Divorce Law: Lis Pendens, Judgment Liens, Homestead Exemptions, and Bankruptcy

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I. Introduction

A divorce case may involve matters of lis pendens, judgment liens, homestead rights, and bankruptcy. Lis pendens is invoked if one or both parties own property when the divorce petition is filed, so third parties may be affected if they attempt to purchase from one of the litigants during the pendency of the divorce. Since a divorce may result in money judgments for alimony, division of property, child support, and attorney fees, judgment liens may burden the owner of land after the divorce. Homestead rights may be claimed to protect against these judgment liens. A former spouse may file for bankruptcy following the divorce and thereby attempt to be relieved of a judgment lien on property.

In this article we will explore these concepts in the Kansas setting. We will examine statutes and cases and offer some suggestions to the practitioner and the legislature.

II. Lis Pendens and Divorce

A. Summary of Kansas Marital Property Law

Kansas is a separate property state. Spouses can bring property into the marriage, earn incomes, and receive gifts and inheritances during the marriage and keep that property as their own.[1] Marriage itself does not directly affect ownership of the property — i.e., the marriage does not turn separately owned property into jointly held property, nor is income earned made into jointly held or community property; during the marriage each spouse is free to dispose of property.[2] This freedom is subject to the inchoate dower right and other potential constraints both before and after the filing of a divorce petition, as discussed further in Section II. B., below.

B. Real Estate

K.S.A. 60-2201 provides for lis pendens, meaning "a pending suit."[3] This concept protects plaintiffs in actions directly concerning property, actions such as quiet title, mortgage foreclosure, specific performance of a land sales contract, equitable actions in real estate conveyances, and others, where the petition would specifically describe the real estate. The defendant cannot successfully sell the land to a third party during the litigation because K.S.A. 60-2201 (a) provides that the filing of a petition charges third persons with notice of the case and that the third person cannot acquire interests in the "subject matter" of the case "as against the plaintiff's claim." K.S.A. 60-2201 (b) provides that if the defendant owns land in two or more counties, the filing of the petition in one county is not sufficient to give notice to third persons concerning land in the other county; a verified statement describing the case must be filed in the other counties.

In the divorce context, the statute would protect the divorce plaintiff[4] from the possibility that the divorce defendant might attempt to sell real estate to a third person during the pendency of the divorce. An early Kansas case, *Wilkinson v. Elliott*,[5] held that lis pendens is applicable to divorce cases even though they primarily concern the status of the parties and not the disposition of property.

While a sale by a defendant is theoretically possible, other legal concepts protect plaintiffs in divorce. The inchoate statutory dower interest of K.S.A. 59-505 requires spouses to consent to the sale of real estate. Prudent buyers inquire into the marital status of the seller and require both spouses' signatures even if the property is held by only the seller. In addition, upon the filing of the divorce petition, all property held by each party separately becomes "marital property" under K.S.A. 23-201, and the court has jurisdiction to divide that property. A sale or gift by only one spouse during the divorce proceedings does not necessarily

FOOTNOTES

1. Kan. Stat. Ann. § 23-201 (a) (1988).
2. Kan. Stat. Ann. § 23-204 (1988), Kan. Stat. Ann. § 23-202 (1988).
3. Black's Law Dictionary, 5th ed., at 840 (1979).
4. The divorce code, K.S.A. 60-1601, et. seq., calls the plaintiff the "petitioner," and it calls the defendant the "respondent." We will use plaintiff and defendant throughout this article for both divorce cases and non-divorce cases to conform to the language used by the lis pendens and judgment lien statutes.
5. 48 Kan. 590, 29 P. 614 (1890).

mean that the court loses power to divide the property.[6]

Even with these protections, however, the lis pendens statute contains one problem when applied to divorce. K.S.A. 60-2201(b) expressly covers only a situation where the defendant owns property in two or more counties. It does not cover a situation where the defendant owns property only in one county, but not in the county where the petition is filed. The Kansas venue statutes provide that actions concerning real estate are typically filed in the county where the real estate is located,[7] with two exceptions: divorce cases are filed where the plaintiff or defendant resides or where the defendant may be served;[8] actions for specific performance of a real estate land contract may be filed either where the land is located or where the defendant resides.[9]

In divorce cases, therefore, an action may be filed in a county where no real estate is owned by the defendant, and K.S.A. 60-2201 (b) by its terms does not cover this situation. Practitioners probably file notice of lis pendens in counties where land is situated even though the statute does not specifically allow it, but it would be helpful if the legislature would amend K.S.A. 60-2201 (b) to recognize cases like divorce and specific performance of a land contract where a suit may be filed in a county other than where the land is located.

C. Personal Property

One might ask whether personal property is also covered by lis pendens. Can a husband whose wife has just filed for divorce sell a car, a hog, a negotiable instrument, or a mineral interest during the pendency of a divorce? Would a purchaser have good title? Our statutory dower interest does not protect personal property,[10] so the buyer will not seek the signature of the spouse. K.S.A. 23-201, however, makes all property, both real and personal, "marital property" at the time of filing the divorce petition and thus subjects all property to a division, even property sold or given to another person after the petition is filed.[11]

Our lis pendens statute covers property that is the "subject matter" of the lawsuit; the statute does not distinguish between real and personal property. In Wilkinson, the court stated in dicta that lis pendens notice is effective in divorce actions if the petition "point[s] out particular real or personal property."[12] This statement indicates that the court considered lis pendens applicable to both real and personal property.

In *Rumsey v. Rumsey*,[13] an action for alimony without divorce under a 1935 statute, plaintiff sought in an amended petition to set aside conveyances of mineral interests ("oil, gas and other minerals in section 23") that were deemed personal property. Defendant had conveyed these interests after the filing of the original petition, which had not mentioned the mineral interests. Plaintiff claimed that these were fraudulent conveyances. The court held for plaintiff, not only because of the fraud involved, but also because lis pendens had given the purchaser constructive notice of the action. The court stated that the lis pendens statute "was not limited to real property."[14] Since the purchaser in *Rumsey* also had actual notice due to an attachment of the property involved, it is unclear whether the

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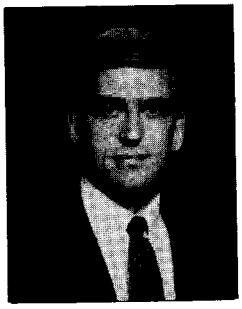

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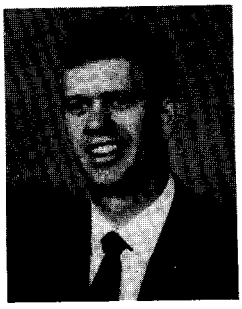

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6. No such cases based on K.S.A. 23-201 (b) have come down since that sub-section was enacted in 1978 (see text at note 33, infra, for discussion of the 1987 *In re Marriage of Smith* case, which related K.S.A. 23-201 to a judgment obtained by a third party against a husband who had filed for divorce). Indeed the purpose of the sub-section (b) was a tax purpose — to enable spouses to transfer property to each other without immediate tax consequences. A Nebraska case, *Baker v. Baker*, 201 Neb. 409, 267 N.W.2d 756 (1978), however, illustrates the principle. There the husband transferred negotiable bonds to his children after the divorce petition was filed. The court held that the bonds remained marital assets subject to division: "The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets." *Id.*, at 758. See also *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979) (trial court did not err in including certain assets owned by the parties' children in the marital assets which were divided between the parties); *Salvio v. Salvio*, 186 Conn. 311, 441 A.2d 190 (1982) (divorce court's equal division between husband and wife of bank accounts held by wife as trustee for children (for college education) was upheld, where there was no unequivocal act by wife rendering accounts irrevocable); 27B C.J.S. Divorce § 514 (1986); 24 Am. Jur. 2d Divorce and Separation, § 896 (1983).

7. Kan. Stat. Ann. § 60-601 (1983).

8. Kan. Stat. Ann. § 60-607 (1983).

9. Kan. Stat. Ann. § 60-601 (b) (4) (1983).

10. Kan. Stat. Ann. § 59-505 (1983) provides that a surviving spouse is entitled to one-half of all real estate owned by the decedent during the marriage, to the disposition of which the survivor did not consent.

11. See note 6, supra. Conveyances by one spouse prior to the filing of the divorce petition may also be attacked if fraud is involved. See *Breidenthal v. Breidenthal*, 182 Kan. 23, 318 P.2d 981 (1957) (wife can name as defendants third parties to whom husband has conveyed his property in fraud of her rights on the ground that the court must determine whether property is in fact owned by husband or third parties).

12. *Wilkinson*, supra note 5, at 594, quoting Bennett on Lis Pendens, § 99.

13. 150 Kan. 49, 90 P.2d 1093 (1939).

14. *Id.*, at 53.

court would have held the same with only constructive notice and not actual notice.

While purchasers of real estate and their title examiners routinely check the public records — the register of deeds for evidence of good title, and the district court for pending lawsuits, judgments, and other filings — purchasers of personal property seldom check the public records nor ask whether the seller is a party in a divorce suit. They usually assume that sellers own whatever is being sold: a car will have a title certificate with the seller's name on it; other property is usually in the seller's possession; and the seller might have a bill of sale for some personal property.

A stronger case can be made for lis pendens' applicability to personal property where the petition describes the personal property. A quiet title action on a car is an example. Here a good argument can be made that a purchaser should be held to constructive notice of the case since not to do so would promote fraudulent conveyances. But in a divorce case, the petition rarely sets out the personal property with specificity. The *Wilkinson* case mentioned above indicated in dicta that only if the personal property were "pointed out" in the petition would it be covered by lis pendens concepts.[15] The policy of protecting the litigants as against purchasers would favor having lis pendens cover personal property, whether specifically described in the petition or not. The policy of supporting the inclusion of personal property in lis pendens is further buttressed by K.S.A. 23-201 which makes all property "marital property" at the time of filing the divorce petition.

What if after the divorce petition is filed in County A, where the personal property is located, the defendant moves the property to another county and sells it? Kansas appellate courts have not considered this question. An early Missouri case[16] refused to extend the doctrine of lis pendens to personal property that had been moved outside the state, but suggested in dicta that lis pendens notice would apply to personal property moved to another location within the state, despite the harshness of the rule to third party purchasers.

Application of lis pendens to personal property in the divorce context thus presents some problems. The legislature might consider clarifying the situation by stating whether lis pendens applies at all; by stating how the plaintiff may give notice in counties other than the forum county; by clarifying whether the notice follows the property to other counties in the state; and by stating whether lis pendens applies if the property is not specifically described in the petition.

III. Judgment Liens and the Homestead Exemption in Divorce

A. Judgment Liens in General

Judgment liens are covered by K.S.A. 60-2202 and 2203a. Unlike lis pendens, judgment liens arise when the property is not the subject matter of the lawsuit. When a money judgment is entered by a Kansas state district or federal court in any chapter 60 action, the judgment becomes a lien on the judgment debtor's real property.[17] The lien is automatic in the county in which the petition is filed and can be obtained against property of the judgment debtor in other Kansas counties by filing a copy of the judgment and paying a fee.[18] The lien in the county of the petition is effective from the day of filing the petition, unless judgment is entered more than four months after the filing date, in which case the lien will date back only four months prior to the entry of judgment. A lien obtained in a county where real estate is not located will be effective only from the date an attested copy of the journal entry is filed in the county where the defendant's property is located, unless the lienholder has resorted to section 60-2203a(a), which provides a mechanism for obtaining early notice of judgment liens.

These statutory sections do not address whether a judgment lien attaches to after-acquired property. A recent Kansas case concluded that after-acquired property is subject to judgment liens. In *Wichita Fed. Sav. & Loan Ass'n v. North Rock Rd. Lts. Partnership*,[19] a wife in a divorce had been given a property division judgment against her husband, payable in installments over fifteen years. Later, the husband acquired land, which he owned for several years during which the installments became due. The court held that this after-acquired property was subject to a judgment lien in favor of the wife.[20]

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B. The Homestead Exemption in General

The homestead exemption can sometimes protect certain property from forced sale, including a foreclosure sale based on a judgment lien. The Kansas Constitution[21] provides for a homestead that is exempt from forced sale under any process of law, with exceptions stated for sale for taxes, for the payment of obligations contracted for the purchase of the premises, or for erection of improvements (mechanics' liens). K.S.A. 60-2301 defines the homestead as "one hundred and sixty acres of farming land, or . . . one acre within the limits of an incorporated town or city, or a mobile home, occupied as a residence by the owner or by the family of the owner, or by both the owner and family."

When a personal money judgment is obtained, it becomes a lien on all the real property of the judgment debtor. But in situations where the homestead is put up as a defense to the lien, timing is critical, as shown in the following discussion.

The case of *Jones v. St. Francis Hosp. & School of Nursing*[22] illustrates, for example, that a judgment lien will not attach to an existing homestead. *Jones* involved property that had been occupied as a homestead prior to the hospital's obtaining a judgment. The court held that the lien had not attached to the existing homestead. Like-

15. *Wilkinson*, supra note 5, at 594.
16. *Carr v. Lewis Coal Co.*, 96 Mo. 149, 8 S.W. 907 (1888).
17. Kan. Stat. Ann. § 60-2202(a) (1989 Supp.).
18. *Id.*
19. 13 Kan. App. 2d 678, 779 P.2d 442 (1989). This conclusion is also supported by K.S.A. 58-2305 (1983), which states that a purchase money mortgage has preference over a prior judgment obtained against the purchaser.
20. An early Kansas case that predates the current judgment lien statute concluded that after-acquired property was subject to judgment liens. In *Babcock v. Jones*, 15 Kan. 296 (1875), a judgment had been obtained against Davidson. Later, Davidson acquired title to real property. The court examined the treatment of after-acquired property in other states. It concluded that the courts were split, that "[a] decision either way . . . would be well supported by authority," and that the view should be adopted that "the lien does bind after-acquired lands." *Id.* at 302. *See also Leslie v. Harrison Nat'l Bank*, 97 Kan. 22, 154 P. 209 (1916).
21. Kan. Const. Art. 15, § 9 (1988).
22. 225 Kan. 649, 594 P.2d 162 (1979).

wise, in *Anderson v. Anderson*,[23] homestead rights were found to be superior to judgment lien rights for child support when a Kansas judgment, based on a prior judgment obtained in Colorado, had not been entered in Kansas until after the Kansas homestead was acquired.[24]

While a lien does not attach to land that is an existing homestead, it may attach later if the homestead is abandoned.[25] The death of the judgment debtor is not abandonment if the judgment debtor's survivor continues to occupy the property as a homestead. For example, the *Jones* court concluded that so long as Jones' widow continued to occupy the property as a homestead, the personal judgment against her dead husband could not attach to the land.[26] Once she abandoned the homestead by moving to a new residence, the property might have been attached, but by the time this occurred the hospital's attachment had been barred by the nonclaim statute.[27]

The homestead exemption will not protect land against a judgment lien that has attached before any homestead is created.[28] For example, if a purchaser buys land that is already subject to a judgment lien, the purchaser may not spare the property from foreclosure by occupying it as a homestead.[29]

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A hybrid situation can arise. Plaintiff obtains a personal judgment against defendant who does not own any real property. Within a short period of time, defendant obtains some real estate and occupies it as her homestead. Which is superior, the prior judgment or the homestead rights? In Section III. A., above, we suggested that a judgment lien can attach to after-acquired property in Kansas. Under Kansas homestead case law, however, the judgment debtor in this situation has a reasonable amount of time after acquiring property to occupy the property as a homestead. According to *Stowell v. Kerr*,[30] if defendant acquires land and establishes a homestead within a reasonable time, the homestead exemption will be superior to the lien. The court did not define "reasonable time," but indicated that a period of "several months" was a reasonable amount of time to establish a homestead.[31] The court pointed out that the land was purchased with the intent of making it a homestead.[32]

C. Applicability to Divorce Actions

1. Introduction. Interesting judgment lien issues can arise when a third party sues a married person. The case of *In re Marriage of Smith*,[33] for example, illustrates that a third party who sues a married person may have difficulties obtaining judgment lien rights, depending on the timing of the filing of the suit. Husband's employer filed an action against husband eleven days after husband had filed a petition for divorce against wife. The court, based on K.S.A. 23-201(b), which makes all property "marital property" at the filing of the divorce petition, 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."[34]

Of more concern in this article are the rights of former spouses against each other, since divorce actions can produce judgment lien rights in favor of divorcing litigants in several areas: division of property, alimony, child support, and attorney fees. Any such judgment can create a judgment lien against the judgment debtor's real property under K.S.A. 60-2202(a). For example, if husband is awarded a judgment for alimony in the amount of $500 per month, that amount would become a judgment lien on former wife's real estate each month, with accruals every month the alimony remains unpaid. Judgment liens in divorce, however, raise interesting questions because of homestead exemption claims and because the judgment lien and acquisition of property often occur simultaneously at the moment of entry of the divorce decree.

As shown above, a judgment lien attaches to after-acquired property. If property is already subject to a judgment lien, a purchaser takes subject to the judgment. But a judgment lien does not even attach to property that is held by the defendant as homestead when the judgment is obtained, and a person against whom a judgment has been rendered may purchase land with intent to make it a homestead and do so within a reasonable time.

What happens in divorce where the property division is typically made at the same time that the judgment for alimony, child support, or attorney fees is rendered? Is divorce to be treated differently due to this simultaneity or due to the nature of the judgments for child support, alimony, or division of property — i.e., should judgments for these payments as a matter of public policy be preferred over a claimed homestead exemption of a judgment debtor?

2. Child Support.[35] In *Anderson*, the wife had a Colorado judgment against her former husband for the payment of child support. The court denied execution against the former husband's homestead property because the wife had not filed her judgment in the Kansas county in which the property was located until after her former husband had occupied the property as a homestead. This case merely supports the general rule of homestead law, mentioned above, that judgment liens cannot attach to existing homestead property.

We found no homestead cases where child support judgment liens were preferred over the homestead exemption.

23. 155 Kan. 69, 123 P.2d 315 (1942).
24. *Id. But see* Section III. C., infra.
25. Porter, *Homestead Law in Kansas*, Kan. Jud. Council Bill. 3, 25 (1951).
26. *Jones*, supra note 22, at 650.
27. *Id.* at 654.
28. Porter, *supra* note 25, at 28.
29. *Bullene v. Hiatt*, 12 Kan. 98 (1873) (levy of execution upon the land before it became a homestead); *Aldrich v. Boice*, 56 Kan. 170, 42 P. 685 (1895) (levy and sale preceded occupation as a homestead, the court stating: "Where a judgment lien has attached, no subsequent occupation of the land as a homestead by the debtor affects the extent or validity of such prior lien." *Id.*, at 173).
30. 72 Kan. 330, 83 P. 827 (1905). This situation is distinguishable from judgment liens against property that is purchased and where the purchaser attempts to make it homestead; the homestead is not superior to the prior lien. *See*, Porter, *supra* note 25, at 28.
31. *Id.*, at 332.
32. *Id.*
33. 241 Kan. 249, 737 P.2d 469 (1987).
34. *Id.*, at 251.
35. The Kansas legislature has enacted a special statute relating to liens for child support. This statute, K.S.A. 60-2204, provides that a minor child's guardian may release child support judgment liens against real property. "If the support rights . . . have been assigned to the secretary of social and rehabilitation services . . ., such lien may not be released without the written consent of the secretary." K.S.A. 60-2204 (1983).

However, the 1973 case of *Mahone v. Mahone*,[36] while not a real property case, shows some preference for child support judgments over exempt property. There, the husband received his pension rights in a divorce action. These funds were exempt property under K.S.A. 74-4923 and were thus comparable to a homestead exemption. On behalf of the children, the wife sought to have these funds applied to the husband's child support obligation under the divorce. The court held that a statutory exemption for pension rights is not applicable when in conflict with the enforcement of a decree for child support, because the purpose of the exemption laws are "to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges."[37]

The *Mahone* court cited *Blankenship v. Blankenship*[38] and *Johnson v. Johnson*,[39] (discussed below in the alimony section), stating that they "clearly stand for the proposition that the exemption afforded a husband's homestead will not be applied to prevent a court from enforcing the alimony rights of a wife."[40] Having preferred alimony rights, the court could also prefer child support rights. Similarly and more recently in *Mariche v. Mariche*,[41] Social Security benefits of father were held to be subject to garnishment to satisfy past due child support despite K.S.A. 60-2308 (a)'s exemption for a "pensioner of the United States." The court again cited *Blankenship* and *Johnson* as support for preferring the judgment lien for child support to an exemption.

3. **Alimony.** A lien could arise out of a judgment for alimony. In an action concerning a husband's failure to pay alimony as prescribed in an earlier divorce judgment, the court in *Blankenship* held that the alimony judgment was superior to the homestead exemption. The original divorce decree, however, had expressly declared "the sum allowed as alimony is a lien on all the property of the husband," and had authorized the sale of such property (even if it is a homestead) to satisfy the lien.[42] The court went on to state that "[t]he power to take the homestead from the husband, and assign the same to the wife, is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same sold to discharge the lien."[43] Similarly, in *Johnson*, the court held that property (apparently husband's homestead prior to the divorce judgment) could be sold to satisfy a judgment for alimony although the property was a homestead.

Blankenship and *Johnson* thus both resulted in the judgment lien for alimony being superior to the homestead exemption. Dicta in *Mahone*[44] and *Mariche*[45] seem to attempt to read into these two cases an inherent preference for alimony judgments over the homestead exemption. Our reading of *Blankenship* and *Johnson*, on the other hand, persuades us that the rationale is apparently not that alimony rights are somehow inherently preferred over homestead rights. Rather, as expressly stated in *Blankenship*, if a divorce court has the power to award any property of either spouse to the other absolutely, then it has the lesser power to award homestead property to one spouse but make it subject to a lien for the alimony obligation placed on the recipient of the homestead. The courts simply did that in the decrees of those two cases.

4. **Division of Property.** A divorce decree might provide that the husband receive certain real property as part of the property division. The wife, also as part of the property division, receives a money judgment against the husband. Can the husband's property be protected as a homestead? The answer may depend on whether the decree specifically provides that the homestead is subject to the lien, as in *Blankenship* and *Johnson*. Absent such a provision, it may depend on whether the husband is living in the house as homestead when the judgment lien becomes valid. In *Bohl v. Bohl*,[46] husband and wife were divorced, husband receiving a vacation house (not then occupied as his homestead) and wife receiving a money judgment. The decree did not expressly subject the property to a lien. Shortly thereafter, husband remarried and occupied the vacation house as a homestead. The court held that the judgment lien under K.S.A. 60-2202 had attached before the homestead was established, and so the homestead exemption was no protection against the lien.

If, by contrast, the judgment debtor lives in the house continuously during the marriage, during the divorce proceeding, and following the divorce, a different outcome might result. Here, as stated in the *Jones* case above, the judgment lien arguably could not attach to the existing homestead; and as stated in the *Stowell* case above, a homestead established in a reasonable time after acquisition by a person against whom an earlier judgment has been rendered will be protected. This situation, however, is admittedly different from *Jones* and *Stowell*, because the judgment and the ownership change occur simultaneously. While the house was homestead for the judgment debtor, the final, sole ownership of the house technically did not pass to the judgment debtor until the divorce decree. And this is so, regardless of ownership prior to the date of filing the divorce petition, because K.S.A. 23-201 (b) makes all property "marital property" at that date, with distribution made by the trial court in the divorce decree.

Are divorce cases different in regard to judgment liens versus homestead either because of the nature of child support, alimony, or child support, or because the property division and the judgment are created simultaneously?

5. **Summary.** Are divorce cases different in regard to judgment liens versus homestead either because of the nature of child support, alimony, or child support, or because the property division and the judgment are created simultaneously? The answer seems to be "yes, maybe" to the former and "it depends" to the latter. Clearly K.S.A. 23-201(b) and 60-1610 give courts ample authority to subject a homestead that is given to one party in the divorce

36. 213 Kan. 346, 517 P.2d 131 (1973).
37. *Id.*, at 350.
38. 10 Kan. 159 (1877).
39. 66 Kan. 546, 72 P. 267 (1903).
40. *Id.*, at 351.
41. 243 Kan. 547, 758 P.2d 745 (1988).
42. 10 Kan. at 160, 161.
43. *Id.*, at 161.
44. 213 Kan. at 351.
45. 243 Kan. at 551.
46. 234 Kan. 327, 670 P.2d 1344 (1983).

decree to a lien for alimony, child support, or division of property. Absent this express lien, it is possible that our appellate courts will prefer a 60-2202 judgment lien for child support and perhaps alimony over a competing homestead claim in the right case, if we read dicta in the recent comparable cases correctly. The simultaneous creation of the lien and the ownership is not paramount; what may be more important is whether the property was homestead prior to the divorce decree.

IV. Bankruptcy Following Divorce

A. In General

Following a divorce in which one party is required to make periodic payments for alimony, child support, or division of property, either or both parties may file for bankruptcy. Issues can include whether the right to receive any of these payments from the former spouse is included as property in the bankrupt's estate and whether the property is exempt;[47] whether such rights to receive payments should be treated differently, depending upon whether the rights are accrued, unpaid rights or future rights to income;[48] and which duties to make periodic payments are dischargeable debts.[49] Since our focus in this article is on judgment liens and homestead, we focus instead on yet another issue: avoidance of judicial liens on exempt property.

The divorce judgment can produce a division of property where former spouse A receives the house along with an obligation to pay the other former spouse B a future sum of money to equalize the division of the equity in the house. The judgment may result from a contested divorce where the judge signs the judgment after hearing the evidence;[50] or it may result from a settlement agreement filed by the parties and approved by the court as "valid, just and equitable."[51] If A then files for bankruptcy, can A keep the house but avoid paying the claim imposed on A by the judgment?

We first need to introduce the subject and the terminology. When a person files for bankruptcy, the trustee in bankruptcy takes charge of the bankrupt's non-exempt property, under § 541 of the Bankruptcy Code called the "estate," composed of most of the bankrupt's property, with exceptions. Under § 522, the bankrupt can "exempt" certain property from passing to the trustee, i.e., retain ownership, if that property is exempt under state law. That property can include a home, and in Kansas it does include the homestead described above — 160 acres in the country or 1 acre in the city.[52] The bankrupt can be relieved of most debt obligations by having them "discharged." Obligations arising from a divorce proceeding in the nature of a property division, as opposed to child support or alimony, are dischargeable.[53] The bankrupt can also "avoid" a "judicial lien" on exempt property under § 522 (f).[54] "Judicial lien" is defined in § 101 (32) as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding," and thus would include a judgment lien under K.S.A. 60-2202 as discussed above.

A non-divorce case might involve a bankrupt who exempts his house, which has a first mortgage against it. The bankrupt can thus keep his house, subject to the continuing mortgage lien (not a judicial lien).[55] In the divorce context, however, a fairness problem can arise because the creditor is the former spouse B who holds a judgment against former spouse A and a judgment lien on the house received by A, the judgment given to make an equitable and fair property division. Can A keep the house, but avoid the lien because it is a "judicial lien?" Three important cases have emerged from the 10th Circuit involving this question in Kansas divorce cases followed by bankruptcy.

B. Three Recent Tenth Circuit Cases

1. Maus v. Maus.[56] In *Maus*, Nikki and Jesse entered into a property settlement agreement which was accepted by the court and incorporated into the divorce decree. The agreement provided in relevant part:

> D. [Nikki] be, and she is hereby granted as her sole and separate property, **free and clear of any and all claims of [Jesse],** the following:
>
> [legal description of the real property]
>
> * * *
>
> "F. [Nikki] shall pay to [Jesse] the sum of Twenty-Two Thousand Dollars ($22,000.00) on or before the 1st day of September, 1985 . . .
>
> "G. Should [Nikki] sell or convey the real property first hereinabove described prior to July 1, 1984, [Jesse] shall be entitled to receive 40% of the net proceeds of the sale of the same . . .[57]

After the divorce, Nikki filed bankruptcy and claimed the property awarded to her in the divorce proceeding as her exempt homestead. She also filed an application in the bankruptcy proceeding pursuant to § 522(f) (1) seeking to avoid any lien Jesse claimed in the property by virtue of the divorce decree.

The bankruptcy court held that the above-quoted language in the property settlement agreement created a "consensual lien in the nature of a security agreement"[58] rather than a judicial lien and, therefore, was not avoidable under § 522(f) (1). The district court reversed, holding that the

47. Section 522 (b) and (d) (10) (D) of the Bankruptcy Code (11 U.S.C. §§ 101, et seq., referred to hereafter as the "Bankruptcy Code") allows the bankrupt to exempt "alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

48. Under Bankruptcy Act, which was in force prior to the Code enacted in 1978, alimony in arrears passed to the trustee as an asset of the estate; as a general rule, however, future allowances did not pass, unless the payments were not really alimony but were a division of property. See 10 A.L.R. 881 (1972). The new Bankruptcy Code probably retains that law in the area of exempt property. See U.S. Code Cong. & Ad. News, at 5791, 5792 (1978).

49. Section 523 of the Bankruptcy Code states that "[a] discharge . . . does not discharge an individual debtor from any debt — . . . to a former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . [with two exceptions]."

50. K.S.A. 60-1610 (b) (1) requires that the "decree shall divide the real and personal property of the parties . . ." and that the division of property be "just and reasonable."

51. If the divorcing parties present a separation agreement to the court, K.S.A. 60-1610 (b) (3) requires the court to incorporate in the decree a separation agreement "which the court finds to be valid, just and equitable."

52. Kan. Const. Art. 15, § 9. See text accompanying note 21, supra.

53. *See In Re Cowley*, 35 B.R. 520 (Bankr. D. Kan. 1983); *In Re Yeates*, 807 F.2d 874 (10th Cir. 1986); and § 523 (a) (5) of the Bankruptcy Code.

54. That section provides as follows:

> "Notwithstanding any waiver of exemption, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section if such lien is —
>
> (1) A judicial lien;
>
> * * *

In order to prevail under Section 522(f) (1), a debtor must establish three elements:

1. The lien must be fixed on an interest of the debtor.
2. The lien must impair an exemption to which the debtor would otherwise be entitled.
3. The lien must be a judicial lien.

In Re Thomas, 32 B.R. 11, 12 (Bankr. D. Ore. 1983).

55. While the discharge of in personam liability granted by a discharge in bankruptcy may oftentimes be devastating to the creditor, the discharge does not abrogate valid liens which encumber property unless the liens can be avoided under certain situations specified in the Bankruptcy Code (e.g. § 522(f) (1)). *Chandler Bank of Lyons v. Ray*, 804 F.2d 577 (10th Cir. 1986); *In Re Weathers*, 15 B.R. 945 (Bankr. D. Kan. 1981); *In Re Grimes*, 6 B.R. 943 (Bankr. D. Kan. 1980). Thus, while the in personam liability attendant to a property settlement may be discharged, the aggrieved spouse may be able to salvage some recovery if he or she is granted a lien which cannot be avoided. See the three cases described in Section IV. B, infra.

56. 837 F.2d 935 (10th Cir. 1988).

57. *Id.*, at 937 (emphasis in original).

58. *Id.*, at 938, 939.

lien created by the settlement agreement was an avoidable judicial lien.

The Court of Appeals for the Tenth Circuit affirmed, holding that pursuant to § 522(f) (1) a debtor can avoid a judicial lien imposed on homestead property by a state court in a domestic proceeding which arises attendant to a property distribution. The court stated that "if the decree imposes a lien at all, it is a judgment lien under Kan. Stat. Ann. § 60-2202(a)" and that "[c]onsequently, it is a judicial lien as defined in 11 U.S.C. § 101(27)."[59]

The court reasoned that because the specific language of the settlement agreement did not give Jesse a lien "by its own terms,"[60] a lien could only arise under the general lien statute, K.S.A. 60-2202(a). The court emphasized that the settlement agreement had specifically provided that Nikki take the property **free and clear** of any interest claimed by Jesse therein. Therefore, the court reasoned that a lien could only be created as a result of the judgment being rendered against Nikki in the same county as the county where the homestead property was located. The court thus concluded that if there was a lien, it could only be a judgment lien arising under K.S.A. 60-2202(a) and that such a lien was a "judicial lien," as defined in § 101(32), which could be avoided by § 522(f) (1). The court recognized the harshness of its decision but felt constrained to apply the law as written by Congress.[61]

2. In Re Donahue.[62] The issue next reached the Tenth Circuit Court of Appeals in *In Re Donahue*, after the *Maus* decision had been criticized.[63] There, Donahue and his wife ("Parker") were divorced in Johnson County. Unlike *Maus*, where the parties had a settlement agreement, the divorce decree here resulted from a contested hearing. The decree provided in pertinent part as follows:

> E. Judgment against the defendant [Donahue] in the amount of $43,650, payable on February 15, 1983, or upon the remarriage of the defendant, the sale of the property or a conveyance or mortgage of the property, whichever should occur first . . .[64]

It further awarded Miami County land to Donahue

> . . . **subject to** any indebtedness thereon and to the judgment to plaintiff [Parker] in the amount of $43,650 . . .[65]

After the divorce decree was entered, Parker neglected to file the divorce decree in Miami County, Kansas, where the real property was located.

After the divorce was finalized, Donahue filed bankruptcy and listed Parker as an unsecured creditor on the basis that the divorce decree had not been filed in Miami County and that therefore no lien under K.S.A. 60-2202(a) could have attached. Parker filed a proof of claim in the bankruptcy as a secured creditor arguing that the "subject to" language in the divorce decree imposed a lien in her favor which was effective between Donahue and her, and that the failure to file the divorce decree in Miami County only rendered the lien unperfected, a matter of no consequence as between the parties. The bankruptcy court and the district court sided with Donahue and held that due to Parker's failure to file the divorce decree in Miami County, no lien was attached and that she was, therefore, an unsecured creditor.

The court of appeals reversed, holding that in addition to the judgment lien Parker could have had if the decree had been filed in Miami County, she also had a separate equitable lien arising from the "subject to" language contained in the decree. The court distinguished *Maus:*

> The critical difference between this case and *Maus* is that the terms of the divorce decree in *Maus* explicitly awarded the Property to the debtor spouse "free and clear" of any claim of the nondebtor spouse. In our case, by contrast, the divorce decree itself clearly contemplated the creation of a lien or security interest of some kind in favor of Parker and against the Property. As just stated, that distinction is crucial. We said in *Maus* that **"if the decree imposes a lien at all,** it is a judgment lien under Kan. Stat. Ann. § 60-2202(a)." *Id.* (emphasis added). In other words, the simple money judgment in *Maus* only became a lien, if at all, by virtue of Kan. Stat. Ann. § 60-2202. Such a lien is, we held, an avoidable "judicial lien" under the Bankruptcy Code. In this case, there was **both** a money judgment in Parker's favor **and** a "lien" against the Property, both of which were created by the divorce decree. That specific "lien" is separate from any lien arising from the money judgment by virtue of section 60-2202.[66]

3. In Re Borman.[67] The issue next came before the court in *In re Borman*. In *Borman*, the parties acquired a residence during their marriage which they owned as joint tenants as their homestead property. The modified divorce decree ordered husband to pay wife the sum of $19,640.67 within 45 days for the purpose of effectuating a division of the marital estate. The real estate was set aside to him. The court further ordered that if husband failed to pay the cash settlement, the real estate assigned to him would be sold and the proceeds applied first to the payment of any mortgages of record and then to the obligation owed to wife. When the cash settlement was due, husband filed bankruptcy.[68]

In the bankruptcy, husband claimed the real property exempt as his homestead, and he filed a motion to avoid wife's lien to which wife objected. The bankruptcy court and the district court found for husband. The district court relied on *Maus* in making its decision. On appeal, the Court of Appeals for the Tenth Circuit reversed. In so doing, the court limited its decision in *Maus*, stating:

> [Wife] argues that in *Maus* the husband received a money judgment and the wife received the homestead property "free and clear" of any and all claims of the husband; thus, *Maus* is limited to the issue of whether a money judgment awarded in a divorce decree can give rise to a lien on homestead property when the divorce decree itself does not specifically create a lien.

59. *Id.*, at 939. The court refers to "§ 101(27)." The Bankruptcy Code was amended in 1984 and 1986 and several new definitions were added. As a result, the definition of "judicial lien" was renumbered to § 101(32).
60. *Id.*, at 938.
61. *Id.*, at 940.
62. 882 F.2d 259 (10th Cir. 1988).
63. *In Re Sanderfoot*, 83 B.R. 564, 569 (Bankr. E.D. Wis. 1988) (lien arising from contested property division could not be avoided). *Sanderfoot* was subsequently reversed by the district court in *In Re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988), and the district court's decision was affirmed by the Seventh Circuit in *In Re Sanderfoot*, 899 F.2d 588 (7th Cir. 1990), cert granted (U.S. Sup. Ct. No. 90-350, Nov. 26, 1990). *Maus* was also noted and discussed by Johnson County's Judge Fierdon, who suggested that to avoid the *Maus* result, one must state in the property settlement agreement that a consensual lien to marital property is being given. Johnson County Bar Letter, May 1988, at 5-7. See text at note 73, infra, and note 73 itself, for further suggestions.
64. 882 F.2d at 260.
65. *Id.* (emphasis added).
66. *Id.*, at 265 (emphasis in original).
67. 886 F.2d 273 (10th Cir. 1989).
68. See *Id.*, at 273-274.

We agree.[69]

The *Borman* court allowed the imposition of an equitable lien on the homestead property because "it [was] clear the property was intended to be the source from which the debt would be paid."[70] The court further held that the bankruptcy court had erred in avoiding the lien.

The *Borman* decision instructs (1) that the *Maus* decision is specifically limited to its facts; (2) that as long as the divorce decree evidences an intent that a property division is to be paid from the proceeds of homestead property, an equitable lien can be imposed on the property to secure the payment; and (3) that an equitable lien impressed in the above circumstances is not avoidable pursuant to § 522(f) (1). The court did not address whether a lien specifically granted in a divorce decree to secure a property division could be avoided pursuant to § 522(f) (1); however, it appears likely from the dicta in *Donahue* that such liens could not be avoided.[71]

C. Recommendations

The foregoing trilogy of cases[72] instructs domestic practitioners. When representing the spouse who is not receiving the house but is to receive a judgment, avoid factual circumstances similar to *Maus;* do not grant to one spouse homestead property free and clear of any claims or interests of the other spouse and simply grant a corresponding judgment for the equity division in the homestead property without showing some evidence of an intent to secure the equity payment by the homestead property. Specifically state that a lien is being created. Extremely cautious domestic practitioners may even want to retain title in both spouses, grant possession to one spouse, and provide that upon sale of the property, an award of a portion of the equity of the property necessary to effectuate a fair property distribution is to be made at that time.[73]

***When representing the spouse who is not receiving the house but is to receive a judgment, avoid factual circumstances similar to* Maus; . . . .**

Due to the recent Tenth Circuit decisions, domestic practitioners in Kansas can structure their clients' settlement agreements and make suggestions to courts dividing their clients' property to protect them from the pitfalls they may encounter in bankruptcy court. However, there is a split in the decisions across the country on this issue and unless Congress amends the Bankruptcy Code to create uniformity some uncertainty will remain. The issue could be clarified by amending § 522(f) (1) to read:

(1) A judicial lien, **except a judicial lien awarded in a divorce or separate maintenance action to provide for an equitable distribution of property between spouses;** . . . .

69. *Id.*, at 274.

70. *Id.*

71. *See In Re Rittenhouse*, 103 B.R. 250 (D. Kan. 1989) which so holds, and *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984). *But see, In Re Sonderfoot*, 899 F.2d 598 (7th Cir. 1990), *cert granted* (U.S. Sup. Ct. No. 90-350, Nov. 26, 1990), and *In Re Pederson*, 875 F.2d 781 (9th Cir. 1989) which hold *contra*.

72. *See also* the unpublished opinion *In Re Williams* (Bank. Dist. Kan., No. 87-12454, Dec. 7, 1989), in which Judge Pearson analyzed the three Tenth Circuit Court opinions. He used a play on words in concluding that the combined effect of those cases was to eviscerate *Maus* (Mouse?), leaving only the tail. He went on to state:

". . . If the divorce decree cuts off all of the creditor spouse's rights to the subject property, i.e., grants it 'free and clear' of any claims of the non-debtor spouse, then any lien which attaches under Kansas law is avoidable under 11 U.S.C. § 522(f) (1). On the other hand, if the divorce decree expressly grants the creditor spouse a money judgment secured by a lien on the subject property, or if it is clear that the parties intended that the marital property be the source from which the debt is paid then the lien is not avoidable. The unfortunate result is that on occasion this court must delve into the intent of another court in determining the rights of the parties in the bankruptcy case, often without any record. If the true test is the intent of the state court, then the state court is better situated to construe its own order." at 9, 10.

73. *See* K.S.A. 60-1610(b) (1) (C) (1989 Supp.). Blaylock and Lambdin, in their chapter on Family Law to the *1990 Kansas Annual Survey*, at 88, published in October 1990 by the Kansas Bar Association, made the following suggestions:

"Practice Tip: Following *Williams*, there are at least four methods whereby the creditor-spouse can be protected from Section 522(f) (1) lien avoidance: (1) A judicial sale of jointly held real estate; (2) co-ownership of real estate perhaps in proportionate shares; (3) a promissory note in favor of the creditor secured by a properly prepared and recorded mortgage; and (4) a 'lien' in favor of the creditor clearly providing that the residence is to be the source of the funds for payment of a money judgment secured by the lien. In addition, if a lien is used, the property settlement agreement should state, at a minimum, that the award to the spouse is a 'consensual lien' and thus not subject to lien avoidance as a 'judicial lien' under Section 522(f) (1)."

See also note 63, *supra*.

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