[67]

JUVENILE CODE

Some minor alterations in the statutory language of juvenile code provisions were made by the 1959 legislature. The only change meriting comment is the modification of KAN. G.S. 1957 Supp., 38-825 which specifically authorizes the placing of a dependent and neglected child committed to the state department of social welfare in the home of the parent or parents who have not been deprived of parental rights.[68] This authorization probably was implicit in the 1957 law, but omission of an express statement to that effect created a possible ambiguity which the 1959 law attempts to clarify.

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[65] 183 Kan. 201, 326 P.2d 283 (1958).
[66] KAN. G.S. 1949, 60-1516.
[67] Kan. Sess. Laws 1959, c. 199, amending KAN. G.S. 1957 Supp., 38-824.
[68] Kan. Sess. Laws 1959, c. 200.

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An interesting discussion of juvenile court procedure under the law prior to the 1957 Juvenile Code revisions appears in *In re McCoy*.[69]

PARENT-CHILD RELATIONSHIPS

One very significant change in the law dealing with parent-child relations is the parental liability statute enacted by the 1959 legislature.[70] At common law, of course, parents are not liable for torts committed by their children except where his active complicity or the doctrine of respondeat superior renders the parent vulnerable to suit. The child himself is liable, but in most cases the child is financially irresponsible. With the alarming post war rise in juvenile vandalism many states have felt it necessary to abridge the parent's common law immunity to a certain extent in order to encourage parental control over minors and to render some responsible person liable for the damages caused by juvenile vandalism. The Kansas legislature enacted a law making parents liable for actual damages up to $300 plus court costs for the "willful or malicious damage or destruction of property" belonging to certain specified types of institutions and to private individuals. The law does not extend to damage negligently caused by the minor. The specification of several types of associations entitled to the coverage of the act will raise some questions of interpretation of this new law, and these will be left for the courts to solve. For instance, will the maxim *inclusio unius est exclusio alterius* be invoked to bar recovery against parents under this act by unincorporated labor or fraternal organizations since such associations are not specifically mentioned in the act? If the statute contains flaws or ambiguities, however, they are the same ones contained in about half of the other parental liability statutes in the United States, the same statutory language having been adopted with little change by many of the states.[71]

[69] 184 Kan. 1, 334 P.2d 820 (1959). For a discussion of the 1957 Juvenile Code, see Comment, *The New Kansas Juvenile Code*, 6 KAN. L. REV. 347 (1958).
[70] Kan. Sess. Laws 1959, c. 203.
[71] See generally, Note, 55 MICH. L. REV. 1205 (1957).

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