



Some issues concerning the property of married persons in Kansas

By John C. Peck¹

Introduction

Ask someone what marital property is. You'll probably get various responses like — it is property a married couple has at any given time during the marriage; it is property acquired during the marriage; or it is property owned jointly by the couple. *Black's Law Dictionary* defines marital property as "property of spouses subject to equitable distribution upon termination of marriage" or "[p]roperty purchased or otherwise accumulated by spouses while married to each other and which, in most jurisdictions, on dissolution of the marriage is divided in proportions as the court deems fit."² The lay understanding focuses on the marriage, while Black's dictionary focuses on divorce.

Kansas statutes use the term more narrowly than do the definitions from the vernacular or from Black's dictionary. In Kansas, marital property as the term is used in the statutes technically comes into being only upon the filing of divorce under K.S.A. 60-1601 to -1622. Prior to the filing of divorce, a husband and a wife may own some property separately and some property jointly. K.S.A. 1998 Supp. 23-201 states that at the filing of the divorce all property, regardless of when or how acquired or how held, becomes marital property. So technically marital property does not exist as such in Kansas prior to the filing for divorce. This use of the term most closely fits Black's first definition and makes Kansas, in Professor Swisher's classification, an "all property" equitable distribution state."³

In this article I discuss several issues regarding property ownership and disposition during marriage and property division at divorce. While most of these issues do in fact concern marital property as our statutes define the term, others do not. Hence, the title to this article.

The main sources of law on these issues for Kansas practitioners are K.S.A. 23-201 to -208 (married persons) and K.S.A. 60-1601 to -1622 (divorce and maintenance), appellate court cases, and Kansas Supreme Court rules.⁴ Some local bar associations have guidelines.⁵ Two handbooks on Kansas family law are available.⁶

II. Property of married persons, in general

A. The statutory framework

The general rules regarding the nature of ownership of property held by married persons are found in K.S.A. 1998 Supp. 23-201(a) and K.S.A. 23-202, and -204. K.S.A. 1998 Supp. 23-201(a) says that property brought into the marriage or received after the marriage by gift or inheritance, except a gift from the other spouse, remains the person's separate property and is not subject to the disposal by the person's spouse or liable for the spouses' debts. K.S.A. 23-202 empowers married persons to convey

their real and personal property. Under K.S.A. 23-204, married persons may carry on any trade or business, perform any labor or services, and keep the earnings as separate property.

When a person files a divorce, subsection (b) of K.S.A. 1998 Supp. 23-201 comes into play: "All property owned" by married persons becomes "marital property" at the time one spouse files for divorce. From that moment until the divorce decree divides the property, each spouse has an undetermined "common ownership" in the marital property, the extent of which is to be determined by the court under K.S.A. 1998 Supp. 60-1610, a part of the divorce statutes.

The first three words of K.S.A. 1998 Supp. 23-201(b) are key — "all property owned." "All" indicates a legislative intent to bring literally every bit of property of whatever kind and in whatever form under the umbrella of the divorce court's dispositional powers. While the word "property" seems clear, a look at the rest of K.S.A. 1998 Supp. 23-201(b) and cases from Kansas and other states indicates that, over time, such a word needs clarification. For example, we have had to add military retirement pay and professional goodwill expressly to the statutory section, and the Kansas Supreme Court has dealt with patents as marital property.⁷ Other states have dealt with the question of whether professional degrees such as the M.D., M.B.A., or J.D. are property.⁸ Property "owned" would include property held in fee simple as well as lesser vested and contingent interests, even though difficult to value, but not mere expectancies.

Thus, in general, Kansas is a separate property state, which means that property brought into the marriage (K.S.A. 1998 Supp. 23-201(a)) or acquired during the marriage (K.S.A. 23-201(a) and -204) remains the separate property of each spouse during the marriage, until commingled, gifted, or otherwise converted to jointly held property. But on the filing of divorce, all property becomes "marital property," a kind of jointly held property, subject to division of the divorce court.

FOOTNOTES

1. I wish to thank Judge Steve Leben for his helpful comments and for editing this article, and David White, a graduating 3L from the University of Kansas School of Law, for his research help. Much of the material for this article was prepared for two CLE programs, one given in Kansas City, Mo., in November 1998 for the University of Missouri at Kansas City School of Law, and the other given at the KU Law School in Lawrence in June 1999. This material was rewritten and published here with the approval of laws schools at UMKC and KU.

2. BLACK'S LAW DICTIONARY (6th ed. 1990).

3. Of the two classifications of property used in the United States for distribution of property at divorce, community property and equitable distribution, Professor Swisher subdivides the latter category into two subgroups: "dual property" equitable distribution states (separate property is generally property brought into the marriage and acquired by gift after the marriage, while marital property includes all other property acquired by either spouse during the marriage that is not separate property); and "all property" equitable distribution states, of which Kansas is a part. Family Law: Cases, Materials and Problems, Peter N. Swisher, et al., at 872-875 (2d ed. 1998).

4. See Rule 164 (Required Factual Statements in Divorce, Annulment, and Separate Maintenance Cases); and Appendix III to Admin. Order No. 128 (1998 Kansas Child Support Guidelines, Domestic Relations Affidavit form), Rules Relating to District Courts (1998).

5. Johnson County Bar Association Domestic Relations Guidelines

(hereafter "Johnson County guidelines"), prepared by the Family Law Bench Bar Committee of the Johnson County Bar Association, are used as a tool to assist settlement of divorce cases in Johnson County, but are not binding on the court. See *In re Marriage of Webster*, No. 66,953, 1992 Kan. App. LEXIS 364 (1992) (unpublished opinion) (Johnson County guidelines "are not binding upon the district court because the guidelines do not supersede the district court's discretion in the division of property pursuant to 60-1610(b)"). Shawnee County Family Law Guidelines (hereafter "Shawnee County guidelines"), prepared by the Shawnee County Family Committee of the Topeka Bar Association in conjunction with the District Court of Shawnee County, Kan., are intended as a reference by lawyers in Shawnee County as tools in negotiating settlements. They are generally followed by the court, but are not binding. See *In re Marriage of Debenham*, 21 Kan. App. 2d 121, 123, 896 P.2d 1098, 1100 (1995) (Shawnee County guidelines not binding on the court). Other counties such as Sedgwick, Wyandotte, and Douglas have no such rules or guidelines.

6. PRACTITIONER'S GUIDE TO KANSAS FAMILY LAW, (Steve Leben, ed., 1997); LINDA ELROD AND JAMES BUCHELE, KANSAS LAW AND PRACTICE SERIES, KANSAS FAMILY LAW (1999).

7. *In re Matter of the Marriage of Monslow*, 259 Kan. 412, 912 P.2d 735 (1996). See *infra*, Section V.H.3.

8. See, e.g., *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982) (M.B.A.); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985) (M.D.).

B. History of the statutory framework

The 1981 Legislature amended K.S.A. 23- 201(b) ... to include "all property" owned at the time of filing for divorce."

These statutory sections are part of what was originally the 1868 Married Womens' Act, which provided that real and personal property brought into marriage by a woman remained her separate property after the marriage; that a married woman could sell her property; and that a married woman could carry on a trade or business and keep the earnings as her separate property. Amendments in 1976 "desexed" the statute by changing the words "married woman" to "spouse."⁹

In 1978 the Legislature added to K.S.A. 23-201 a subsection (b) to identify "marital property." The 1978 version of the subsection, however, included as marital property only property acquired by either spouse after marriage, except for property received as a gift or inheritance during the marriage.¹⁰ It also excluded from marital property the property brought into the marriage and property covered by a written agreement. Subsection (b) also gave each spouse a common ownership in marital property and made this marital property subject to disposition by the court under K.S.A. 60-1610 of the divorce statutes.¹¹ Thus, the original 1978 version of K.S.A. 23-201(b) included as marital property only some property accumulated after the marriage, making Kansas at that time a "dual property" equitable distribution state" in Professor Swisher's classification.¹² The genesis of the 1978 amendment was a tax reason — to make transfers of appreciated property from one spouse to the other in a divorce settlement agreement a non-taxable event, to circumvent the *Davis* rule.¹³

The 1981 Legislature amended K.S.A. 23-201(b) to broaden marital property to include "all property" owned at the time of filing for divorce."¹⁴ The 1987 amendments to subsection (b) added military retirement pay as a specific type of included property,¹⁵ and the 1998 Legislature added professional goodwill as a specific type of included property.¹⁶

III. Property during the marriage, prior to filing for divorce

A. K.S.A. 1998 Supp. 23-201(a).

As stated above, K.S.A. 1998 Supp. 23-201(a) and K.S.A. 23-204 provide that any property brought into the marriage or

acquired after the marriage belongs to the owner. One exception in K.S.A. 1998 Supp. 23-201 to outright ownership of separate property by one married person is property received as a gift from the person's spouse. Although not apparent from the language of the section, the purpose of this provision is probably to allow creditors to go after property given as a gift by the debtor to the debtor's spouse to avoid the claim. For example, in *Waltz v. Sheetz*,¹⁷ H gave a deed without consideration to W while H was indebted to the bank. The court held that real property received by W as a gift from H remained subject to execution in collection of his debts, that such a gift was fraudulent as to creditors regardless of motive, and that "at best she holds the title in trust for the payment of his debts."¹⁸

K.S.A. 1998 Supp. 23-201(a) states that the property of one person is not liable for that person's spouse's debts. Does subsection (a) conflict with the common law necessities doctrine, under which a husband must pay for necessities for his wife? Does Kansas even still recognize the common law necessities doctrine? In *St. Francis Regional Med. Center, Inc., v. Bowles*,¹⁹ the hospital sued W on H's unpaid medical bills, for which only H and not W had contracted. Both parties agreed that the necessities doctrine was unconstitutional based on *Orr v. Orr*.²⁰ W argued that the doctrine should be abolished, while the hospital argued that the appropriate remedy was to retain the doctrine but apply it equally to both husbands and wives. The court held that the doctrine applies equally to both spouses, but that the creditor must first pursue collection against the recipient spouse. Besides the *St. Francis* case, K.S.A. 59-2006 obligates married people to support their spouses if the spouse is committed to a state institution. So it looks like, despite K.S.A. 1998 Supp. 23-201(a), one spouse's property may indeed be subject to the debts of the other spouse in the cases of necessities or of a commitment to a state institution.

B. K.S.A. 23-202 & K.S.A. 1998 Supp. 59-505.

K.S.A. 23-202 appeared originally as Section 2, Chapter 62 of the 1868 Married Womens' Act. It provided that a married woman could sell her real and personal property and contract concerning the property. The 1976 Legislature amended K.S.A. 23-202 to "desex" the section and to enable a married person to contract about any subject, not just about real and personal property.

While K.S.A. 23-202 appears to give both spouses unfettered power to dispose of their separately owned property, the inchoate dower interest provided by K.S.A. 1998 Supp. 59-505²¹ acts as a constraint with respect to real estate. If the person has conveyed real estate without the spouse's signa-

9. 1976 Kan. Sess. Laws, ch. 172, § 1.

10. 1978 Kan. Sess. Laws, ch. 134, § 1.

11. *Id.*

12. See note 3, *supra*.

13. See *U.S. v. Davis*, 370 U.S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335 (1962). The *Davis* rule provided that one spouse's transferring appreciated property to the other spouse at divorce was a taxable event, requiring the grantor to recognize a capital gain, because it was presumed that the grantor was receiving equivalent property from the other spouse. The court treated the conveyance as if it had been made to a third party for value. The recipient spouse would receive a stepped-up basis. States like Kansas then amended their marital property statutes to make the parties' property joint property at the filing of divorce, so that a gain on transferred property in the settlement agreement would not have to be recognized. 1984

amendments to the Internal Revenue Code permitted the transfers to be tax free, but the recipient spouse now receives the property with a carry-over basis. See Internal Revenue Code § 1041.

14. 1981 Kan. Sess. Laws, ch. 159, § 1 (emphasis added).

15. 1987 Kan. Sess. Laws, ch. 120, § 1.

16. 1998 Kan. Sess. Laws, ch. 162, § 1.

17. 144 Kan. 595, 61 P.2d 883 (1936). See also *Citizens' Bank of Garnett v. Bowen*, 21 Kan. 354 (1878).

18. 144 Kan. at 603, 61 P.2d at 888.

19. 251 Kan. 334, 838 P.2d 1123 (1992).

20. 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 309 (1979).

21. "[T]he surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized ... and to the disposition whereof the survivor shall not have consented ..."

ture on the deed and if the person's spouse survives the person, the surviving spouse may sue to claim a half interest in the property. If the non-consenting spouse predeceases the person who has conveyed the property, the section would not be applicable, and the grantee would have good title. While K.S.A. 1998 Supp. 59-505 does not expressly prohibit the sale of real estate without the signature of the person's spouse, prudent buyers will not accept such a conveyance.

The existence of a homestead raises still other issues. Article 15, section 9 of the Kansas Constitution provides a homestead exemption of one acre in the city and 160 acres of farming land and provides that the homestead cannot be alienated without the joint consent of the husband and the wife.²² K.S.A. 60-2303 prohibits actions for specific performance of a contract for the sale or exchange of real estate occupied as a homestead by the owner and his or her family, unless the contract is signed by both husband and wife. Thus, while the buyer of real estate always wants the signatures of both spouses on the deed because of the inchoate dower interest provided in K.S.A. 1998 Supp. 59-505, the buyer of a homestead must also have the signatures of both spouses on the contract to enforce the contract with a specific performance action.²³

IV. Marital property pending divorce: The Relationship between K.S.A. 1998 Supp. 23-201 (b) and K.S.A. 1998 Supp. 60-1610 (b)(1)

Separately held property remains (or at least can remain) separately owned until one party files for divorce. At that time all property becomes marital property, "a species of common or co-ownership,"²⁴ subject to division by the divorce court under K.S.A. 1998 Supp. 60-1610(b)(1). K.S.A. 1998 Supp. 60-1607(a)(1) permits the divorce court to issue interlocutory orders during the pendency of the divorce case that "[j]ointly restrain the parties with regard to disposition of the property of the parties and provide for the use, occupancy, management and control of that property." Some counties, like Sedgwick County, require a temporary order in every case.

But, if there is no restraining order in place, issues arise. In the absence of a restraining order, can a divorcing spouse convey good title to property that has become marital property under K.S.A. 1998 Supp. 23-201, an antique rocking chair, for example? Would a purchaser of such a transfer of personal property own the property outright as against a claim by the other spouse, who might attempt to have a constructive trust imposed? Could the purchaser be a bona fide purchaser (BFP), a person who pays value and takes without notice of adverse claims, and with that status

cut off the rights of the other spouse? What about transfers just prior to the filing of the divorce petition?

Some lawyers say that the parties can transfer the property after the divorce petition is filed if there is no restraining order, but they caution their clients. If such property is transferred, the court can take the transfer into consideration in dividing the property under K.S.A. 1998 Supp. 60-1610(b). If such a transfer is given for little or no consideration, or seems wasteful or imprudent, the court can consider the transfer to be a dissipation of assets, one of the factors under K.S.A. 60-1610(b)(1).²⁵

But the statute itself appears to indicate impliedly that such a transfer might not be valid if challenged — *i.e.*, it would be a transfer of jointly held property (although the extent of joint ownership is still to be determined) by one spouse only. In general, a tenant in common may convey that person's interest in property. And the holder of a joint tenancy interest may convey that person's interest, the conveyance converting the joint tenancy interest into a tenancy in common.²⁶ But, in general, a joint owner can convey that owner's interest only, which is another way of saying that one cannot convey good title to property one does not own. On the issue at hand, however, that of a divorcing spouse conveying "marital property" after a divorce is filed in the absence of a restraining order prohibiting such conveyances, there are no Kansas cases squarely on point, *i.e.*, none involving direct sales of personal property. The few cases that touch on the question seem to be split.

One recent case seems to read K.S.A. 23-201(b) and K.S.A. 60-1610(b)(1) in an analogous situation possibly to allow a conveyance by one spouse after the divorce petition is filed even though the property is co-owned. In *Wear v. Mizell*,²⁷ after the divorce was filed, W changed the beneficiary from H to W's parents on a life insurance policy owned by W. Prior to the divorce hearing, W died. H sought the proceeds of the policy on the basis that H had become the joint owner of marital property including the insurance policy at the filing of divorce. The Kansas Supreme Court held that "a divorce action is purely personal and ends on the death of either spouse," and that absent an interlocutory order under K.S.A. 60-1607 restraining the parties from changing beneficiaries of the insurance policies, K.S.A. 23-201(b) "imposes no restrictions on either party from making changes during the pendency of the divorce."²⁸

In an earlier case, *Willoughby v. Willoughby*,²⁹ a federal district court had held that a restraining order in a divorce

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22. See also K.S.A. 60-2301.

23. The absence of the signature of the seller's spouse would preclude the seller from enforcing the contract by specific performance for two reasons: inability of the seller to give marketable title due to the inchoate dower interest, and the proscriptions of K.S.A. 60-2303. The buyer of non-homestead property, however, might enforce the sale by specific performance with an abatement in price for the inchoate dower interest. See 5A Corbin, Contracts, § 1160. (1964). See also John C. Peck, Shala Bannister, and W. Thomas Gilman, "Divorce Law: Lis Pendens, Judgment Liens, Homestead Exemption, and

Bankruptcy," 60 J.K.B.A. 25 (Feb./March 1991), for a more complete discussion of homestead rights. See gen. Roger L. Theis & Karl R. Swartz, "Kansas Homestead Law," 65 J.K.B.A. 20 (April 1996).

24. *Cady v. Cady*, 224 Kan. 339, 344, 581 P.2d 358, 363 (1978).

25. See *In re Marriage of Rodriguez*, 266 Kan. 347, 969 P.2d 880 (1998), for a recent case on dissipation assets.

26. 2 Amer. Law of Prop., §§ 6.2 & 6.10, (1952).

27. 263 Kan. 175, 946 P.2d 1363 (1997).

28. *Id.* at 180, 946 P.2d at 1367.

29. 758 F. Supp. 646 (D. Kan. 1990).

case prevented one spouse from changing the beneficiary of a life insurance policy. Citing *Willoughby*, the *Wear* court recognized that the insurance policy became marital property under K.S.A. 23-201(b), but the court found the lack of a restraining order to be determinative.

... other cases would seem to support the proposition that marital property cannot be conveyed after the divorce is filed ...

Instead of relying principally on *Willoughby*, the *Wear* court sided more with *In re Marriage of Wilson*.³⁰ There, on the day of a divorce trial, the parties reached oral agreement on the contested issues, including property division. The court granted the divorce and directed W's lawyer to draft the journal entry. Approximately a month later, the court received and signed the journal entry, but then it was learned that H had died several hours before the court signed the journal entry. W sought to set the journal entry aside. The court held that H's death terminated the marriage, relying on K.S.A. 60-258, which stated that the filing of the journal entry constituted the entry of judgment. Because no journal entry had been filed, the parties were still married when H died, so it was his death that terminated the marriage. Likewise, the *Wear* court reasoned, W "died before any divorce decree or other order concerning the marital property was entered in the divorce action. A divorce action abates at the time of death."³¹ Thus, *Wear* may be read as possible authority to permit a conveyance of marital property by one spouse, if changing a beneficiary on a life insurance policy can be analogized to conveying property.

Yet other cases would seem to support the proposition that marital property cannot be conveyed after the divorce is filed, even in the absence of a restraining order. In *In re marriage of Smith*,³² the court held that a judgment lien does not attach to the marital property when the creditor of H obtains a judgment against H after the divorce petition has been filed. Likewise in *Gardner v. U.S.*,³³ the court held that a U.S. tax lien filed after the divorce petition has been filed does not attach to marital property. In both cases, the rationale was that imposition of liens of third persons would interfere with the trial court's ability to divide the property under K.S.A. 60-1610(b)(1).³⁴ The analogy to a sale is the allowing of a judgment or tax lien to pass from the landowner to the creditor or taxing authority.

What about the BFP status of a person purchasing personal property from a divorce litigant? The divorce statutes themselves contain no provisions for giving special notice of a divorce, and generally purchasers of personal property do not rely on public records. But K.S.A. 60-2201 provides for lis

pendens protection for both personal and real property: "When a petition has been filed ... no interest can be acquired by third persons in the subject matter thereof as against plaintiff's claim" In *Wilkinson v. Elliott*,³⁵ the court in dicta stated that lis pendens notice was effective in divorce actions if the petition "point[s] out particular real or personal property."³⁶ And in *Rumsey v. Rumsey*,³⁷ lis pendens in a divorce action gave the purchaser notice of plaintiff's possible interest in mineral interests conveyed by her husband.

Can a spouse with only an undefined co-ownership in marital property transfer full title under the UCC? K.S.A. 84-2-403 provides the UCC rules for the ability of someone without good title to pass good title to a BFP. Generally, a person without title cannot pass good title. One exception is for the person with voidable title.³⁸ The other exception is for the entrusting of goods with a merchant who sells them.³⁹ Neither of these exceptions seem applicable to the marital property situation, indicating that a purchaser of personal property from a spouse after the divorce is filed would not be a BFP.⁴⁰

Personal property has been the focus of this discussion so far because other considerations would effectively preclude transfers of real estate. In attempted transfers of real estate by one spouse during the pendency of the divorce, the other spouse is protected in two ways. First, the filed divorce case is notice of the pending action, so rules of lis pendens protect the other spouse.⁴¹ Second, purchasers generally will not accept a deed from a person without the signature of the spouse, because of the inchoate dower interest established in K.S.A. 1998 Supp. 59-505.

K.S.A. 1998 Supp. 23-201(b) and K.S.A. 23-202 appear to permit separate property (personal property, at least) to be transferred by one spouse just prior to the filing of the divorce. Depending on the facts, however, a court could deem such a transfer to be a dissipation of assets, to be considered in the divorce case under K.S.A. 1998 Supp. 60-1610(b)(2). Could it ever be so egregious as to be considered a fraudulent transfer? Although it is not squarely on point, the 1999 case of *Snodgrass v. Baumgart*⁴² might support such a judicial finding. There the court decided that conveyances by W to H in a property settlement agreement could amount to a fraudulent conveyance as against a plaintiff who had sued W prior to the divorce being filed.

V. Division of property at divorce

A. Factors considered in division of property

K.S.A. 1998 Supp. 23-201(b) makes all property of the couple subject to division by the divorce court, regardless of how and when acquired. K.S.A. 1998 Supp. 60-1610(b)(1) lists the specific factors to be considered by the court.⁴³ One

30. 245 Kan. 178, 777 P.2d 773 (1989).

31. 263 Kan. at 180, 946 P.2d at 1367 (1997).

32. 241 Kan. 249, 737 P.2d 469 (1987).

33. 34 F.3d 985 (10th Cir. 1994).

34. See Section V.I, *infra*.

35. 43 Kan. 590, 23 P. 614 (1890).

36. *Id.* at 594, 23 P. at 615.

37. 150 Kan. 49, 90 P.2d 1093 (1939).

38. K.S.A. 84-2-403 (1).

39. K.S.A. 84-2-403 (2).

40. See also, Peck, et al., *supra* note 23.

41. See K.S.A. § 60-2201.

42. 25 Kan. App. 2d 812, 974 P.2d 604 (1999).

43. The factors are "the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property."

of the factors, "time, source and manner of acquisition of the property," would allow property brought into the marriage to be returned by the court to the original owner. However, this is not required. In *In re Marriage of Schwiien*,⁴⁴ H had brought property into the marriage that he thought he should receive in the divorce — a remainder interest in 240 acres of real estate, livestock, equipment, and the right to occupy a residence rent-free for 10 years. W's premarital estate included \$2,000 in a certificate of deposit and a bond. The court held: "Unless and until guidelines are adopted by the Kansas Supreme Court of required application throughout the state (as exists with respect to child support guidelines), it is not an abuse of discretion for a trial court to refuse to restore non-marital property to either spouse or to give direct credit for gifts acquired during the term of the marriage."⁴⁵

B. Fault as a factor

In 1976, before the Legislature amended K.S.A. 60-1610 to provide specific factors to be used in division of property,⁴⁶ the court in *Williams v. Williams*⁴⁷ listed relevant factors, one of which was fault. But then in the 1990 case of *In re Marriage of Sommers*,⁴⁸ the court held that the Legislature did not intend fault to be a consideration in economic matters, except in some "rare and unusual situation where the misconduct is so gross and extreme that failure to penalize therefor would, itself, be inequitable." The act of fault not deemed gross and extreme in *Sommers* was an alleged extramarital affair of H. According to the *Sommers* court, examples of fault that could have been considered might include abuse of a family dog that both parties sought in the division of property, or H's mental abuse of W that had impaired her emotional ability to earn a living. A recent article raises interesting questions about the *Sommers* decision, specifically whether fault may still be a factor in the economic matters of a divorce.⁴⁹

C. Local guidelines

As mentioned above,⁵⁰ some local bar associations and district courts have family law guidelines to assist the parties in settling divorce cases. They specifically deal with marital property division. In the Johnson County guidelines, for example, Chapter III covers division of property and Chapter IV valuation of property. Chapter III distinguishes between "mutual property" (property common to the marital enterprise) and "individual property" (property acquired independent of the marital enterprise): "As a general rule, *mutual* property is included in the net worth of the parties

and is divided equally between the parties. On the other hand, *individual* property is generally restored to the party from whose side it originally came."⁵¹ Chapter III then provides further guidance in identification and treatment of these two types of property.

The Shawnee County guidelines define marital property as property acquired during the marriage, with associated income and appreciation. They define non-marital property as property brought into the marriage or acquired after the marriage by will, inheritance, or gift. Generally, marital property according to Shawnee County's definition is divisible at divorce, while non-marital property is not divisible.⁵²

Sedgwick County has no bar association guidelines. Attorneys occasionally use those of Johnson County and Shawnee County, however, and occasionally mention them in court, but apparently sometimes the court admonishes the lawyer about their inapplicability in Sedgwick County. There, the unwritten general rule is that courts start with the presumption that in a lengthy marriage, e.g., 10 years or longer, property should be divided equally; then it is the lawyer's job to move the court off the presumption.

D. Debt

While neither K.S.A. 1998 Supp. 23-201(b) nor K.S.A. 1998 Supp. 60-1610(b)(1) mentions debt, courts generally view debt as a kind of negative property and assign debts along with property in dividing the property.⁵³ Placing the burden of a debt on one spouse does not relieve the obligation of the other spouse to the creditor if the other spouse is obligated as a cosigner of the note or otherwise obligated on the debt.

The Shawnee County Family Law Guidelines treat debts in three topics: unsecured debts, secured debts, and debt incurred after filing.⁵⁴ The Johnson County Family Law Guidelines treat the effect of premarital debts paid during the marriage.⁵⁵

E. Contested divorce versus settlement agreement

In a contested divorce situation, K.S.A. 1998 Supp. 60-1610(b)(1) requires the court to divide the "real and personal

One of the factors, "time, source and manner of acquisition of the property," would allow property brought into the marriage to be returned

* 44. 17 Kan. App. 2d 498, 839 P.2d 541 (1992).

45. Id. at 505, 839 P.2d at 547.

46. The Legislature amended K.S.A. 60-1610 (b) in 1982 to provide the factors now shown in that section. See note 43, *supra*.

47. 219 Kan. 303, 548 P.2d 794 (1976).

48. 246 Kan. 652, 792 P.2d 1005 (1990).

49. James P. O'Hara and Steve Leben, "May Fault be Considered in Deciding Financial Issues in Divorce Cases?" 67 J.K.B.A. 28 (June/July 1998). The article provides arguments on both sides of the question of whether fault should be considered in divorce cases notwithstanding the *Sommers* case.

50. See text at note 5, *supra*.

51. Johnson County guidelines, *supra* note 5, at 24 (emphasis in original). But see *Schwien*, *supra* note 44, for a case indicating that the court need not restore such property.

52. Shawnee County guidelines, *supra* note 5, at §§ 5.02 & 5.03.

53. See, e.g., *In the Matter of the Marriage of Beardslee*, 22 Kan. App. 2d 787, 922 P.2d 1128 (1996); *Long v. Brooks*, 6 Kan. App. 2d 963, 636 P.2d 242 (1981).

54. Shawnee County guidelines, *supra* note 5, § 5.04.

55. Johnson County guidelines, *supra* note 5, § 3.4.

property of the parties." On the other hand, K.S.A. 1998 Supp. 60-1610(b)(3) permits the parties to enter into a separation agreement that divides the property, which the court may accept if the court finds it to be "valid, just and equitable." The agreement is then "incorporated into the decree," which is equivalent to merger.⁵⁶

... gifts from anyone received during the marriage 'except [gifts] from the person's spouse' are separate property.

Unlike most other decrees that are final when made, some parts of divorce decrees are modifiable. K.S.A. 1998 Supp. 60-1610 permits post-decree modification of child custody and support that result from either a decree or a settlement agreement. Decreed alimony is modifiable, but downward only unless the obligor agrees otherwise.⁵⁷ But obligations for alimony and division of property grounded in a separation agreement are not modifiable unless prescribed

by the agreement or later agreed to by the parties.⁵⁸ Thus, property division by decree is final; property division by settlement agreement incorporated in the decree is generally treated the same for post-decree modification purposes — *i.e.*, it too is final and not modifiable unless the agreement prescribes that the property division is modifiable, an unlikely situation.

F. Undoing estate plans: Rights of spouses or courts to revoke gifts made as part of estate plans made during the marriage

Assume that H and W divide their property as part of an estate plan, with H and W each receiving property from the other, that deeds are filed, that stock ownership is transferred, etc. Later one of the parties files for divorce. Can the parties undo this plan after the divorce is filed as part of a settlement agreement? Can the court undo it under K.S.A. 1998 Supp. 60-1610(b)(1)?

1. Power of the parties. K.S.A. 1998 Supp. 23-201(a) provides that gifts from anyone received during the marriage "except

[gifts] from the person's spouse" are separate property. While this language seems to imply that such gifts are revocable, the section does not say expressly that gifts are revocable, and the purpose of the language is apparently to protect creditors of one spouse.⁵⁹ K.S.A. 1998 Supp. 23-201(b) provides that at the filing of divorce, all property becomes marital property and becomes subject to division by the court under K.S.A. 1998 Supp. 60-1610(b). The parties could agree to undo the estate planning allocation as part of their settlement agreement, at least with respect to revocable transfers.⁶⁰

In regard to a transfer to an irrevocable trust, if one spouse has transferred property to an irrevocable trust and the beneficiary is the other spouse, the transfer would be revocable if the two spouses so request.⁶¹ If one spouse has transferred property to an irrevocable trust and the beneficiary is a third party, the transfer is irrevocable by the grantor, and such property is not owned by either the grantor or the grantor's spouse.

2. Power of the court. K.S.A. 1998 Supp. 60-1610(b) gives the court the power to divide the property of the parties. This would include all property to which the parties have an ownership interest — property in revocable, grantor-type trusts. With respect to irrevocable, grantor-type trusts, if the beneficiary is the other spouse, the right to receive income and corpus would be an asset of the other spouse, which the court could divide under its power under K.S.A. 1998 Supp. 60-1610(b)(1). If the beneficiary is a third person, there is no ownership interest in either spouse, so it would not be property divisible by the court.

G. Spouse in another state; property in other states

If one spouse owns property in Kansas, and if the other spouse has never resided in Kansas, there is no statutory dower interest with respect to the Kansas property.⁶² In a divorce, the jurisdiction of a Kansas court to dispose of real estate located in another state is limited. According to Professor Casad, while a Kansas court may order a party in a divorce to transfer out-of-state property to the other party, the court itself does not have the power to convey the property by decree.⁶³

56. *In re Estate of Sweeney*, 210 Kan. 216 (1972), 500 P.2d 56 (1972). The concept of merger implies that the court may modify the terms, that the parties are subject to contempt citations for failing to follow the terms, and that the parties may use judgment remedies to enforce the judgment. See also *Johnston v. Johnston*, 297 Md. 48, 465 A.2d 436 (1983). In *In the Matter of the Marriage of Kirk*, 24 Kan. App. 2d 31, 941 P.2d 385 (1997), W successfully moved to set aside a property settlement agreement accepted by the trial court almost a year prior to the motion on the basis that the court had failed to determine whether the settlement agreement was valid, just, and equitable as required by K.S.A. 60-1610 (b)(3). While domestic relations affidavits had been filed, there were no values given for H's excavation business nor for W's Mary Kay business.

57. K.S.A. 1998 Supp. 60-1610(b)(2).

58. K.S.A. 1998 Supp. 60-1610(b)(3).

59. See Section III.A., *supra*.

60. Restatement (Second) of Trusts § 330 (1959).

61. *Diller v. Kilgore*, 135 Kan. 200, 9 P.2d 643 (1932) (when the settlor and all beneficiaries agree to a termination of the trust, courts will allow termination). See also Restatement (Second) of Trusts §§ 338 & 339 (1959).

62. See K.S.A. 1998 Supp. 59-505, discussed at Section III.B., *supra*.

63. "A court that has personal jurisdiction over a defendant traditionally has been regarded as capable of adjudicating issues relating to the defendant's interest in real property situated outside the forum state. If the defendant should lose, the judgment can be enforced through the court's power over the defendant's person. The defendant can be compelled to execute a conveyance of his interest in the out-of-state property or face punishment for contempt of court. If the defendant does execute such a conveyance, it undoubtedly will be honored in the state where the land is situated, even though the conveyance was made under coercion." Robert C. Casad & William B. Richman, *Jurisdiction in Civil Actions* § 9-1 [1]a) (3d ed. 1998). Professor Casad goes on to say: "If the defendant does not execute the conveyance, however, and the court attempts to enforce the decree by a sheriff's deed or some other direct means, the transfer of title apparently does not have to be given effect in the state of the situs of the land. That was the ruling in *Fall v. Eastin*, [215 U.S. 1 (1909)], a case that has been widely criticized but never overruled. The full scope of the decision in *Fall v. Eastin* has never been made clear, and it is questionable if the Supreme Court would continue to follow it if a case presenting the issue should arise today." *Id.*

H. Specific types of property to be divided at divorce

1. Pension plans. Although pension plans have become important aspects of property today, our statutes do not deal with them in either a comprehensive or a very satisfactory way. K.S.A. 1998 Supp. 23-201(b) specifically includes as property only "the present value of any vested or unvested military retirement pay." It does not mention other types of pensions. K.S.A. 1998 Supp. 60-1610(b)(1) includes the following statement: "In dividing defined-contribution types of retirement and pension plans, the court shall allocate profits and losses on the non-participant's portion until date of distribution to that nonparticipant." Not mentioned are defined-benefits types of plans. The Employee Retirement Income Security Act of 1974⁶⁴ created qualified domestic relations orders, QDROs: "a type of domestic relations order which creates or recognizes an alternate payee's right to, or assigns to an alternate payee the right to, a portion of the benefits payable with respect to a participant under a plan."⁶⁵ QDROs permit a court to divide a pension plan and order the pension company to make payments to the non-owner of the plan as part of the order, even though the company is not a party to the divorce case. But Kansas statutes do not mention this concept. Both the Johnson County Family Law Guidelines⁶⁶ and the Shawnee County Family Law Guidelines⁶⁷ discuss valuation of retirement plans.

2. Goodwill of a professional. In the 1982 Kansas case *Powell v. Powell*,⁶⁸ the court held that goodwill of a doctor's practice was not property divisible in divorce. In H.B. 2626, enacted by the 1998 Legislature, the Legislature added language to K.S.A. 23-201(b) that makes "professional goodwill to the extent that it is marketable for that particular professional" property divisible at divorce.⁶⁹

3. Patents. The court treated patents as marital property in the 1996 case *In re Marriage of Monslow*.⁷⁰ H owned a partnership interest in two patents. The value of the patents was not ascertainable at the time of the divorce, and the district court awarded the patents to H subject to a lien in favor of W for 40 percent of H's income from the patents after expenses. H argued that the patents were not marital prop-

erty subject to division, but merely expectancies. The Kansas Supreme Court held that an interest in a patent is a marital asset subject to division despite the absence of a current dollar value and upheld the ordered split of income after expenses. This case demonstrates one way courts or parties could handle cases of property difficult to value but having income potential.

4. Trusts. K.S.A. 1998 Supp. 60-1610(b)(1) states that "[t]he decree shall provide for any changes in beneficiary designation on ... (B) any trust instrument under which one party is the grantor or holds a power of appointment over part or all of the trust assets, that may be exercised in favor of either party" The Johnson County Family Law Guidelines⁷¹ discuss the types of trusts that should be considered in a division of property — revocable, grantor-type trusts; and revocable and irrevocable, non-grantor type trusts.

I. Judgment liens and tax liens

K.S.A. 1998 Supp. 60-2202 provides that a judgment creates a judgment lien on all the real property of the judgment debtor in the county in which the judgment is obtained and in other counties in which the plaintiff files a certified copy of the judgment. Interesting judgment lien questions can arise between divorcing litigants regarding money judgments for division of property, alimony, child support, and attorney fees, especially in regard to homestead property.⁷² Judgment liens⁷³ and tax liens⁷⁴ can arise in suits against married persons.

J. Antenuptial and postnuptial agreements

1. Antenuptial agreements. Kansas has enacted the Uniform Premarital Agreement Act, K.S.A. 23-801 to -811. The Uniform Act generally upholds premarital agreements if they are voluntarily entered into and are not unconscionable.⁷⁵ Section 23-804(a) permits the parties to contract

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64. 88 Stat. 832, as amended, 29 U.S.C. § 1001, et seq.

65. *Boggs v. Boggs*, 520 U.S. 833, 846, 117 S. Ct. 1754, 1763, 138 L. Ed. 2d 45, 58 (1997).

66. Johnson County guidelines, *supra* note 5, § 4.4.

67. Shawnee County guidelines, *supra* note 5, § 5.11.

68. 231 Kan. 456, 648 P.2d 218 (1982).

69. 1998 Kan. Sess. Laws, ch. 162, § 1. See Ronald L. Brown, *Valuing Professional Practices & Licenses: A Guide for the Matrimonial Practitioner*, (2d ed. 1993 & Supps.).

70. 259 Kan. 412, 912 P.2d 735 (1996).

71. Johnson County guidelines, *supra* note 5, § 4.20.

72. For more detail, see Peck, et al., *supra* note 23.

73. In *In re Marriage of Smith*, 241 Kan. 249, 737 P.2d 469 (1987), H's employer filed an action against H 11 days after H had filed a petition for divorce. Construing K.S.A. 23-201(b), the court held that a creditor who obtains a judgment against one spouse during the pendency of a divorce action is precluded from collecting its judgment by executing against or claiming a lien on property owned individually or jointly by the debtor spouse.

74. The tax lien question arose in *Gardner v. United States*, 34 F.3d

985 (10th Cir. 1994). On Jan. 22, 1985, W commenced a divorce action in a Kansas district court. On Aug. 1, 1986, prior to entry of a divorce decree, the IRS assessed previously unpaid taxes against H and W and filed a Notice of Federal Tax Lien three days later. Later the IRS released the lien against W, but not against H. H filed a Chapter 7 bankruptcy petition. On Jan. 12, 1987, the Kansas district court entered the divorce decree awarding a substantial amount of the property to W. H, in violation of the Kansas district court's order, had secreted away substantial portions of the property and had subsequently disappeared. On Dec. 7, 1990, W filed a complaint in Federal District Court to quiet title to the marital property. The IRS argued that the federal tax lien had attached to H's interest in the property on the date of assessment and took priority over W's interest in the property. The federal district court granted summary judgment for W because it held that W came into ownership of the property when the divorce petition was filed and that therefore H had no interest in the property to which the tax lien could attach. The Tenth Circuit affirmed, holding that H had no rights to the property in question when the IRS made its assessment against him.

75. K.S.A. 23-807(a).

in the areas of property ownership,⁷⁶ management,⁷⁷ and disposition.⁷⁸ Even before adoption of the Uniform Premarital Agreement Act, Kansas recognized, liberally interpreted, and upheld premarital agreements if fairly and understandably made and if just and equitable.⁷⁹

**... apparently
all property
becomes
marital
property when
the divorce
petition is
filed,
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coverage by an
antenuptial or
postnuptial
agreement.**

*King v. Estate of King*⁸⁰ is a recent prenuptial agreement case. The parties entered into a prenuptial agreement, which provided that each would retain property brought into the marriage or acquired after their marriage, with the specific exception of a house they were purchasing on a 50-50 basis. When this house was sold, the proceeds were to be divided one-half to the survivor and one-half to the decedent's children. In case of death, the survivor would have the right to remain in the house and would pay expenses. The deed to the house, however, was a joint tenancy deed. H died two years later. W sued to quiet title, claiming title outright

and not subject to the agreement because the deed was a joint tenancy deed that would vest complete title in her at the time of death. Without citing the Uniform Act or any prior prenuptial agreement case as authority, the court upheld the agreement and affirmed the trial court's judgment against W. The agreement clearly contemplated the purchase and disposition of the house. Without that specific language, however, the joint tenancy deed would have "entitled the survivor to absolute possession and ownership of the real estate upon the death of the other party because it would have been considered real property that the survivor acquired during the marriage."⁸¹

2. Postnuptial agreements. A postnuptial agreement is similar to an antenuptial agreement, but the parties contract after the marriage rather than before the marriage. Because of this time difference, while the marriage may be consideration for an antenuptial agreement, arguably it cannot be consideration for a postnuptial agreement because of the contract rule that bars past consideration from being consideration.⁸² Kansas courts say that postnuptial agreements are generally upheld if fairly and intelligently entered into, just, and equitable. However, most of the annotated Kansas cases on the validity of postnuptial agreements are of two kinds. One kind involves separation agreements made in contemplation of divorce. The other kind involves antenuptial agreements, in which the court mentions postnuptial agreements in passing when stating that the rules are the

same for both antenuptial and postnuptial agreements. Most of the Kansas cases do not involve agreements made during marriage when H and W are getting along and want an agreement in case of divorce or death for some reason such as to protect children from an earlier marriage.

But there are cases involving true postnuptial agreements made before marital problems arose — agreements, therefore, that were neither prenuptial agreements nor divorce settlement agreements. In *Porter v. Axline*,⁸³ the parties had married in 1901 and had entered into a postnuptial contract in 1929 because of differences of opinion in regard to what property belonged to each of them. Both parties waived rights of inheritance. H executed a will in 1933 that made reference to the agreement. H died in 1940. The court upheld the agreement against W's claim of a homestead and personal property. In *Keller v. Keller*,⁸⁴ the parties had married in 1908. They had entered into the contract in 1914. Each had waived rights in the other's property and had left property to the children of earlier marriages. When H died, W sought to avoid the terms, but the court upheld the contract.

3. Antenuptial and postnuptial agreements in light of K.S.A. 1998 Supp. 23-201(b) & K.S.A. 1998 Supp. 60-1610 (b)(1). Early versions of K.S.A. 23-201(b) specifically stated that "property excluded by a written agreement by the parties" did not become marital property at the filing of the divorce.⁸⁵ But the current version does not exclude such property, so apparently all property becomes marital property when the divorce petition is filed, regardless of coverage by an antenuptial or postnuptial agreement.

If antenuptial and postnuptial agreements can be upheld in Kansas (and they can, assuming that the court finds that the contract meets the terms of the Uniform Act), the divorce court's power to divide the property under K.S.A. 1998 Supp. 60-1610(b)(1) is replaced by the court's power to uphold or strike down the agreement under the guidelines of the Uniform Act. Technically, upon the filing of the divorce action, all property still becomes marital property under K.S.A. 1998 Supp. 23-201(b), but the party seeking to uphold an antenuptial or postnuptial agreement then comes forth at the divorce hearing with that agreement and seeks court approval of it. During the period between filing the case and the hearing, that party can seek an order based on K.S.A. 1998 Supp. 60-1607 to protect against dissipation of assets in an attempt to uphold the agreement during this time period. Alternatively, a party seeking to uphold the agreement could append the agreement to the original divorce petition or answer to give the court notice of the existence and contents of the agreement, or append it to the motion for temporary orders as grounds to support the motion. Absent a temporary order against disposing of

76. Parties may contract regarding "[t]he rights and obligations of each of the parties in any of the property of either, or both, whenever and wherever acquired or located."

77. Parties may contract regarding "the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of or otherwise manage and control property."

78. Parties may contract regarding "the disposition of property upon separation, marital dissolution, death or the occurrence or

nonoccurrence of any other event."

79. See, e.g., *Sanger v. Sanger*, 132 Kan. 596, 296 P. 355 (1931); cf. *Ranney v. Ranney*, 219 Kan. 428, 548 P.2d 734 (1976).

80. 25 Kan. App. 2d 335, 962 P.2d 1118 (1998).

81. *Id.* at 337, 962 P.2d at 1119-20.

82. E. Allan Farnsworth, *CONTRACTS*, § 2.7 (2d ed. 1990).

83. 154 Kan. 87, 114 P.2d 849 (1941).

84. 121 Kan. 520, 247 P.2d 433 (1926).

85. See text at notes 10 to 12, *supra*.

the assets, if the owner of property were still free to dispose of assets during the pendency of the action⁸⁶ it would be possible for one party to dispose of the assets in violation of the letter and spirit of the antenuptial or postnuptial agreement.

VII. Suggestions for Further Research.

This article barely scratches the surface on a few issues relating to property of married persons in Kansas. Future articles might explore several issues in more depth. One

issue is valuing property like pension plans, goodwill of professionals, closely held corporations, and personal property such as antiques, heirlooms, or collections (e.g., stamp, coin, or doll collections). Another topic could be tax issues in divorce. Still another topic could be QDRO's. An article might explore the arguments for and against amending our statutes to include professional degrees and licenses in the definition of property, thereby permitting the court to consider them in allocating assets, as New York has done. An article on the property and support rights of unmarried cohabitants would also be appropriate.

86. See Section IV. *supra*.

About the Author



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